

JACKSON COUNTY
CIVIL MOTION CONSENSUS STATEMENT

9/15/18

Periodically, the Circuit Court Judges assigned to civil cases in Jackson County will confer regarding their prior rulings on motions in civil cases. These judges have developed a consensus statement on particular issues that regularly come up in motions made in civil cases.

This consensus statement does not have the force of statute or court rule, and the statements are not binding on any judge, but are a good indication of how Judges handling civil cases will rule on similar issues. The following is not a predetermination of any question presented on the merits to a judge in a particular action. The statement may be of assistance in guiding practitioners as to anticipated rulings on a specific question and may eliminate the time and expense of presenting the issues to the court.

1. Arbitration

A. Motions – Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR 13.040(3). A party may show cause (by application to the judge assigned to the case) why a motion should not be decided by the arbitrator.

B. Punitive Damages – Where the damages alleged are less than \$50,000, the subsequent pleading of a punitive damages claim, which results in the prayer exceeding \$50,000, will not exempt a case from mandatory arbitration.

2. Motion Practice

A. Conferring and Good Faith Efforts to Confer (UTCR 5.010)

1. “Conferring.” We have held that “to confer” means to talk in person or on the phone.

2. Good Faith Efforts to Confer. Because “confer” means to talk in person or on the phone, a “good faith effort to confer” is action designed to result in such a conversation. In various cases,

judges have held that a letter to opposing counsel, even one that includes an invitation to call for a discussion, does not constitute a good faith effort to confer unless the moving attorney also makes a follow-up phone call to discuss the matter. We have held that a phone call leaving a message must be specific as to the subject matter before it constitutes a good faith effort to confer. Likewise, a message that says simply: “This is Jane, Please call me about Smith v. Jones,” is not enough. Last minute phone messages or FAX transmissions immediately before the filing of a motion have been held not to satisfy the requirements of a good faith effort to confer. If, after hearing the motion, the court finds that efforts to confer have not been made in good faith, the court may decide the motion against the moving party.

3. Complying with the Certification Requirement. UTCR 5.010(3) specifies that the certificate of compliance is sufficient if it states either that the parties conferred, or contains facts showing good cause for not conferring. The judges have held that the certificate is not sufficient if it simply says “I made a good faith effort to confer.” It must either state that the lawyers actually talked or state the facts showing good cause why they did not talk.

B. Copy of Complaint

The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 5.020(2) may result in denial of the motions. UTCR 1.090.

C. Motions for Reconsideration

Motions for Reconsideration on any pre-trial, trial, or post-trial civil or criminal matter generally will not be considered except as set forth below.

This statement will not apply to any statutory motion to modify, set aside, vacate, suppress, or rescind; nor will it obstruct the authority of the assigned trial judge to review any previously-filed motions.

3. Discovery

A. Motions to Compel

A motion to compel discovery will set out at the beginning of the motion the specific items the moving party seeks to compel a party to produce (ORCP 46A(2)). Simply asserting that the party has not complied with the attached request for production will not satisfy this requirement.

B. Medical Examinations (ORCP44)

1. The court generally authorizes (1) the recording of an examination by audio tape at the examined party's expense, and (2) the presence of a family member or friend of the examined party at the examination.
2. An examiner's qualifications (curriculum vitae) will be promptly provided to the examined party, upon request.
3. As soon as is reasonably possible before the examination, defendant will provide the examined party with copies of all forms the examiner will require the examined party to complete as part of the examination.
4. No later than fourteen days after the examination, defendant will provide the examined party a copy of any report prepared by the examiner.
5. If requested, prior to the testimony of the examiner or cross examination, the party calling the examiner as a witness will provide the opposing party with copies of the examiner's 1099 and W-2 forms showing the examiner's income for the past two years from performing ORCP 44 examinations or medical record reviews. All such documents provided by the examiner will be retained by the examiner after review by the opposing party.
6. When entitled, a party generally may have an ORCP 44 examination performed by a doctor selected by the requesting party. For an examination taking place in Jackson County, the requesting party may schedule the examination at a reasonable time and place without any payment to the other party.

If the examination is to be scheduled outside Jackson County, the requesting party shall pay travel costs at the rate allowed for mileage by the IRS or shall pay air fare. If the entire travel and examination time will take 4 hours or more, the reasonable costs of meals shall be paid. If the entire travel and examination time will take 8 hours or more, the reasonable costs of meals and lodging will be paid.

Reasonable accommodations as to the type of travel and the scheduling needed by the person to be examined shall be made.

C. Depositions

1. Attendance of Experts – Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon the motion of a party.
2. Attendance of Others – Persons other than the parties and their lawyers are generally not allowed to attend a deposition. Upon a showing of need, exceptions have been granted.
3. Out-of-State Parties – A non-resident plaintiff is normally required to appear at plaintiff's expense in Oregon for depositions. Upon a showing of undue burden or expense, the court has ordered, among other things, that plaintiff's deposition occur by telephone with a follow-up

personal appearance in Oregon before trial. Non-resident defendants normally have not been required to appear in Oregon for deposition at their own expense. The deposition of non-resident corporate defendants, through their agents or officers, normally occurs in the forum of the corporation's principle place of business. However, the court has ordered that a defendant must travel to Oregon at either party's expense, to avoid an undue burden and expense and depending upon such circumstances as (a) whether the alleged conduct of the defendant occurred in Oregon, (b) whether defendant was an Oregon resident at the time the claim arose, and (c) whether defendant voluntarily left Oregon after the claim arose.

4. Videotaping – Videotaping of discovery depositions has been allowed with the requisite notice. The notice must designate the form of the official record. There is no prohibition against the use of both a stenographer and a video, so long as the notice requirements are met.

D. Experts

Discovery under ORCP 36B(1) has not been extended to the identity of expert witnesses.

E. Witnesses

Identity – The court has required production of documents, including those prepared in anticipation of litigation, reflecting the names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys have been allowed to provide a “list” of occurrence witnesses, including their addresses and phone numbers.

Rule 27 Depositions to Perpetuate Testimony

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

(1) *Petition.* A person who wants to perpetuate testimony about any matter cognizable in a united states court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

- (A) that the petitioner expects to be a party to an action cognizable in a united states court but cannot presently bring it or cause it to be brought;
- (B) the subject matter of the expected action and the petitioner's interest;
- (C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;
- (D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and
- (E) the name, address, and expected substance of the testimony of each deponent.

(2) *Notice and Service.* At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) *Order and Examination.* If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) *Using the Deposition.* A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) Pending Appeal.

(1) *In General.* The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) *Motion.* The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

- (A) the name, address, and expected substance of the testimony of each deponent; and
- (B) the reasons for perpetuating the testimony.

(3) *Court Order.* If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(c) Perpetuation by an Action. This rule does not limit a court's power to entertain an action to perpetuate testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Rule 28 Persons Before Whom Depositions May Be Taken

Rule 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States.

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

- (A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or
- (B) a person appointed by the court where the action is pending to administer oaths and take testimony.

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

(b) In a Foreign Country.

(1) *In General.* A deposition may be taken in a foreign country:

- (A) under an applicable treaty or convention; (b) under a letter of request, whether or not captioned a "letter rogatory";
- (C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or
- (D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) *Issuing a Letter of Request or a Commission.* A letter of request, a commission, or both may be issued:

- (A) on appropriate terms after an application and notice of it; and
- (B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) *Form of a Request, Notice, or Commission.* When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) *Letter of Request* ☐ *Admitting Evidence.* Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any

similar departure from the requirements for depositions taken within the United States.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 1, 2007, eff. Dec. 1, 2007.)

Rule 29 Stipulations About Discovery Procedure

Rule 29. Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified ☐ in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified ☐ but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

(As amended Mar. 30, 1970, eff. July 1, 1970; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 30 Depositions by Oral Examination

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

- (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;
- (ii) the deponent has already been deposed in the case;
- or
- (iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the united states and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

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

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

(3) *Method of Recording.*

(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the

testimony. unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

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

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

(5) *Officer's Duties.*

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

- (i) the officer's name and business address;
- (ii) the date, time, and place of the deposition;
- (iii) the deponent's name;
- (iv) the officer's administration of the oath or affirmation to the deponent; and
- (v) the identity of all persons present.

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

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

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out

the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination ☐ whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition ☐ must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction ☐ including the reasonable expenses and attorney's fees incurred by any party ☐ on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The

motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order*. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses*. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) *Review; Statement of Changes*. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate*. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) *Certification and Delivery*. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things*.

(A) *Originals and Copies*. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals ☐ after giving all parties a

fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked ☐ in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) *Failure to Attend a Deposition or Serve a Subpoena; Expenses.* A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015.)

Rule 31 Depositions by Written Questions

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

- (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;
- (ii) the deponent has already been deposed in the case;
- or
- (iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) *Service; Required Notice.* A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) *Questions Directed to an Organization.* A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) *Questions from Other Parties.* Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) **Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

- (1) take the deponent's testimony in response to the questions;
- (2) prepare and certify the deposition; and
- (3) send it to the party, attaching a copy of the questions and of the notice.

(c) **Notice of Completion or Filing.**

- (1) *Completion.* The party who noticed the deposition must notify all other parties when it is completed.
- (2) *Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015.)

Rule 32 Using Depositions in Court Proceedings

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) *In General.* At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

- (A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
- (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
- (C) the use is allowed by Rule 32(a)(2) through (8).

(2) *Impeachment and Other Uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

- (A) that the witness is dead;
- (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
- (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
- (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or
- (E) on motion and notice, that exceptional circumstances make it desirable ☐ in the interest of justice and with due regard to the importance of live testimony in open court ☐ to permit the deposition to be used.

(5) *Limitations on Use.*

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different

time or place ☐ and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) *Using Part of a Deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) *Substituting a Party.* Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) *Deposition Taken in an Earlier Action.* A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) *Objections to Admissibility.* Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) *Form of Presentation.* Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in non-transcript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) *Waiver of Objections.*

(1) *To the Notice.* An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the Officer's Qualification.* An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the Taking of the Deposition.*

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence ☐ or to the competence, relevance, or materiality of testimony ☐ is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

- (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
- (ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) *To Completing and Returning the Deposition.* An objection to how the officer transcribed the testimony ☐ or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition ☐ is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

(As amended Mar. 30, 1970, eff. July 1, 1970; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)



MULTNOMAH COUNTY DEPOSITION GUIDELINES

Presented by the Multnomah Bar Association Court Liaison Committee.

The attorneys and judges of Multnomah County have asked for clarification of local deposition practice. These guidelines are the result of a collaboration between the bench and bar, and are designed to provide uniformity and thereby reduce disputes during discovery depositions. No attempt is made to cover every potential area of dispute; instead, the intent is to cover the majority of avoidable problems arising during discovery depositions.

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OBJECTIONS. ORCP 39D(3) creates a mechanism so that the attorney whose question is objected to may accept the objection as an invitation to correct an alleged defect in the question; rejection of the invitation may result in exclusion of the question and answer at trial. Attorneys should not state anything more than the legal grounds for the objection to preserve the record, and objection should be made without comment to avoid contamination of the answers of the witness. Argument in response to the objection is neither necessary nor desirable.

INSTRUCTIONS NOT TO ANSWER. The only basis for an instruction not to answer a question reasonably calculated to lead to the discovery of admissible evidence is in response to an attempt by the attorney taking the deposition to inquire into an area of privacy right, privilege, an area protected by the constitution, statute, work product, or questioning amounting to harassment of the witness. Any other objection to inquiry, such as lack of foundation, competence, asked and answered, etc., can be preserved with recitation of a brief objection.

DEPOSITION DISPUTES. If the parties have a problem which may be solved by assistance from the court, they should briefly suspend the deposition and contact the presiding court for hearing on the record by phone or at the courthouse. Presiding court will provide names of judges and will give preference to judges who have previously heard matters in the case or judges on the Multnomah County Motion Panel.

PENDING QUESTIONS. If a break in questioning is requested, it shall be allowed so long as a question is not pending. If a question is pending, it shall be answered before a break is taken, unless the question involves a matter of privacy right, privilege or an area protected by the constitution, statute or work product.

PERSONS PRESENT. Any party may attend a deposition. Non-party witnesses are excluded at the request of any party. Parties and non-witness may be excluded by the court upon hearing, or if they disrupt the proceedings.

Approved, MBA Board of Directors, September 1992

Revised December 1992

Reviewed and reapproved, MBA Board of Directors, March 7, 2012

Deposition Preparation

The Four Simple Rules

BY EDNA SELAN EPSTEIN

The author, an associate editor of *LITIGATION*, is the author of *Attorney-Client Privilege and the Work-Product Doctrine, Fifth Edition* (American Bar Association).

Like all professionals, we lawyers often speak our own special language. We forget that laypeople do not understand the lingo that has become second nature to us.

So, when preparing a client for a deposition—even a fairly sophisticated client who you have reason to believe understands lawyer talk—act as if your client is a naïf. If you do it well, even the most sophisticated client will be grateful and will not feel condescended to or insulted.

First and foremost, don't assume your client even knows what a deposition is. Be sure to ask whether your client has ever given a deposition and, if so, ask for feedback:

How did it go?

What were you most at ease with?

What did you find the most difficult?

Do you know how your performance could have been improved?

Don't assume that your client remembers the deposition preparation or that an adequate, let alone a good, preparation took place. Give your own. Hit all four essential simple rules of giving a good deposition. Make sure your client practices them with your guidance. And refer back to them repeatedly as your preparation proceeds. (We'll cover those four simple rules in a moment.)

If your client has never given a deposition, before you do

anything else, explain what the purpose of the deposition is:

The deposition is an opportunity for the other side to ask questions of you, to find out what you do and do not know, and what you would and would not say if you were called to testify at a trial. They will want to hear and lock in your testimony so you can't surprise them at trial.

It's also an opportunity for the other side to evaluate how you will come across to a judge or jury deciding the case, and for us to do so, too. We may notice weaknesses in our case that we haven't yet seen or considered clearly enough. And you may remember or say something you haven't already told us.

So a lot is riding on this deposition. But don't make the mistake of thinking that the purpose of this deposition is for you to try to make the case go away [if you are the defendant] or for you to try to get a great settlement without a trial. That's just not likely to happen, and it shouldn't be your goal and mindset going in.

Regardless of whether your client has given a deposition before, explain that whatever answers he gives will follow him to court (and beyond). While, technically speaking, the words used will be subject to change, the answers he gives cannot be unsaid.

Explain, as well, what a deposition is not—that, although what



your client says at the deposition will stick through trial if there is one, the deposition itself is not trial:

The deposition is not an opportunity for you to convince anyone, especially the other lawyer, about how right you are, how great your claim is, or what a wonderful person or skilled professional you are. Nor is it an opportunity for you to tell off the other side.

When the deposition ends, they are not going to say to themselves, or to us: “How wrong we were; let’s just fold our cards and call off this whole silly business.”

So you can’t think that’s your job. Your job is just to answer the questions posed and only the questions posed. Don’t imagine that anything you say will “win” our case. On the other hand, please understand that something you say may *lose* the case; it may shut the door on your being able to prevail. In that way, there is an awful lot riding on your deposition.

That introduction will provoke some anxiety (which is good), so continue and explain:

What do I mean when I say that we’re not going to win the case based on what you say at your deposition, but we could lose the case based on what you may say? Let me spell out for you the elements that have to be established and what we have to prove or do at trial to win.

Then take the time to review with your client the causes of action in the case, and all the essential elements and defenses for each of them, and to explain how the facts, as you recount them to your client, prove up what’s necessary. Then tell him this directly, using your own words:

If—in the answers you give to questions posed by the opposing side’s lawyer—you destroy or undermine one of the crucial elements of our case, it may all be over.

Continue:

How is that possible, given what I said that a deposition is not a trial? The opposing side will file a motion asking for the court to rule without a trial and arguing that—in light of your testimony—no trial is necessary or warranted.

It’s known as a motion for summary judgment. In it, they can rely on your deposition testimony. The judge must then decide whether you, in your testimony, have shut the door on your claim or defense. That is why it is so important for you to follow the four simple rules of giving a good deposition that we are about to talk about, one by one.

But, before you tell him the four simple rules, set the stage. Again, do not assume that your client knows what has become second nature to you. Help him to picture what is to come.

In doing so, be blunt and direct; your purpose should not be to put your client at ease. Nothing enhances performance as much as a little appropriate nervousness. Be strict, not accommodating, in the course of your preparation.

Here, help your client by drawing a mental picture of the stage on which his deposition is to take place. Explain that because the deposition is not a trial, it will not take place in a courtroom in front of either a judge or a jury. It will instead take place in the opposing lawyer’s office. Why? Because the lawyer who asks the questions gets to designate that the deposition will take place on her home turf. “When it is our turn to take the deposition of the opposing side, it will be at my office,” you can say.

Explain who will be there and why, and don’t forget to tell your client about the court reporter and any videographer. You may have to explain why your client’s best friend, significant other, or emotional-support animal cannot attend, unless, of course, opposing counsel is willing to allow it. How likely is that?

What should you tell your client to do at his deposition?

Do a Dry-Run

First and foremost, to tell the truth. This may be a good opportunity to do a dry-run of the most likely questions so he can

rehearse his answers to be comfortable with how the story is to be told. Be sure to ask the top five questions you least want to hear at a deposition or at the trial, and be sure that you and the client know what the answers will be when those questions are asked.

Some lawyers like to video-record a prep session so their clients can watch their performances. You may choose to do so, but keep in mind that most people who are not professional performers get rattled from watching playbacks of themselves. And satisfy yourself that the videotape won't be discoverable for rebuttal purposes, even if you think you have a good chance to keep it—as work product—from being discovered generally.

If you erase the videotape after it is made and watched by your client, the fact that it was made and erased is definitely discoverable. A good lawyer could have a field day in front of the jury with that kind of evidence, which should be irrelevant.

Having set the stage, now you're ready. Beyond telling the truth, there are only four simple rules for giving a good deposition. They are easy to explain to any client, and—even better—they are easy for any client to understand and follow, though it may take some practice. Unlike the 20-plus pages of deposition dos and don'ts that some law firms provide their clients who are about to be deposed, these four simple rules are easy to understand, easy to remember, and, with practice, easy to follow:

Rule 1: Listen to the question.

Rule 2: Be sure you understand the question.

Rule 3: Think about the answer.

Rule 4: Express the answer in the shortest and clearest manner possible.

This is a good opportunity to rehearse the preparatory questions and answers again, to be sure that your client understands and can follow the four simple rules.

If your client starts to answer a question before you have completed the question, indicate that violates Rule 1. And if Rule 1 is broken, the rest will be a shambles. Point out to your client that he is not a mind reader. He doesn't know how the question will be formulated until after he has heard it fully asked.

If your client answers in a way that has little or nothing to do with the question, or otherwise is not responsive, point out that Rule 2 has been broken. You can then elaborate:

This is not a multiple-choice question on a college test, where you have five choices and a 20 percent chance of selecting the right one. You cannot answer a question if you have not understood it. So you had better be sure you do understand it. If you do not understand the question, you must tell the questioner that you do not.

You have every right to have the lawyer explain what you have not understood. If you answer a question, you will be assumed

to have understood it fully. We will not really be able to fix your misunderstanding later on, after the deposition, when you tell me what question you thought you were answering, even though it was never asked.

Explain to your client, particularly if he is a professional or an expert witness, that it is not his job to educate the opposing lawyer or to help her to ask sensible questions. He is there just to answer the questions, once he is sure he has understood them.

Explain to your client that the deposition is not a knowledge exam. If the client does not know the answer to a question, he is not to guess, to speculate, to help the lawyer refine the question, or to try to accommodate the lawyer.

Tell your client that he need not be concerned about appearing ignorant or stupid. If he does not know or remember something, it is perfectly acceptable to say so. Indeed, it is the only correct answer. There is nothing wrong with answering "I don't know" or "I don't remember," provided those are truthful rather than evasive answers.

If your client has a propensity to answer questions too quickly, he is not giving himself time to abide by Rule 3. He is not thinking about his answer before he blurts it out. Try this: Tell him to pause for at least five seconds before he starts his answer, to be sure he is abiding by Rule 3.

Some people engage their mouths before their brains are in gear. They think as they talk. Some cannot think unless they are talking. Instruct your client that in a deposition, that is a cardinal sin. You must show him just how dangerous it is. With each long-winded, complicated answer that your client gives, make him answer again, after he has stopped to give himself a chance to think of the complete answer before he starts to speak.

One high-ranking official at a Fortune 500 company managed this exquisitely. He even considered and deliberated silently on his answers to the simple questions—"What is your name?" "Where do you work?" "What is your position there?" The lawyer taking the deposition was thoroughly discomfited; the deposition was over in record time, and the deponent had made clear by the manner in which he gave his first several responses that he could not be manipulated, trapped, or fooled.

Answer Succinctly

Rule 4—to give a succinct and simple answer—is as important as the first three rules. The more your client rambles, the more room there is for confusion, for error, for misunderstanding, for things that have to be (but may not be able to be) cleaned up later.

If your client volunteers answers to questions that were never asked, he opens endless doors to be explored and countless areas that the questioner may never even have considered, but for your client's rambling. Each volunteered answer, each

seemingly irrelevant ramble, is an open invitation not only to prolong the deposition but also for potential trouble.

In a deposition, brevity is indeed the soul of wit, and the less said, the better. Period. If the question is “Was it raining?” the appropriate answer is “yes” or “no”; not “It was raining cats and dogs; the pavement was slick; my brakes had no opportunity to engage even though I was only going 10 miles an hour.”

If you can get your client to understand the four simple rules, subscribe to them, and follow them, then the deposition will go better and more smoothly. Any commentary you may wish to add can readily be appended as exegesis to those four simple rules and will then be more likely to be remembered and followed by your client.

Finally, explain your role at the deposition. Your client may well be surprised to learn that there is very little you can or should do during the deposition to defend him. You must explain to him:

I can't object if a question seems unfair. I can't object—just so you can try again, to give a better answer—if the question elicits a troublesome answer that you gave without thinking. Before you give an answer, I can't take you out into the hallway for a private chat and tell you how you should answer.

I can object on a variety of technical grounds—about the form of the question, for example, or about a failure by opposing counsel to lay a proper foundation—so that opposing counsel has an opportunity to correct the legal problem, but that is about it. Anything I can say during the deposition is typically so technical and so limited that you may not even understand it. The key is this: When it comes to the answer you will give once we are in the deposition, you're on your own.

Although many lawyers still try, some lawyers still succeed, and a few lawyers still succeed with impunity, you cannot be an obstructionist. You can't coach your client on how to answer a question or stop him if he is rambling.

Helping your client to know how little you can do during the deposition reinforces your message to him that his best defense is in his own hands and that even if just for his own sake, he should abide by the four simple rules.

He may ask, “If you can do so little to defend me, what can you do?”

You'll explain that if you think that the questions asked and the answers given have not provided a true picture of what happened, you—as his lawyer—will have the opportunity and the obligation, before the close of the deposition, to pose your own follow-up questions to him, while still on the record, through which to give a clearer, more complete, and more accurate picture of what did occur.

Tell him that, in answering your questions, he must apply the very same four simple rules: Listen to your entire question, make

sure he has understood your question, think about the answer, and state his answer briefly and succinctly.

You also can tell him that if he fails to abide by the four simple rules, you may pause the deposition when no question is pending, take him out into the hallway, and remind him of the four simple rules he is busily breaking. Tell him that if you do so, opposing counsel will object and argue that you are coaching your witness during a deposition, which is improper, and that it will not look good for you on the record.

Explain to your client that you will both have the opportunity to read the deposition transcript when it is ready, usually a week or so after the deposition. Tell him that, of course, both you and he will take pride in the clarity of his good short answers and will feel bad about those answers he may have, to a lesser or greater extent, botched.

Some people engage their mouths before their brains are in gear—that is a cardinal sin.

Teach him to understand that while he will have the opportunity to think better of what he may have blurted out and wish to change it on the errata sheet, the ritual of reading and signing a deposition transcript typically goes no further than correcting specific words of the questions and answers that the court reporter may have misheard, misunderstood, or simply mistyped. The client should not plan to rely on the errata sheet to provide the opportunity to fix his own snafus.

Don't overlook a brief discussion of your client's attire. What constitutes acceptable business attire varies, but general rules against overly casual clothes (flip-flops, spaghetti-strap shirts, joke ties with pinup girls or clown faces) make good sense. Don't just tell your client what appropriate attire is. Experience teaches that you should be sure you know what your client intends to wear, and approve of it.

Regardless of how much else you may choose to cover, complete your preparation by bringing your client back to the simplest of instructions. While preparing your client to give an effective deposition amounts to informing him fully about all aspects of the process, in the end be certain he really understands and is ready to follow the four simple rules. Everything hinges on that. ■

Deposition Mechanics and Strategy

Oregon State Bar, Oregon New Lawyers Division
Litigation Success CLE

Presented by
Elisa Dozono
Miller Nash Graham & Dunn LLP
December 11, 2018

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Portland, OR | Seattle, WA | Vancouver, WA | Long Beach, CA

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Overview

- The Technical Stuff
- Taking a Deposition
- Defending a Deposition

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I. The Technical Stuff

A. What is it?

1. Discovery and trial tool.
2. Special types
 - a) Corporate.
 - b) Perpetuation
 - c) Deposition by written questions
 - d) Foreign depositions

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I. The Technical Stuff

B. Why do it?

1. Get all information, good and bad
2. Reasons not to take a deposition

C. How to do it

1. Rules

- a) FRCP 27-32, LR 27 - 30
- b) ORCP 37-41, UTCR 5.130, 5.140

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I. The Technical Stuff

C. How to do it

2. Other sources of info

- a) Civil Motion Panel Statements of Consensus

C. Depositions

1. Attendance of Experts – Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon the motion of a party.
2. Attendance of Others – Persons other than the parties and their lawyers are generally not allowed to attend a deposition. Upon a showing of need, exceptions have been granted.
3. Out-of-State Parties – A non-resident plaintiff is normally required to appear at plaintiff's expense in Oregon for depositions. Upon a showing of undue burden or expense, the court has ordered, among other things, that plaintiff's deposition occur by telephone with a follow-up

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I. The Technical Stuff

C. How to do it

2. Other sources of info

- b) Multnomah Bar Association Deposition Guidelines

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I. The Technical Stuff

C. How to do it

2. Other sources of info

c) Oregon State Bar Books

- 1) Look to for detail on how to take deposition of parties out of state or in foreign countries
- 2) Subpoenaing non-party witnesses.
- 3) Protective orders

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I. The Technical Stuff

C. How to do it

3. When


- a) Scheduling
- b) Notice
- c) Length of deposition
- d) After proper preparation

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II. Taking a Deposition

A. How not to do it:



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II. Taking a Deposition

B. Preparation

1. Know the facts
2. Know the law
3. Will you need an expert to help you prepare?
Review pleadings
4. Exhibits

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II. Taking a Deposition

B. Preparation

5. Outline the Examination
 - a) By topic
 - b) By legal elements of claims/defenses
 - c) Chronological
 - d) Be flexible - ability to shift questioning could garner more honest answers if you catch the witness off balance.
 - e) Focus general to specific

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II. Taking a Deposition

C. The examination

1. Demeanor
2. Preliminaries
 - a) Establish baseline of understanding of oath, use of deposition.
 - b) Establish competency, avoid ability to proffer "sham affidavit" in future.
 - c) Ask what they did to prepare, who they talked with, what documents they reviewed.

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II. Taking a Deposition

C. The examination

3. General guidance

- a) Broad discovery questions to get info
 - 1) who, what, when, where, why
 - 2) LISTEN LISTEN LISTEN
- b) Watch facial reactions to documents, photos
- c) Ask short questions. Break long questions up into multiple questions.
- d) Don't use double negatives.

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II. Taking a Deposition

C. The examination

4. Using exhibits

- a) Describe what's being presented and get confirmation of authenticity.
- b) Identify by Bates Number, or page number if premarked, to ensure questioner and witness are literally on same page, and to ensure a juror reviewing the transcript later will know what the document is, not just hear number.

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II. Taking a Deposition

C. The examination

5. Types of questions

- a) Background
- b) Summarizing questions
- c) Leading v. open-ended questions
- d) Embarrassing questions

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II. Taking a Deposition

C. The examination

6. Tips for getting better answers

- Watch for absolutes
 - Example: A: "I was the only person asked to stay late." Follow up Q: how many people were in the office when you were asked to stay? A: "just me."
 - Drill down for specifics.
- Equivocal answers – if "I don't recall" ask what they do remember.
- Confronting an evasive witness
 - The law requires you to answer.
 - Are you embarrassed to answer?
 - Have you been told not to answer?

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II. Taking a Deposition

C. The examination

7. When to stop

- When you have all the answers you need for (1) your dispositive motion; (2) to know you need to settle

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III. Defending a Deposition

A. Preparing the witness

- Explain procedure, potential uses of deposition
- Instruct them not to bring anything with them.
- Instruct them what to wear
- General tips – see article
- Witness Dos and Don'ts

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III. Defending a Deposition

B. Objections

1. Preserve your objections, but use them judiciously.
2. See deposition guidance in civil motion panel statements of consensus on form of objections.
3. Typical objections
 - a) Compound
 - b) Calls for speculation
 - c) Calls for legal conclusion
 - d) Too ambiguous
 - e) Asked and answered
 - f) NOT hearsay, irrelevant,

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III. Defending a Deposition

B. Objections

4. Dealing with harassing questions
 - a) Keep everything on the record
 - b) Call the judge
 - c) Before you call the judge remind opposing counsel that attorney fees may be awarded to losing party (LR 30-6)

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III. Defending a Deposition

C. Cross

1. Cross if you need something corrected or clarified for the record.

D. Read and sign

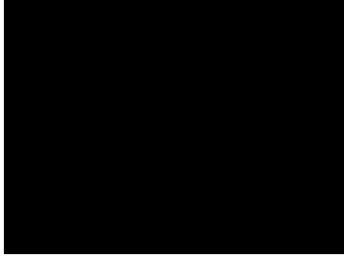
1. If you don't reserve the right to read and sign you waive it. FRCP 30(e)

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III. Defending a Deposition

Example of a well-prepared client and cross



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Questions?

Thank you!

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