CHAPTER 8

Miscellaneous Deposition Issues

Following is a brief discussion of a variety of miscellaneous deposition issues, including compensation of fact witnesses and issues relating to taking depositions by non-standard means.

A. Compensation of Fact Witnesses

Can you pay a fact witness to prepare for and attend a deposition? The answer is it depends on the controlling law in the applicable jurisdiction, the identity of the fact witness, the purpose of the payment, the time for which you paying the witness, and the amount of the payment.[185]

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[185] For a thorough discussion of this issue, see Douglas R. Richmond, *Compensating Fact Witnesses: The Price is Sometimes Right*, 906 HOFSTRA L. REV. [Vol. 42-905] (2014).

ABA Model Rule of Professional Conduct 3.3(b) and ABA Ethics Opinion 96-402 (1996) address this issue and provide that fact witnesses may be compensated for time spent preparing to testify and testifying in depositions, including time spent in deposition preparation sessions with attorneys, if the payment is not for the substance or efficacy of the witness's testimony or an inducement to tell the truth. If not prohibited by local law, witnesses also may be compensated for time spent in researching and reviewing records that are germane to their anticipated deposition testimony. The amount of the compensation must be "reasonable" and should equate to the witness's direct loss of income related to the witness's time spent in connection with the deposition. If there is no such direct loss, the lawyer must demonstrate the reasonable value of the witness's time based on relevant circumstances.[186]

You should be aware that, notwithstanding the ABA's position on this issue, some states prohibit the compensation of fact witnesses. For example, in its Advisory Opinion 1984-01, the New Mexico State Bar Ethics Advisory Committee interpreted its rules to prohibit any compensation to fact witnesses for their wages lost from preparing to testify or testifying. A New Mexico statute[187] also prohibits "fees for services," not just "fees for testifying," which arguably prohibits payments of fees to fact witnesses for preparing to testify in or testifying in a deposition. Accordingly, you should make sure to research the applicable local law to determine if payment to a fact witness is permitted.[188]

The federal bribery statute[189] also is germane to this issue. This statute makes it a crime to "corruptly" give, offer, or promise anything of value to any person with intent to influence that person's testimony under oath. It excepts, however, from this prohibition the payment of "the reasonable cost of travel and

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[186] *See, e.g.*, Cal. State Bar Comm. Prof'l Responsibility, Formal Op. 1997-149 (1997) (describing various factors to consider in deciding whether a payment is reasonable including, for example, what other persons earn for comparable activity).

[187] N.M. Stat. Ann. § 38-6-4(A).

[188] Model Rule 8.5(b)(1) provides that the forum court governs ethical issues. In complex litigation involving numerous lawsuits, it may be necessary to consult the ethics rules of more than one state.

[189] 18 U.S.C. § 201.

subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing or proceeding." A payment to a fact witness violates the statute if the payment was "for" or "because of" the witness's testimony.[190] Courts have generally held that reasonable payments for time that the witness spends not just testifying, but also reviewing documents and meeting with attorneys does not constitute a payment "for" or "because of" testimony in violation of the statute.

Assuming that you can ethically compensate a fact witness, should you do so? Any payment can later arguably be characterized as, and perceived to be, an attempted bribe to obtain the witness's favorable testimony. Accordingly, you should avoid paying fact witnesses if you can. On the other hand, some witnesses (e.g., police officers) routinely insist that you compensate them for their time. In that case, you may have little choice but to pay the witness. You may feel less concerned about compensating fact witnesses if you know the other side is doing the same thing.

If you compensate a fact witness, here are some practical tips:

- Do *not* pay the fact witness for favorable testimony or condition payment on a favorable outcome in the litigation.
- Research the law of the applicable jurisdiction regarding your ability to compensate the fact witness.
- Pay only a reasonable amount to the fact witness, which is best determined by the value of the direct loss of income from the witness's time.
- Avoid paying a fact witness who was formerly employed by the other party or hostile to your client.[191]

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[190] Consol. Rail Corp. v. Grand Trunk W. R.R., No. 09-cv-10179, 2012 WL 511572, at *8 (E.D. Mich. Feb. 16, 2012).

[191] Courts look critically at payments made to a fact witness who was affiliated with an opposing party. *See* Fla. Bar v. Wohl, 842 So.2d 811, 814-15 (Fla. 2003).

- Document in a letter that: (1) you are paying the witness "as the witness requested;" (2) the payment is "for the witness's time" in meeting with you to prepare for the witness's deposition; and (3) the payment is based on the witness's direct loss of income based on the witness's actual rate of pay."[192]

- Be aware that you will have to divulge this payment if sought during discovery.

B. Depositions on Written Questions

Although rarely used, Federal Rule of Civil Procedure 31 authorizes depositions upon written questions, and sets forth the procedures by which a party can notice and take such a deposition.[193] The Rule allows a party to take such a deposition of a governmental entity or corporation in accordance with the procedure for designated deponents under Rule 30(b)(6). The procedure also allows for the service of cross, redirect and re-cross questions.

When would you consider using this deposition method? You might use it if the deponent is far away, or in ill health, or if you merely wish to elicit non-controversial objective testimony, such as authentication of documents. Depositions on written questions may be a useful alternative to interrogatories in some situations, even if written depositions generally are less useful than live depositions. For example, written deposition questions, as opposed to interrogatory requests, may be directed to a particular individual within an organization.[194]

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[192] Some attorneys also like to state in such a letter that this payment is not in any way a payment for the substance of the witness's testimony or an inducement to tell the truth. Other lawyers do not believe this is necessary and prefer not to even mention this point at all lest it appear that they or the witness would ever even entertain the thought of such a bribe.

[193] The 2015 Amendment to Rule 31 incorporates the "proportionality" provision discussed *supra* at Chapter 9.A.

[194] *Compare* FED. R. CIV. P. 31 *with* FED. R. CIV. P. 33.

The disadvantages of written depositions over live depositions are numerous and generally significant. For example, you cannot observe the deponent's demeanor while the deponent answers your questions. You cannot ask spontaneous follow-up questions.[195] And, perhaps most significant of all, you are not likely to get the testimony of the deponent. Rather, the written response to your questions will, like interrogatories, be crafted with the assistance of an attorney.

Example: *Q:* *What was the color of the traffic light for the northbound traffic as your brother's car entered the intersection?*

A: *When my brother drove his car, with his hands on the steering wheel at the 10:00 and 2:00 positions, on his way to donate toys to the children's orphanage using the same care that a reasonable person would use under like circumstances, I noticed with my 20/20 vision that the traffic light facing us was the deepest shade of emerald green I had ever seen in my life, the span of which, of course, has been tragically shortened as a direct and proximate result of the unspeakable injuries I suffered when the Defendant's car illegally and recklessly rocketed right through the bright crimson red light into the side of my brother's car, which had the clear legal right of way.*

Given these disadvantages, depositions on written questions generally are of limited value unless they deal with relatively non-controversial requests for objective information.

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[195] Some commentators note that a party can serve successive sets of written questions under Rule 31. It is unclear, however, whether this is permitted in light of the limitation on the number of times a person can be deposed in Rule 30. In fact, Rule 31(a)(2)(A) provides that written questions can be sent to a person already deposed only by court order or written consent of the parties. If a person who receives and answers an initial set of written deposition questions under Rule 31 is considered "already deposed," then a party would have no right to serve successive sets of written deposition questions on a witness.

C. Telephone and Videoconference Depositions

Rule 30(b)(4) expressly authorizes the recording of a deposition by telephonic or remote electronic (e.g., satellite television) means.[196] To record a deposition by these means, the party must obtain the consent of counsel or a court order. While these procedures are used relatively infrequently, they can be quite useful, especially when the witness is far away or unable to travel, when the deposition is expected to be short and the testimony relatively non-controversial (e.g., authentication of documents), or when you have a limited litigation budget. You might also use this procedure if your opponent notices a deposition far away and you would prefer not to travel to it.[197]

The mechanics of setting up a telephone deposition are not terribly complicated. You need to figure out where everyone will be during the deposition and connect them to a conference call. The deponent will be wherever the deponent is. Opposing counsel can be: (1) in the same room with you; (2) in the same room with the witness; or (3) at some other location such as his or her office. The court reporter is usually in the room with you or in the room with the witness.

There are several advantages to this deposition recording method. The major advantage is the cost-saving. It may be prohibitively expensive to travel to take the deposition of a particular witness or to pay the witness's expenses to travel to you. This procedure provides a low-cost alternative to get the sworn testimony of such a witness.

There also are several disadvantages to this type of deposition. The principal disadvantage is the inability of counsel taking the deposition to observe the witness's demeanor while testifying. Generally, this should not be very important if the witness is not especially critical. On the other hand, if it is important that you see with your own eyes the blood drain out of the deponent's

[196] A Rule 30(b)(4) deposition is considered taken at the place where the deponent answers the questions rather than where the questions are propounded.

[197] There is nothing that prohibits one party's counsel from participating in a deposition by telephone while the other party's counsel attends in-person.

face when you ask those go-for-the-jugular questions, you may not want to use this recording method. Another disadvantage is that it can be somewhat difficult to question the witness about documents in such a deposition. There are, however, ways to deal with this difficulty, such as sending the documents to the witness in advance. You also can "hand" the documents to the witness via a fax machine.

Attorneys also may be reluctant to take a telephone deposition if they know that opposing counsel, or the witness's own counsel, will be with the witness while the witness is testifying. They fear that they will not be able to see the other counsel signal the witness on how to answer the questions (e.g., counsel holding up a big sign stating: "The answer to this question is 'No'").[198] While this is a risk that counsel takes in using this deposition procedure, the risk may be mitigated if the court reporter or another neutral person is present in the same room with the witness and opposing counsel and can observe any such impermissible coaching.

Counsel can avoid some of the disadvantages of a telephone deposition by taking the deposition via a videoconference system. These systems are becoming increasingly popular and some law firms have these systems in-house. If your firm does not have such a system, you usually can rent one. You can also have a videoconference connection via readily available programs like "Skype". The attorneys and court reporter can be situated in the same way as in a telephone deposition. The split or multiple-screen capability of many videoconference systems allows for the participants to be in multiple locations and to still see each other.

The principal advantage of a videoconference deposition over a telephone deposition is that it allows the participants to see each other throughout the deposition. As such, the attorneys can observe the witness's demeanor almost as well as if they were in the same room. The video link also allows attorneys to watch for improper signaling of the witness by counsel. It also is relatively easy to work with documents using such a system. The systems often have a separate camera that displays documents to the witness and counsel in a split screen format or on a separate monitor. The principal disadvantage of this recording method is the cost. All of the participants need to have access to compatible systems. While the rental and transmission charges of such a deposition will invariably exceed

[198] The court can prevent other persons from interfering in such a deposition this way by ordering that no one else be present while the witness is testifying.

that of a telephone deposition, they may still be significantly less than the cost of traveling to the witness for an in-person deposition.

D. Videotaped Depositions

Videotaped depositions have become very popular in the last 25 years. This means of recording presents some obvious advantages over purely oral and even stenographic recording. The videotape not only records what was said, but how it was said, including the fidgeting, hesitation, and aversion of the eyes that tell much about the witness's credibility.

1. Rules/Requirements

Rule 30 does not say much about this type of recording, except that the camera or sound recording cannot distort the appearance or demeanor of the deponents and attorneys (e.g., no *60 Minutes*-style close-ups on the deponent's shaking hands or sweaty brow).[199] The Uniform Audio-Visual Deposition Act addresses certain procedures to be followed in videotaping a deposition, including: the preliminary statements to be made at the start of the deposition, the use of a time counter index to prevent unauthorized editing, and the marking, handling, and filing of the videotapes.[200]

It is advisable to hire a professional videographer and to film with high quality video equipment. The use of a professional usually will result in a much higher quality tape. Some courts have held that the fact that a lawyer or an employee of the lawyer's firm operated the videocamera is not sufficient to invalidate the recording absent any apparent irregularities. While not required, it often is helpful to have a stenographic recording made of a deposition that is videotaped.

If you videotape a deposition, you need to be mindful of various logistical issues such as the background, the camera view, and the lighting. Some attorneys prefer a softer, more natural and interesting background, such as the interior of an office. Others prefer a stark, completely blank background, especially if the

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[199] FED. R. CIV. P. 30(b)(5)(B).

[200] 12 UNIF. AUDIO-VISUAL ACT §§ 1-9, 12 U.L.A. 11.

witness is an opposing party. The camera is typically aimed only at the witness, and you may insist (and a court may order) that the cameraperson not use a zoom feature (e.g., to zoom in on the beads of sweat on your client's forehead). Finally, while many videographers like using extra lights to eliminate shadows and get a better quality tape, these lights can make the room very hot and very uncomfortable.

Given the risk of later manipulation of deposition videotapes, care must be taken in the editing of any deposition videotapes. A deposition videotape may need to be edited before it is played back at trial to eliminate inadmissible questions and testimony and extraneous footage. If the deposition is edited for use at trial, the original unedited tape should be retained. Courts will sometimes issue editing orders to spell out what can and cannot be done with such a videotape.

2. Advantages and Disadvantages

There are several advantages and disadvantages associated with videotaped depositions. A video deposition has the potential to be powerful and more interesting to the trier of fact than a written transcript. The videotape allows the trier of fact to observe the witness's demeanor in a way that a plain written transcript does not.[201] As such, this form of recording may be well suited for depositions taken to preserve a witness's testimony for trial.[202]

A videotaped deposition also is well suited for demonstrative testimony in which the witness describes an action, such as a physical assault. A written transcript can never replicate a videotaped reenactment. Likewise, videotaped depositions can be very effective when a physician uses anatomical models to explain the location and type of an injury, or when an accident reconstruction

[201] While a videotape can be more interesting than a written transcript, it can also be every bit as boring. Just because the deposition is videotaped does not mean it will be riveting to the jury. If you do a long, dull examination of the witness, the videotape will not magically make it interesting. In fact, the videotape may even highlight how dull the deposition was. Most jurors are accustomed to much slicker video presentations and much better production quality than one generally finds in a video deposition.

[202] Some courts permit parties to take a prior "discovery deposition" of a deponent whose deposition is going to be taken by videotape and used at trial in lieu of the deponent's live testimony.

expert uses a diagram of a scene and vehicle models to show the location of impact and the movement of a vehicle during a rollover accident.

An especially useful and sometimes overlooked advantage of a videotaped deposition is as a device to curtail abusive tactics by a witness or opposing counsel. Even the most abusive witnesses and attorneys tend to clean up their act when they are on videotape. The videotape also may be able to detect impermissible nonverbal coaching or signaling of a witness by an attorney.[203]

Some attorneys videotape depositions in order to have the videotapes to use in connection with video settlement brochures. The attorneys splice selected excerpts of the video depositions into their overall video brochure. When combined with other videotape, such as videotaped witness statements, day-in-the-life videos, and news media videotape, the resulting product can be very persuasive.

There also are some disadvantages to videotaped depositions. One downside is the cost. The cost of these recordings is, however, likely to decline in the future as video recording equipment gets less and less expensive. Another downside of video depositions is the effect of the camera on certain witnesses. Some witnesses "freeze up" or get extremely nervous when the camera is rolling and they become much less effective. Moreover, just as any deposition can perpetuate unfavorable testimony, videotaped depositions can perpetuate the same testimony even more powerfully. Finally, videotaped depositions can present logistical difficulties when used at trial. For one thing, the court may order on-the-spot additional editing due to newly-sustained objections. Furthermore, you may not be able to play back the deposition at trial while you are waiting for a live witness to show up because of the set-up time required. You may have more flexibility by reading a deposition transcript into the record in these circumstances.

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[203] *See* Riley v. Murdock, 156 F.R.D. 130 (E.D.N.C. 1994).

E. International Depositions

To take a deposition in a foreign country, begin by consulting Federal Rule of Civil Procedure 28(b). Depending on the rules of the country in which the witness is located, you may take a foreign deposition:

- *"[U]nder an applicable treaty or convention."*[204] If you need to take a deposition in a foreign country, always consult the Hague Convention, including all treaty supplements.[205] Some countries have treaties with the United States that will assist you; others do not. If there is a treaty that applies, you need to follow it.

- *"[U]nder a letter of request, whether or not captioned a 'letter rogatory'."*[206] A letter of request also may be called a letter rogatory. You may seek a letter of request or letter rogatory from a federal court. All federal courts are authorized to issue letters rogatory. Evidence obtained from a letter of request need not be excluded even though rules applicable to other depositions are not followed. For example, testimony obtained pursuant to a letter of request may not be under oath or may not be provided in the form of a verbatim transcript. If you use a letter of request, you may want to channel it through the State Department, which may transmit the letter for you and receive and return the response.[207]

- *"[O]n notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination."*[208] The person may be so authorized either by the laws of the foreign country or by the laws of the United States.

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[204] FED. R. CIV. P. 28(b)(1)(A).

[205] You can find the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters reproduced in a note to 28 U.S.C.A. § 1781 and on Westlaw.

[206] FED. R. CIV. P. 28(b)(1)(B).

[207] 28 U.S.C. § 1781(a)(2). Note that this section only references letters rogatory.

[208] FED. R. CIV. P. 28(b)(1)(C).

- *"[B]efore a person commissioned by the court."*[209] To obtain a commission, you apply to a federal court, which shall issue the commission on terms that are just and appropriate. The commission may designate the person before whom the deposition is to be taken either by name or by descriptive title. A court may issue both a letter of request and a commission in appropriate cases.

F. Internet Depositions

The technology now exists to take depositions over the Internet, and some lawyers have begun to take advantage of this new medium.[210] The advantages and disadvantages of using the Internet to take a remote deposition mirror the advantages and disadvantages of telephone and videoconference depositions. The advantage of Internet depositions over telephone depositions is the ability to see the witness; the advantage of Internet depositions over videoconference depositions is that Internet streaming technology allows the video, audio, and text to display simultaneously and as a continuous stream. With new on-line deposition services, you can see and hear the witness in real time, receive a real time transcript as the court reporter types it, and send private encrypted messages to selected participants at other locations.

An additional advantage of Internet depositions over videoconference depositions relates to cost and convenience. To do a videoconference deposition the participants need to own or rent costly equipment and may need to travel to another location to access the equipment. Internet depositions can be done with relatively in expensive equipment that most law offices already may have. So long as you have a high speed Internet connection, an online deposition service provider will take care of everything else.

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[209] FED. R. CIV. P. 28(b)(1)(D).

[210] For a good discussion of Internet depositions, including logistics, advantages and disadvantages, see Rebecca Porter, *The next step: taking depositions online*, TRIAL, Aug. 1, 2001, at 12. For a discussion of some of the unique ethical concerns posed by online depositions, see Lynn Epstein, *The Technology Challenge: Lawyers Have Finally Entered the Race but Will Ethical Hurdles Slow the Pace?*, 28 NOVA L. REV. 721, 730-32 (2004).

Internet Depositions

- See and hear witness in real time
- Receive real time transcript
- Send and receive private messages to and from remote participants
- Multiple participants in multiple locations
- Remote monitoring of on-site associate
- Save travel time and expense
- Limited ability to assess witness
- Limited ability to monitor coaching of witness
- Limited ability to monitor participation of others (e.g., experts)

This new technology provides exciting possibilities for particular situations, but it is not a panacea because of logistical issues and the importance in many situations of seeing the deponent and potential trial witness live. Internet depositions are especially useful for peripheral witnesses being deposed by co-counsel in multiparty cases and in situations where you otherwise may use a telephone deposition. This new technology also is useful if multiple attorneys or an expert want to attend a particular deposition without incurring the additional time and expense of traveling to a distant location. Similarly, Internet depositions could provide useful backup and monitoring of less experienced attorneys.

Logistically, the court reporter should be with the witness. In most cases, we would not recommend Internet depositions in situations where opposing

counsel is with the witness, while you as the deposing attorney are the only remote participant.

G. Depositions of Electronic Data Custodians

We live in an increasingly electronic world. This means you are almost certain to become involved in litigation in which you will need to discover electronic data ("e-data") from your client's opponent. Following is a brief discussion of the types of questions you should consider asking the opposing entity's e-data designated custodian to get a "lay of the land" for your opponent's e-data.[211] This discussion does not include various other important issues regarding e-discovery, including, for example, the permissible scope of e-discovery, e-data production options and requirements, the costs of e-discovery, e-data spoliation, and privilege waivers.[212]

1. Get Help from Your Own E-Data Expert

Particularly in complex or high stake cases, consider consulting with your own e-data expert before taking the deposition of your opponent's e-data custodian. In such cases it is advisable to have your expert attend this deposition with you. E-data tends to be quite complex and you may find yourself in over your head if you are not highly trained regarding this kind of data. Your expert can help you navigate the murky waters in which you opponent's e-data are likely to be found.[213]

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[211] You can depose such a custodian using FED. R. CIV. P. 30(b)(6).

[212] Some of the uncertainties regarding e-discovery have been and hopefully will continue to be resolved through amendments to the Federal Rules of Civil Procedure. For an expanded discussion of e-discovery issues, review such resources as Michele C.S. Lange and Kristin M. Nimsger, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW (ABA 2004).

[213] Some commentators contend that e-discovery is so complex that it is best left to outside e-data experts. *See, e.g.,* Jason Krause, *Don't Try This at Home*, A.B.A. J., March 2005, at 59.

2. E-Data Custodian's Background and E-Data Policies

Ask questions to determine the expertise of the e-data custodian. Is this a highly educated and experienced person who is managing the entity's e-data or is this someone who is assigned job duties they are not especially qualified to handle? Where does the custodian fit in the entity's organization chart? What is the size of the custodian's budget to manage the entity's e-data? Also ask about the custodian's staff, if any, including their respective areas of responsibility and expertise.[214]

Be certain to inquire about the entity's e-data policies. These policies can help explain the e-data operations, including, for example, e-data retention protocols. Find out if there has been any deviation from the entity's formal e-data policies and, if so, explore any such deviations in detail.

3. Locations of E-Data

While you might principally think of e-data as the large volume of bits and bytes on the entity's central main server, this type of data actually can be found in many other places within an entity, including, for example:

- E-mail systems
- Workstation computer hard drives
- Laptop and home computers
- CDs, DVDs
- Cell phones (including instant messages)
- Personal data assistants
- Thumb drives
- Voice mail
- Pagers
- Video camera data

[214] Companies may find themselves paying much more attention to the management of their e-data operations in the wake of a Florida trial judge's decision to impose a partial default judgment against Morgan Stanley as punishment for its failure to locate and produce a large amount of e-data. A jury then awarded a $1.45 billion fraud verdict against Morgan Stanley. *See* Paul D. Boynton, *A $1.45B 'wake up call' on E-Discovery*, MINN. LAWYER, Sept. 26, 2005, at 1. There have been many situations in which companies have been sanctioned for spoliation of evidence for not retaining, or intentionally destroying e-data.

- Copier/fax machine/printer buffers
- Access control systems
- Archive/back-up storage media

Ask the e-data custodian about the different types of e-data media your opponent uses, e-data found on fixed media, such as a server or hard drive, and e-data contained on removable media, such as CDs and DVDs.

Another type of corporate communication is instant messaging. Instant messaging is increasingly replacing oral communications. Instant messaging works like e-mail but is faster and allows for the exchange in real time of written communications among several participants. The retention of instant messages is more complicated than e-mail because many instant messages are deleted as soon as the computer is turned off. There are, however, some instant message software programs that allow for the archiving of instant messages. Suffice it to say, instant messaging may turn out to be an important source of e-data in your litigation. Ask about it.

4. E-Data Hardware and Software, Access Types, Formats, Storage Media, and File-Naming

Find out what type of electronic hardware and software the entity uses and the location and number of hardware components. This hardware and software may not be uniform throughout the entity. Inquire as to the entity's operating systems and end user applications.

You should inquire about the forms of access to your opponent's e-data. E-data may exist in various forms, such as:

- *Active data.* This is data that is currently readily accessible to end users and should be easily available to discover without special restorative processes.

- *Archive or legacy data.* This includes data found on back-up tapes or other media that is not immediately accessible.

- *Deleted/residual data.* This includes data that has been deleted but is nonetheless still recoverable via special forensic techniques.

E-data files also may be found to exist in different formats including *text files* and *image files*. The latter e-data, which are akin to photographs of documents, may be in formats such as PDF or TIF. Your opponent also may use other, and even out-dated proprietary, data formats that may make your discovery of your opponent's e-data considerably more difficult. If the entity maintains one or more large electronic databases, ask for a general description of what is contained in the database as well as the format, and ask for a field or coding manual, which should describe the specific content of each database.

You should also inquire as to whether the entity keeps its e-data in its *native* format in the usual course of its business. Unlike data in image formats such as PDF, data in this format can be manipulated. Obtaining data in its native format may enable you to access *embedded* or *metadata*. This is data about data, including, for example, data that reflects changes made in a document. Such historical metadata may prove extremely useful; it may, for example, help prove that your client had notice of some fact or considered and actually rejected incorporating some term in an important document. Reading data in its native format generally requires using the same software application used to create the data. Ask about the software applications used and about the entity's file-naming conventions and standards. This information should help you understand the data you eventually receive.

5. E-Data Preservation/Retention

E-data preservation is an important area of inquiry. How, and how often, is the entity's e-data backed up? Is there a formal e-data retention policy that provides a schedule for the destruction of certain e-data after certain prescribed periods? If the entity has such a retention policy, find out if it is actually followed. If not, information that "should" have been destroyed may, in fact, still be available.

If the custodian testifies that certain types of e-data, such as e-mails, are "deleted," inquire as to whether the data is nonetheless recoverable. That is, find out when "delete" does not really mean "irretrievable." Many people assume that e-mails are forever erased once the end user hits the "delete" key. In fact, many deleted e-mails are recoverable.

Also inquire about what steps the custodian and entity have taken to preserve e-data that may be relevant to the litigation which might otherwise be destroyed. Include questions regarding the notice, if any, that was given to your opponent's employees to preserve e-data. Inquire as to the destruction of any relevant e-data that has already occurred, and, if you have not already done so, make a formal record of your demand that all potentially relevant e-data be preserved. As recent cases have shown, the spoliation of relevant e-data can lead to serious consequences.[215]

6. Access to E-Data

Determine who has access to the entity's e-data. This could help you determine who may have destroyed certain data. This information also may be relevant to your opponent's claim of a privilege with respect to certain e-data. A privilege claim may be unsuccessful if the entity has not taken reasonable steps to secure the e-data.

7. How E-Data is Used

Be sure to ask about how certain of the e-data is used. If the entity maintains some large electronic databases, inquire as to the original source of the information entered into the databases and what types of reports are generated from the databases or how end users access the databases interactively. You may request the production of samples of some such reports or end user screens. You also may want to inquire about whether particular information you desire is readily accessible from your opponent's files or whether the production of the data you need would require the creation of a new programming application. In

[215] *See, e.g.*, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 439-40 (S.D.N.Y. 2004) (sanctions imposed and adverse inference instruction given as discovery sanction); Metro. Opera Assoc., Inc. v. Local 100, 212 F.R.D. 178, 190-91, 231 (S.D.N.Y. 2003) (plaintiff's motion for judgment as to liability and other discovery sanctions granted). *See also* Leon v. IDX Sys. Corp., 464 F.3d 951, 959-61 (9th Cir. 2006) (employee's destruction of electronic data sufficient to support dismissal of employee's claim under federal False Claims Act).

the latter circumstance, you might still be able to obtain the data, but you may be required to pay the cost of creating the new application.[216]

[216] *See generally* Corinne L. Giacobbe, Note, *Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Cost of Discovery of Electronically Stored Data*, 57 WASH. & LEE L. REV. 257 (Winter 2000).