CHAPTER 9

Deposition Rules and Procedures

The Federal Rules of Civil Procedure govern such deposition mechanics as scope, number, location, timing, order, and recording. Many battles are waged over these logistical matters. In fact, the actual deposition may be quite anti-climactic after the parties spar over where the deposition will be held, who can attend, and whether it can be videotaped. This Chapter discusses various logistical issues regarding deposition rules and procedures, including some of the threshold issues that tend to spur satellite litigation skirmishes.

A. Scope of Depositions

Generally speaking, the permissible scope of a deposition is governed by Federal Rule of Civil Procedure 26(b)(1), which provides in general that a party may take discovery regarding:

> any non-privileged matter, that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.[217]

Rule 26(b)(2) also notes the authority of federal courts to limit discovery, including depositions, considered to be cumulative or excessive.[218] The court can regulate the scope of depositions through protective orders.[219] The court can prohibit the taking of certain depositions, or even any depositions at all, and can restrict the scope of questioning, the length of the deposition, and other matters.

The Federal Rules encourage parties to negotiate the scope of discovery to be taken, including the scope of, and procedures for taking, depositions. For example, Rule 26(f) requires parties to conduct a discovery conference early in the litigation to discuss and prepare a discovery plan. The Rule directs the parties to consider the subjects on which discovery is needed and any necessary changes in the limitations on discovery imposed under the Rules. Rule 29 also allows parties to provide via a written stipulation that depositions be taken before any person, at any time or place, upon any notice, and in any manner.[220]

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[217] FED. R. CIV. P. 26(b)(1). The proportionality language of the 2015 amendment is likely to lead to new arguments regarding appropriate deposition limits and scope.

[218] Specifically, the court can limit discovery that is unreasonably cumulative or duplicative, that is obtainable from another more convenient and less burdensome and expensive source, where the party had ample opportunity to obtain the information sought, and where the burden of the discovery outweighs its benefits considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues. FED. R. CIV. P. 26(b)(2)(C).

[219] The court can, for example, preclude attempted discovery of privileged information.

[220] Some state rules of civil procedure allow oral stipulations under their counterparts to the Federal Rules. *Compare* FED. R. CIV. P. 29 *with* MINN. R. CIV. P. 29. Because such stipulations are

B. Number of Depositions

Federal Rule of Civil Procedure 30(a)(2)(A) limits the number of depositions that can be taken in a case to ten per side.[221] Because this is a limitation on the number of depositions per side, and not per party, multiple parties on the same side are expected to confer and agree as to which depositions are most needed.[222] As the Advisory Committee noted when this limitation was imposed in 1993, the purpose of the limitation is to ensure judicial review under Rule 26(b)(2) standards before any side is allowed to take more than ten depositions and to emphasize to counsel their professional obligation to develop a cost-effective discovery plan.

Notwithstanding this limitation, the parties can stipulate in writing to a larger limit pursuant to Rule 30(a)(2). In fact, parties frequently agree to a larger number of depositions, especially in large and complex cases, since both sides often want to take more than ten depositions. It is expected that the parties will consider this deposition limitation at the Rule 26(f) discovery conference and at the time of the Rule 16(b) scheduling conference.

Rule 30(a)(2) also authorizes the court to enlarge the number of depositions otherwise permitted. A party seeking such an enlargement will emphasize such factors as the number and complexity of the claims and defenses, the number of individuals having knowledge of important facts in the case, and the number of co-parties.

The Advisory Committee Notes to the 1993 Amendments to Rule 30 also recognize a situation in which more than ten persons can be deposed per side

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usually as enforceable as court orders, you should be cautious about any informal oral agreements you make with opposing counsel.

[221] Some state court rules do not limit the number of depositions. *See, e.g.*, MINN. R. CIV. P. 30. Minnesota used to limit the number of depositions that could be taken prior to a discovery conference to three. This limitation was eliminated in 1993 because it was almost universally ignored.

[222] This task may be considerably more difficult if the co-parties have cross-claims against each other. If co-parties cannot resolve this issue, they can refer the dispute to the court.

without a stipulation or court order. This can occur because Rule 30(b)(6) designated depositions are regarded as a single deposition for purposes of the ten-deposition limit, even if more than one person is designated to testify.[223]

Parties also can request, and the court can order, that fewer than ten depositions per side be permitted in a given case. A party seeking a reduced limit should bring a motion for a protective order under Rule 26(c).

Rule 30(a)(2)(A) also provides that a person can only be deposed once in a case. Once again, the parties can stipulate otherwise and the court can order that a deponent be redeposed. This one-deposition limitation does not apply if the deposition was temporarily continued for the convenience of counsel or of the deponent or to gather additional materials before continuing.[224] There are some circumstances in which a court will permit a party to be deposed more than once. For example, if a case is nearing trial and several years have transpired since the plaintiff in a personal injury case was last deposed, the court might allow the defendant to redepose the plaintiff to evaluate the extent and permanence of the plaintiff's injuries. Courts will also sometimes permit a second deposition of a witness if there is newly acquired evidence in the case or if the witness or a party previously failed to disclose certain information and/or documents. Misbehavior by deponents or their counsel also may justify a second deposition of a witness.

Courts also permit second depositions of deponents where new claims have been added to the complaint or new parties have joined the suit since the deponent's initial deposition. If a court permits a second deposition of a witness,

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[223] While parties could arguably try to circumvent the ten-deposition limitation by serving very broad Rule 30(b)(6) deposition notices, deposing numerous corporate representatives, and arguing that all such depositions constitute only a single deposition, the court can always prevent such attempts to end-run the rule. In one decision, a federal district court refused to permit a party to take a second Rule 30(b)(6) deposition which it claimed was necessary because of an amended complaint. The court reasoned that Rule 30(a)(2) does not allow a party to depose a person who has already been deposed in a case and that since there had already been a deposition of the corporate person, the new deposition within the same case was invalid. *In re* Sulphuric Acid Antitrust Litig., 2005 U.S. Dist. Lexis 17420, at *8 (N.D. Ill. Aug. 19, 2005).

[224] The Advisory Committee Notes suggest that in the latter situation the parties should consider completing the deposition by telephone.

the court may limit the second deposition to questions pertaining to the new evidence, claims, or parties, and preclude a full-blown second deposition.[225]

C. Notice Requirement

Federal Rule of Civil Procedure 30(b)(1) requires you to serve reasonable written notice of the taking of a deposition on the other parties in the case. The notice shall state the time and place for the deposition, the name and address of the deponent and, if the deponent's name is not known, a general description sufficient to identify the person or particular class or group to which the person belongs.[226] The notice also shall include a description of any materials requested in a subpoena duces tecum as well as the method by which the testimony shall be recorded. The notice to a party deponent may be accompanied by a request for production of documents. A sample deposition notice is included at Appendix A.

Disputes regarding deposition notices most often concern the issue of whether "reasonable" notice was provided as required by Rule 30(b)(1). What is reasonable notice for a deposition?[227] As frequently is the case in the law, it depends on the circumstances; there is no fixed time requirement. Courts have addressed challenges to deposition notices of varying lengths of time.[228] As a rough litmus test, you can probably figure that notice of less than one week is

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[225] In a rather unusual example of multiple depositions of an individual, a colleague of one of the authors was permitted to take multiple depositions of a plaintiff who had multiple personalities. Each of the personalities had an independent recollection of the events giving rise to the lawsuit. The plaintiff's psychiatrist elicited each personality at the deposition. Each personality was then separately sworn in and multiple depositions were taken of the separate personalities.

[226] You can draft a single deposition notice for multiple depositions occurring on different dates and at different times.

[227] There are rules regarding the timing of depositions that will also affect the service and content of your deposition notices. For example, if you seek to take a deposition before the time allowed under Rule 26(d), Rule 30(a)(2)(A)(iii) requires that your deposition notice certify that the deponent is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

[228] If you decide to challenge the timing of a deposition, you should bring a motion for a protective order under Rule 26(c)(1).

likely to elicit an objection.[229] Rule 32(a)(5)(A) implies that fourteen days notice is presumptively sufficient. If you give notice of a week or more, chances are the notice will be upheld if challenged.[230] Several courts have noted that scheduling conflicts of this sort are easily avoided if counsel exhibit some minimal professional courtesy and contact each other before scheduling depositions.[231]

Parties sometimes battle over whether a deposition can be scheduled on a weekend or in the evening. While one court ruled that Sunday depositions are not permitted,[232] there is no provision in the Rules barring depositions on certain days or at certain times. Once again, the reasonableness of a weekend, holiday, or evening deposition is likely to depend upon the exigency under the circumstances.

Can you give oral notice of a deposition? Courts have generally held that you can dispense with written notice only in the most unusual circumstances.[233] Parties can, however, waive the formal deposition notice requirement. It is common, for example, in large cases involving many depositions on both sides for counsel to schedule depositions of the parties by phone, confirming the schedule by letter rather than by formal deposition notices of the type described above.

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[229] *Compare* Lloyd v. Cessna Aircraft Co., 430 F. Supp. 25, 26 (E.D. Tenn. 1976) (two days-notice unreasonable where no need shown for such haste) *with* Natural Organics, Inc. v. Proteins Plus, Inc., 724 F. Supp. 50, 52 n.3 (E.D.N.Y. 1989) (one day notice reasonable given expedited discovery schedule and sudden, unexpected need for deposition).

[230] *See, e.g.*, Pearl v. Keystone Consol. Indus., Inc., 884 F.2d 1047, 1052 (7th Cir. 1989) (giving six days-notice complied with Rule 30 absent showing why such notice was unreasonable); United States v. Woods, 2008 WL 2115130, at *2 (E.D.N.C. May 16, 2008) (notice received one week prior to deposition was reasonable); James v. Ann Arbor Pub. Sch., 2000 WL 33418959, at *2 (Mich. Ct. App. May 30, 2000) (one week constitutes reasonable notice for taking of depositions, especially where deponents are not unknown witnesses).

[231] *See, e.g.*, Judicial Watch, Inc. v. U.S. Dep't of Commerce, 34 F. Supp. 2d 47, 50 (D.D.C. 1998) (dispute over two-day deposition notice could have been avoided if lawyers would have demonstrated minimal level of professional courtesy toward one another); Seabrook Med. Sys., Inc. v. Baxter Healthcare Corp., 164 F.R.D. 232, 233 (S.D. Ohio 1995) (counsel should, as a matter of professional courtesy, jointly schedule third-party depositions to avoid conflicts).

[232] Shenker v. United States, 25 F.R.D. 96, 98 (E.D.N.Y. 1960).

[233] *See, e.g.*, C & F Packing Co. v. Doskocil Cos., 126 F.R.D. 662 (N.D. Ill. 1989).

Must the opposing party receive your deposition notice? Some courts have held that nonreceipt does not affect the validity of a properly served deposition notice.[234]

D. Timing and Order of Depositions

Federal Rule of Civil Procedure 26(d) provides that parties cannot take any depositions in a case until after the Rule 26(f) conference.[235] There is an exception to this rule under Rule 30(a)(2)(A)(iii). Under the latter rule, a party need not wait until the Rule 26(f) conference if the deposition notice contains a certification, with supporting facts, that the person to be deposed is expected to leave the country and be unavailable for examination unless deposed before the Rule 26(f) conference. There are several issues that can arise regarding the timing and order of the depositions in a case.

1. Priority/Sequence

It is not uncommon for parties to battle over the order of the depositions taken in a case. The 1970 Amendments to Rule 26(d) eliminated any deposition priority based on which party noticed a deposition first. The Advisory Committee noted several reasons why such a priority rule is unsatisfactory. Rule 26(d) provides that the fact that a party is conducting discovery does not operate to delay any other party's discovery. The court also has the authority to set a sequence for the taking of depositions in a case upon motion.

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[234] *See, e.g.*, Lock 26 Contractors v. John Massman Contracting Co., 127 F.R.D. 542 (D. Kan. 1989); *see also* Fattah v. Killeen, 2005 WL 2234644, at *3 (M.D. Pa. Sept. 14, 2005) (non-receipt of mailed notice does not affect validity of notice); 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1148 (2d ed. 1987).

[235] State court rules of civil procedure often contain different timing limitations. For example, MINN. R. CIV. P. 30.01 provides that a plaintiff cannot take a deposition, without leave of court, until 30 days after the service of the summons and complaint unless the defendant has served a deposition notice or otherwise conducted discovery. The Rule permits a defendant to take a deposition any time after commencement of the action.

2. Multiple Tracking

Especially in cases involving many depositions or an impending discovery deadline, the parties will engage in multiple tracking of depositions – the simultaneous taking of depositions of multiple deponents.[236] One advantage of multiple tracking is that it may prevent collusion between witnesses deposed on opposing tracks since they are not able to observe or read each other's testimony. Parties sometimes schedule depositions for the same time with the hope that they can prevent such collusion or that they can prevent certain opposing attorneys from defending particular deponents. If you cannot schedule the depositions of hostile witnesses for the same time, you may alternatively want to schedule them back-to-back to try to minimize the likelihood of any effective collusion.

3. Rule 27 Pre-Action Depositions

Federal Rule of Civil Procedure 27 permits the taking of depositions before the commencement of a lawsuit. This procedure is most often invoked when a deponent is about to leave the country or subpoena power of the court or is otherwise unlikely to be available to be deposed at a later date (e.g., the deponent is dying).[237] This procedure cannot be used by a party to determine if there is a basis for bringing a lawsuit. It is also not available to a party if the party is able to commence the lawsuit and conduct discovery in the usual fashion. Consequently, this procedure is most likely to be invoked by a prospective defendant who wishes to preserve a witness's testimony before the plaintiff commences the action. This procedure also may be available to a plaintiff if there

[236] While counsel usually agree to multiple tracking of depositions, it is not entirely clear whether a party can unilaterally schedule more than one deposition for the same time. While the Advisory Committee to the 1970 Amendments noted (in commenting on Rule 26(d)) that Rule 30 does permit parties to set concurrent depositions, it did not address whether the same party could schedule multiple depositions at the same time over another party's objection.

[237] But as the Eleventh Circuit Court of Appeals decided in *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974 (11th Cir. 1985), the fact that witnesses are "not immune from the uncertainties of life (and death)" is not enough to justify the taking of a Rule 27 deposition. So, if you seek permission to take such a deposition, you ought to allege more than that it is merely possible the deponent could be struck by lightning, eaten by a shark, or spontaneously implode.

is something that prevents the plaintiff from commencing the action (e.g., a statutory waiting period).[238]

4. Tactical Considerations

There are some basic strategic considerations regarding the timing and order of depositions. Some attorneys prefer to depose an opposing party or critical witness as early as possible in the case to "pin down" the deponent's story.[239] This can effectively limit the ability of such witnesses to mold their testimony to conform to the testimony of other witnesses.[240] The downside of taking early depositions is that the attorney may still not know critical facts and issues in the case and may still be trying to understand and to develop the client's theme of the case. Because the attorney is not likely to be able to re-depose the witness, the attorney may lose the chance to question the witness regarding this later acquired information. Because they typically get only one shot at a witness, some attorneys prefer to take depositions of opposing parties and other critical witnesses later in the course of the litigation. The disadvantage of this approach, of course, is that the deponents will have seen how the other witnesses testified and may conform their testimony accordingly.

Because there is no clear right or wrong approach to this dilemma, make sure that you consider the ramifications of your approach in your specific case. Do not simply take a deposition right away because other lawyers you know do. If, for example, you are pretty confident that you can use other discovery devices (such as interrogatories and requests for admissions) to obtain the necessary

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[238] Some courts also recognize an equitable cause of action to take discovery, including depositions, independent of a lawsuit where exceptional circumstances exist. *See, e.g.*, Lubrin v. Hess Oil Virgin Islands Corp., 109 F.R.D. 403 (D.V.I. 1986); Temple v. Chevron U.S.A. Inc., 840 P.2d 561, 563-66 (Mont. 1992). Some states refuse to recognize such equitable discovery actions. *See, e.g.*, Austin v. Johnston Coca-Cola Bottling Group, Inc., 891 P.2d 1143 (Kan. App. 1995).

[239] The witnesses' memories also are likely to be fresher the earlier they are deposed. Such early depositions may help to preserve other evidence in the case before it is lost or destroyed.

[240] Similarly, some attorneys schedule early depositions in a case to try to force the other side to question the deponent before the other side has completed its preliminary investigation. It is not entirely clear whether an attorney can reserve the right to question a deponent at a later date because the other side has scheduled the deposition before the attorney is ready to depose the witness.

information from a deponent regarding later acquired information in the case, you may decide that it is worth the risk to depose the witness early. Conversely, if you already have the witness pinned down through other means (such as a signed statement), you may opt to forego pinning the witness down in an early deposition, and wait until you have more facts and a better understanding of the case.

There also are strategic considerations regarding the order or sequence of the depositions. For example, you may want to take the deposition of an opposing party or critical witness before your clients are deposed so that your clients can hear what other witnesses have said before they are deposed. You may want to depose a higher-level employee of an opposing corporate party before deposing that employee's subordinates if you think the higher-level employee's testimony is likely to be helpful, or not all that harmful, and you think the subordinates will be subtly pressured to testify the same way when they are deposed. Of course, just the opposite may be true in some cases.

There are also strategic considerations regarding the deposition of certain types of witnesses. Some attorneys prefer to begin with an early round of Rule 30(b)(6) designated depositions to identify witnesses, documents, and other forms of proof, and to get a general "lay of the land" for the case. There also are tactical considerations regarding the timing of expert depositions. Such depositions usually are done later in the case, after the experts have submitted their Rule 26(a)(2)(B) reports. Defense counsel often will seek a staggered expert deposition schedule under which the plaintiff's expert is deposed first and the defendant's expert is deposed second. Courts frequently issue such scheduling orders for expert discovery. Parties also may leave some time for additional lay witness discovery after the expert depositions so that they can obtain certain important factual information discussed by the experts.

E. Location of Depositions

There are several general statements that can be made about the location of depositions. First, the location of a deposition lies ultimately within the sound discretion of the court. Second, a party has the unilateral right to specify the

location of the deposition.[241] Third, a deposition should ordinarily occur in the community where the deponent works or resides.

1. Location of Particular Types of Depositions

Notwithstanding the general rules noted above, the courts have developed several additional principles regarding the location of the depositions of certain kinds of deponents. Following is a summary of these rules:

a. Plaintiffs

Plaintiffs are usually deposed where they work or reside or where the action was brought. Courts have generally held that the defendant can examine a non-resident plaintiff in the forum state where the action was brought.[242] This is basically an exception to the general rule that one ought to be deposed where one is. Defendants can compel non-resident plaintiffs to be deposed in the state where they brought the lawsuit. Courts can alter this rule if it would impose an undue hardship on the plaintiff that outweighs any prejudice to the defendant were the deposition taken elsewhere.

b. Defendants

Defendants are normally deposed where they work or reside.[243] Consequently, if the defendant is a non-resident, the plaintiff has to go to where the defendant works or resides to take the defendant's deposition. This is subject to modification by the court. A non-resident defendant also can be deposed while otherwise in the forum state.

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[241] *See* FED. R. CIV. P. 30(b)(1).

[242] *See* Clem v. Allied Van Lines Int'l Corp., 102 F.R.D. 938 (S.D.N.Y. 1984). *But see* Connell v. City of New York, 230 F. Supp. 2d 432, 437 (S.D.N.Y. 2002) (permitting video conferencing deposition of indigent plaintiff in Boston); Normande v. Grippo, 2002 WL 59427 (S.D.N.Y. Jan. 16, 2002) (permitting telephone deposition of plaintiff in Brazil).

[243] *See* Bank of N.Y. v. Meridien Biao Bank Tanz. Ltd., 171 F.R.D. 135 (S.D.N.Y. 1997); *cf.* Fausto v. Credigy Servs. Corp., 251 F.R.D. 427, 429 (N.D. Cal. 2008).

c. Corporations

The general rule regarding corporations is that officers, directors, and managing agents must be deposed at the corporation's principal place of business or where these individuals reside.[244] This is not an inflexible rule. In ruling on requests to alter this general rule, courts will look at the relative costs and inconvenience to the parties and the overall efficiency of the case (e.g., where the documents reside). If the corporate officials to be deposed regularly travel to the forum state on business, the court will be more likely to compel such witnesses to submit to depositions in the forum state. The court also may require a corporate official to attend a deposition in another state but require the party noticing the deposition to pay the official's travel expenses.

d. Non-Parties

Generally speaking, non-party witnesses, including lower level employees of a corporation, are deposed within 100 miles of where they reside or do business. This follows from the limitation on the reach of subpoenas under Rule 45(c)(3)(A)(ii). While the parties can, of course, agree with the non-party deponent to modify these general rules, they cannot unilaterally alter the reach of Rule 45.

e. Experts

Experts, like other non-party witnesses, need to be subpoenaed to require their attendance at a deposition. Sometimes the parties will mutually agree to produce their respective experts for depositions in the forum state.

2. Selecting the Location

Once you have decided in what city and state (and sometimes in what country) the deposition will take place, you also need to decide the exact location for the deposition. Depositions typically take place in a conference room in the offices of one of the party's attorneys. They also may be taken in various other locations such as the deponent's home or business, an expert's office, a

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[244] *See* Thomas v. IBM Corp., 48 F.3d 478, 483 (10th Cir. 1995).

courthouse, a court reporter's office, a hospital, an accident site, a hotel, or an airport.

In selecting the location of the deposition, you will want to consider various logistical matters. For example, in a case involving a large number of documents, you may strongly prefer to take, and even defend, the deposition close to where your files are since you may want to be able to access parts of your files during the deposition. This may be more important to you when you are deposing an opposing party or critical non-party witness.

You also may want to be assured that you have ready access to a photocopier, a computer, and other office equipment during the deposition. This is more likely to be an issue if the deposition will be taken at some neutral location. Laptop computers with accompanying portable printers may eliminate some of these problems.

You should consider the likely effect of the location on the deponent. It is this consideration which most often prompts attorneys to request that depositions of their clients be taken in their own offices. They want to make their clients feel more comfortable. Because of this, some attorneys insist on taking the depositions of opposing parties in their own offices to make the opposing parties less comfortable. In deciding how to handle this issue, you should consider that what goes around comes around – if you insist on deposing your opposing party in your offices, your opponent will no doubt insist on deposing your client in your opponent's offices.

You also want to consider the convenience of the deponent if you are deposing a non-party witness. If this witness is inclined to testify favorably toward your client, it behooves you to minimize any inconvenience to the witness when you take the witness's deposition. Rather than compel such a witness to drive 20 miles to your offices, you may want to go to where the witness resides or works to take the deposition. Attorneys frequently agree to take the depositions of physicians at the physicians' offices as a courtesy to the physicians so they do not have to travel to the attorneys' offices.

You also should consider whether you would prefer to take the deposition at the workplace of the witness because of the witness's ready access to his or her files. It is for this reason that attorneys sometimes prefer to travel to the office of a

witness, such as a physician or expert or even an opposing party. Oftentimes during a deposition, the witness will reference certain documents, books, or other things that the parties have not seen. If such witnesses are in their own offices, they can go get these documents during a break in the deposition. Some attorneys also like to take depositions of certain witnesses at the witnesses' offices because the attorneys like to scope out the offices – to see what books and treatises are on the witnesses' bookshelves and to get a sense for what type of business the witnesses operate.

Finally, you will no doubt want to consider the cost of taking a deposition in a particular location. In some instances, it may be cheaper for you to agree to pay a witness to travel to your offices for a deposition than for you to travel to the witness.

F. Deposition Subpoenas

Federal Rule 45, which was substantially modified in 2013 Amendments, governs the issuance of subpoenas to compel the attendance of non-parties to attend a deposition. You do not need to subpoena individual parties or directors, officers, or managing agents of organizational parties to attend a deposition. These persons are required to attend their depositions based merely on your deposition notice. Lower-level employees of a party organization and non-parties, on the other hand, must be subpoenaed to compel their attendance at a deposition.[245] If you notice the deposition of such a lower-level employee or non-party without serving a subpoena, and the deponent fails to appear for the deposition, you may be liable for the other party's attorneys' fees and expenses in attending the no-show deposition.[246]

A subpoena must issue from the court where the action is pending. The clerk of court must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may

[245] If you want to depose a lower-level employee, or if you are not sure if the witness is a managing agent of the organization, you can ask the organization's counsel to agree to produce the witness without a subpoena. Such agreements are common especially when lower-level employees on both sides are likely to be deposed.

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

issue and sign a subpoena if the attorney is authorized to practice in the issuing court. Subpoenas must be personally served on the deponent. They cannot be served by mail like complaints. Along with the subpoena, you must tender the fees for one day's attendance and the mileage allowed by law. The failure to tender these invalidates the subpoena.

There are geographic limits on the scope of a subpoena. A subpoena may command a person to attend a deposition: within 100 miles of where the person resides, is employed, or regularly transacts business in person; or within the state where the person resides, is employed, or regularly transacts business in person, if the person is a party or a party's officer. The court issuing the subpoena also may authorize service at any other place pursuant to a federal statute and application and cause shown.

A subpoena may be used to command the production of documents, electronically stored information ("ESI"), or tangible things.[247] This is referred to as a subpoena "duces tecum." (You can find sample subpoenas in court document databases.) Such a subpoena may command production of documents, ESI, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person. A notice and a copy of such a subpoena must be served on each party before it is served on the person to whom it is directed. A person commanded to produce documents, ESI, or tangible things need not appear in person at the place of production or inspection unless also commanded to appear for a deposition.[248] Such a person may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to producing ESI in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served and the party

[247] You cannot, however, use a subpoena to compel the production of documents, ESI, or tangible things from a party; rather, you must use a Rule 34 request for production. Rule 30(b)(2) provides that a deposition notice to a party deponent can be accompanied by a request for the production of documents and that the procedures in Rule 34 apply to such a request. One of the provisions of Rule 34 is that the party upon whom the request is served has 30 days within which to respond. Accordingly, if you use a Rule 30(b)(2) request for documents, make sure you serve it on the opposing party deponent at least 30 days before the deponent's deposition.

[248] Some state courts do not permit this and require such a subpoena to include a deposition subpoena of a live witness.

issuing the subpoena shall then not be entitled to inspect the documents, ESI, or tangible things except pursuant to a court order. When a person responding to such a subpoena does produce the requested items, the person must produce the documents or ESI as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

Here is a practice tip regarding the use of a subpoena duces tecum. If you plan to depose a non-party witness and want to compel the production of documents or ESI from the witness, consider issuing an initial subpoena duces tecum to get the documents or ESI you want and a later subpoena to compel the witness to be deposed. Otherwise, you will have to use your limited deposition time to review the documents the witness brings to the deposition.

Rule 45 sets forth various grounds upon which a court can quash a subpoena, including: failing to allow a reasonable time for compliance; requiring a person to comply beyond the geographical limits specified in Rule 45; requiring disclosure of privileged or other protected matter, if no exception or waiver applies; or subjecting a person to undue burden;[249] requiring disclosure of a trade secret or other confidential research, development, or commercial information; or requiring disclosure of a non-retained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

G. Designated Deponents

There will be times when you will want to depose an opposing party organization about some subject but will not know who within the organization is knowledgeable regarding the subject.[250] For example, in a product liability action, you may want to depose the employee of the manufacturer who was responsible for testing the product, but you may not know who this person is. Federal Rule of

[249] A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing under burden or expense on a person subject to the subpoena. A breach of this obligation may subject an attorney to sanctions, professional discipline, or liability in an action for abuse of process.

[250] The Rule applies to public or private corporations, partnerships, associations or governmental agencies.

Civil Procedure 30(b)(6) deals with this situation. Under this Rule, you can designate the subjects about which you desire to inquire and compel your opponent to produce a witness, or witnesses, who can testify on the subjects for the organization. If you invoke this Rule, you must describe the subject matters on which you are requesting examination with reasonable particularity.[251] See Appendix A for a sample Rule 30(b)(6) notice.

While Rule 30(b)(6) does not require the organization to produce the person most knowledgeable on the designated subject, it must produce a person or persons with knowledge of the designated subject matter and it must prepare the person or persons to testify.[252] The organization must designate a person or persons who can testify as to the knowledge of the entire organization or the knowledge reasonably available to it. This person need not be employed by the entity. It is not enough that the designated deponent can address the knowledge within some department or sub-group.[253] If the deponent is unprepared or unable to answer the questions asked, you can ask the court to compel the organization to designate another deponent.[254]

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[251] Some courts allow questions of the designated deponent to go beyond the topics designated in the Rule 30(b)(6) notice, but treat such testimony as directed to the witness in his or her individual capacity and not as representative of the entity that designated the witness and, accordingly, not binding on the entity. As counsel defending a deposition, you may want to note on the record those questions that go beyond the designated topic.

[252] *See, e.g.*, Murphy v. Kmart Corp., 255 F.R.D. 497, 504-05 (D.S.D. 2009); Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633 (D. Minn. 2000); *see also* Dwelly v. Yamaha Motor Corp., 214 F.R.D. 537, 540 (D. Minn. 2003).

[253] If the designated deponent is unable to answer your questions as to the knowledge of the organization as a whole, consider inquiring into what the witness was told about the deposition, to whom the witness spoke about the deposition, what documents the witness reviewed, or what other efforts the witness undertook to educate himself or herself about the corporation's knowledge regarding the designated subject. The record you establish in the answers to these questions may help you convince the organization or the court that the witness is inadequate and was insufficiently prepared.

[254] *See, e.g.*, MCI Worldcom Network Servs. v. Atlas Excavating, Inc., 2004 WL 755786, at *2 (N.D. Ill. Feb. 23, 2004); T&W Funding Co. XII v. Pennant Rent-A-Car Midwest, Inc., 210 F.R.D. 730, 735 (D. Kan. 2002).

While you can use Rule 30(b)(6) to force the organization to produce a deponent, you need not use this Rule if you know a specific person within an organization you want to depose.[255] In other words, the organization cannot refuse to produce a particular deponent you identified because it would prefer to produce someone else in the organization to testify.[256] When you depose a witness designated by the organization, you are free to inquire about the identity of other witnesses who possess greater knowledge about the subject matter and to depose those individuals as well.

Although Rule 30(b)(6) can be very useful, it has certain limitations. One obvious limitation is that the Rule allows the organization to select the deponent. The organization need not select the most knowledgeable deponent nor the one otherwise best able to testify regarding the designated subject. It also may be difficult, if not impossible, for you to determine if the designated witness lacks the knowledge of the entire organization. Nor does the Rule limit the number of persons the organization can designate to testify on a subject. The organization's production of multiple witnesses may make it difficult for you to obtain coherent and consistent responses to your questions.[257]

Rule 30(b)(6) depositions can be very useful in conducting some initial "lay of the land" discovery of an opponent organization – to find out the organization's structure, the key players, and the identity of documents and other

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[255] The Rule specifically states that it does not preclude the taking of a deposition by any other procedure authorized by the rules.

[256] *See* United States v. One Parcel of Real Estate, 121 F.R.D. 439, 440 (S.D. Fla. 1988); *but see* Stelor Productions, Inc. v. Google, Inc., 2008 WL 4218107, at *4 (S.D. Fla. 2008) ("Still, discovery restrictions are imposed when 'the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive.' . . . A deposition will not be allowed 'where the information is obtainable through interrogatories . . . or the deposition of a designated spokesperson[.]" (quoting United States v. Baine, 141 F.R.D. 332, 334 (M.D. Ala. 1991)).

[257] *See also* Jack I. Samet & Andre Bates, *Rule for Streamlining Discovery is No Panacea*, NAT'L L. J., April 24, 2000, at B16 (the use of Rule 30(b)(6) may not ensure that the designated deponent is able to make binding admissions on behalf of the organization and the requirement that the examining party state with particularity the subject matters on which the party wishes to elicit testimony provides the organization with a roadmap upon which to prepare the witness and largely eliminates the ability to elicit spontaneous admissions).

records. Once you have this information, you can do more targeted depositions of particular individuals within the organization.

H. Length of Depositions

The 2000 Amendments to Rule 30 included a significant new provision limiting the length of depositions to one day of seven hours unless the court orders or the parties stipulate otherwise.[258] Prior to this amendment, the Rules contained no limitation on the length of depositions. Rule 30 was amended to include this time limitation because of the concern that overly lengthy depositions may result in undue costs and delay. The seven-hour limit applies to the time of the actual deposition and excludes time for breaks.

Rule 30(d)(1) also provides that the court must allow additional time for a deposition if needed for a fair examination or if another person or other circumstances impeded or delayed the examination.[259] The Advisory Committee Notes recite a variety of factors parties may consider in seeking a court order for additional time for a deposition. These include: (1) the need for an interpreter that may prolong the deposition; (2) the need to cover events occurring over a long period of time; (3) the need to question the witness about numerous and/or lengthy documents;[260] (4) the failure of the deponent or opposing party to produce requested documents; (5) the need for multiple parties to examine the deponent;[261] (6) the need for the deponent's own attorney to examine the deponent; and (7) the need for additional time to examine an expert.

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[258] FED. R. CIV. P. 30(d)(1). The Advisory Committee noted that the deposition of each person designated under Rule 30(b)(6) shall be considered a separate deposition for purposes of this time limitation.

[259] Examples of such other circumstances include power outages and health emergencies.

[260] The Advisory Committee suggests that the interrogating party send documents to the deponent in advance of the deposition to avoid the loss of time caused by the deponent's need to review the documents. T his creates a tactical dilemma for the interrogating attorney. The attorney must weigh the possible loss of some tactical advantage from revealing in advance the documents the attorney plans to use against the loss of valuable time if the attorney does not identify these documents beforehand.

[261] The Committee notes that parties with similar interests should try to designate one lawyer to question the deponent about areas of common interest.

The Advisory Committee Notes also state that the court may order that the deposition be taken within a fixed period over several days. Can a party unilaterally stop a deposition and decide to continue it another day? Even before the 2000 Amendment to Rule 30(d)(1), federal courts generally held that parties had no such right and that the deposition had to continue until its conclusion (unless, of course, the parties agreed to a continuance). In light of the directive that depositions be completed in one day in Rule 30(d)(1), it is arguably even more clear that a party cannot unilaterally decide to stop a deposition and continue it another day.

I. Persons Present at Depositions

Disputes sometimes arise as to who may be present at a deposition. Following is a summary of the generally recognized rules regarding the rights of certain types of individuals to attend a deposition and a discussion of some tactical considerations regarding this issue.

1. Parties

The parties have a near absolute right to attend any deposition in a case. Courts have deviated from this rule in a few instances to protect the deponent from harassment or embarrassment.[262]

2. Witnesses

Federal Rule of Civil Procedure 30(c) was amended in 1993 to make it clear that there is no mandatory sequestration of witnesses upon a party's request as there is under Federal Rule of Evidence 615. As the Advisory Committee Notes to the 1993 Amendments indicate, this revision was intended to address a recurring problem as to whether potential deponents can attend a deposition. The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. That is, one party (or less than all the parties) does not have a unilateral right to exclude someone from a deposition.

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[262] *See,* e.g., Bucher v. Richardson Hosp. Auth., 160 F.R.D. 88, 94 (N.D. Tex. 1994) (defendant accused of raping young female plaintiff excluded from same room as plaintiff during plaintiff's deposition).

Courts have been willing to exclude witnesses from a deposition if the witnesses have not yet testified in order to prevent collusion. They may preclude such witnesses from reviewing the transcript of an earlier witness's deposition or discussing the earlier deposition with anyone.[263]

Courts also have been willing to exclude certain persons from attending a deposition, and to allow certain other persons to be present, in order to protect the deponent, particularly in situations involving vulnerable individuals. In some instances, courts have even ordered that certain individuals and their counsel be allowed to question a witness only from another room via a closed circuit television.[264] Courts also can limit the duration of depositions and the topics to be explored to protect a deponent.

3. Experts

Experts generally are allowed to attend depositions. In fact, as discussed in Chapter 6, it can be quite useful for attorneys to have their own experts present when they are deposing an opponent's experts.

4. Media and/or Public

It is less clear whether the media or the public have the right to attend your depositions. The Advisory Committee Note to the 1993 Amendments to Rule 30 specifically states that Rule 30(c) does not resolve the issue of attendance by such persons. Several courts have addressed the issue of whether a deposition is a public proceeding which the media and press have a right to attend. In *Seattle Times Co. v. Rhinehart*, the United States Supreme Court upheld a protective order prohibiting the release of various pretrial discovery materials reasoning that such civil discovery matter is not public in nature.[265] Other courts have similarly

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[263] *See, e.g.*, Narveson v. White, 355 N.W .2d 474, 476 (Minn. Ct. App. 1984) (trial court can enjoin a witness from reviewing the transcripts of other witnesses' depositions to prevent collusion).

[264] *See, e.g.*, Bucher, 160 F.R.D. at 95.

[265] 467 U.S. 20, 33, 104 S. Ct. 2199, 2208 (1984).

held that the public and press do not have the right to be present at depositions in civil cases.[266]

A party wishing to exclude any person from attending a deposition may bring a motion under Rule 26(c)(1). Accordingly, if Mike Wallace and Geraldo Rivera show up to watch the deposition of your client in a case, you may need to bring a Rule 26(c)(1) motion to keep them out. The party bringing such a motion has the burden of establishing good cause for the exclusion order.

5. Tactical Considerations

From a tactical standpoint, why would you want to have a third person at a deposition and, conversely, why would you want to exclude certain persons? You may want to have a third person attend a deposition because you believe the third person's presence is more likely to keep the deponent honest – that the deponent will be less inclined to lie or embellish the deponent's testimony if he or she has to look this other person in the eye while testifying. This subtle, or not so subtle, pressure is, of course, a reason why you may want to exclude such third persons if you represent the deponent. This is especially true if the deponent is particularly vulnerable – e.g., a minor or a sexual assault victim.

You may want to have a third person present at a deposition to help comfort the deponent. For example, you may want a parent or guardian in attendance during the deposition of a minor. Similarly, you may want a therapist present during the deposition of a mentally or emotionally impaired witness. In some more extreme instances involving a very sickly deponent, you may want a physician present to monitor the deponent's condition during the deposition and to prevent any harm to the deponent.[267]

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[266] *But see* former 15 U.S.C. § 30, now repealed, (making depositions in antitrust cases open to the public). Some contend that this bolsters the argument that depositions in other federal cases are not open to the public since there is no comparable legislation providing as such.

[267] These kinds of health professionals also can be useful to testify at a later date if there is a dispute as to the witness's competence or their mental, emotional, or physical state while testifying.

It also can be helpful to have certain third persons in attendance at a deposition to help you better understand the facts and formulate certain questions. Experts and corporate employees of a deponent can be very useful in this regard.

As noted above, you may want to exclude certain future deponents from a deposition if you believe there is a risk of collusion. To exclude such persons, you will need to convince the court that there is a serious threat of collusion. The mere possibility that later witnesses could conform their testimony to that of earlier witnesses is probably not enough to obtain an exclusion order.

There also is the tactical question of whether you notify opposing counsel if you plan to have someone other than the deponent attend the deposition. You may want to do this as a matter of professional courtesy or to avoid the possible postponement of the deposition while your opponent seeks a protective order. You also may want to give such notice with the hope that your opponent will reciprocate and not surprise you with the presence of other persons at future depositions. Some attorneys might opt not to give such notice believing that their opponents will be unlikely to want to bring a motion for a protective order and that they will simply capitulate and allow the deposition to go forward notwithstanding their objection to the presence of such individuals.

J. Recording the Deposition

You need to decide how to record the deposition. You have various options, including, now, real time recording, which refers to stenographic recording that produces a simultaneous or "real time" transcript as the witness is testifying in the deposition. If the court reporter has the equipment to do this type of recording, counsel can connect a laptop computer to the court reporter's recording machine and get a real time transcript of the deposition. Some attorneys use this recording option to code or annotate deposition transcripts on the fly.

Federal Rule of Civil Procedure 30(b)(3) provides that the party noticing the deposition can select the method of recording. Unless the court orders otherwise, the deposition may be recorded by sound, sound and visual, or stenographic means. A party can select non-stenographic means without an order

of the court or the agreement of counsel.[268] The party noticing the deposition bears the cost of the recording and must disclose the recording method in the deposition notice.

Any other party in the case can, without notice, designate another method to record the testimony in addition to the method specified in the notice. Unless the court orders otherwise, such a party bears the expense of this additional recording method.[269] Accordingly, if the party noticing the deposition plans only to obtain an audio recording of the testimony, another party can show up at the deposition with a court reporter and record the testimony stenographically.[270]

Can you switch recording methods in the middle of the deposition? At least one court allowed a party to take the first part of the deposition of an opposing party by sound or stenographic means and to take the latter part (which was continued three months later) by videotape recording.[271] It is less clear whether this would have been permitted if the deposing party had wanted to switch the recording means in the middle of the same day.[272]

While the court reporter records the deposition, you may decide to obtain a real-time transcript of the deposition on your laptop computer using software programs such as "LiveNote." You can stream the transcript in real time not only

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[268] This was a change included in the 1993 Amendments to Rule 30. If a party selects a non-stenographic means of recording, that party will need to have the deposition transcribed if the party opts to use the deposition at trial or in support of a dispositive motion. Another party can arrange for a transcription to be made from a non-stenographic recording. Other parties in the case also may object to the non-stenographic recording of any deposition.

[269] FED. R. CIV. P. 30(b)(3).

[270] Many, if not most, court reporters make an audio recording of the depositions they record for their own use in preparing the transcripts. While this audiotape is not an official recording of the deposition, it can come in handy if disputes arise over certain things that occurred at the deposition that may not be reflected adequately in the written transcript (e.g., opposing counsel yelling at the deponent).

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

[272] In that situation, the deposing party would probably have had a notice problem since the attorney would not have notified the other side of the alternate recording method as required by the rules.

to those attending the deposition, but also remotely to others, such as other attorneys on your team or your client. A peripheral party may view a deposition in real time this way in lieu of attending in person.

There are several benefits and potential disadvantages of this real time transcript technology. On the positive side, a real time transcript enables the parties to correct misspellings and other transcription mistakes on the spot. These transcripts also allow you as the deposing attorney to review exactly what you asked and the witness said rather than having to rely on your memory. This may be especially important for the critical questions you ask. Your ability to quote a witness's prior answer can also avoid objections that you misstated the witness's prior testimony. It can also allow you to assess your own questions and correct them, if appropriate, when objections are made. Most of these programs also allow you to mark testimony or code it by subject matter which may help when trying later to locate specific testimony.

One of the potential disadvantages of obtaining a real time transcript is that it can detract you from observing the witness and any nonverbal communications. Some attorneys who are too wedded to tracking the transcript end up spending all or most of their time reading their laptop computer screen rather than observing the witness. These programs can also slow down the "flow" of your questions and even prolong the deposition if the deposing attorney spends even a few seconds reading the transcript while also asking questions.

K. Hologram Depositions

An even more recent development in deposition technology than Internet depositions is the hologram deposition. This procedure resembles a deposition conducted via a videoconference system except that the image of the deponent is projected in holographic instead of video form. Instead of projecting a flat image on a screen, the hologram projector projects a three-dimensional visual image at a fixed location in the room.

This technology is a significant improvement over two-dimensional video projections in that it allows those in the room to observe the entire physical demeanor of the deponent almost as if the deponent were in the room in person (albeit with a slightly greenish tint). In fact, the image may appear so life-like that you may mistakenly hand the "image" a document only to watch it fall through

the image's hand and arm. An obvious disadvantage of this technology is the cost, since it requires the use of holographic cameras and image receivers and projectors. No special transmission lines are required because the image is relayed via satellite transmission. If your firm is not able to purchase this equipment, it can rent it.

Problems occasionally arise during hologram depositions. For example, sometimes the holographic image appears fuzzy or distorted (like the holographic images seen in *Star Wars* movies). If this happens, check the holographic projector to see if you are low on hologram fluid. If you add some fluid, this usually rectifies the image distortion. If the image problems do not disappear after you add more fluid, you may have a magnetic interference problem or a transmission problem. Make sure to remove any magnetic devices in the room such as microwave ovens, pacemakers, and cell phones. If that does not work, the problem is likely interference in the transmission of the signal. Make sure that the receiving satellite dish is facing the north pole. You also will likely notice that the image resolution will be better in general on calm days since strong winds tend to bend the transmission waves.

Another less common problem with hologram depositions is the incorrect anatomical alignment of the image due to transmission problems. Literally speaking, because of some glitch in the transmission of the image, the hologram projector reconfigures and projects a misaligned image (e.g., the image's head and lower body are transposed). Imagine a member of the Starship Enterprise who is "beamed" down to a planet and finds his body parts reconfigured when he is reassembled. If you cannot correct this problem, the Rules still allow you to proceed with the hologram deposition even if it appears that the witness is testifying out of his posterior.

Finally, you can play back a holographic deposition to a jury at trial. The only caveat is that the jurors have to wear those less than flattering multi-colored 3-D glasses to get the full holographic effect.[273]

[273] Okay, we are just kidding. There is no such thing as a holographic deposition . . . yet. Stay tuned for future developments in our next edition.