# TWELVE DEPOSITION PRINCIPLES, MECHANICS, STRATEGIES, AND PRACTICES

**STUART M. ISRAEL** practices law in the Detroit area. His experience includes litigation in federal and state courts, federal and state agencies and arbitration forums in labor, employment, and benefits cases, as well as general civil actions. His service as a mediator, arbitrator, and fact-finder have been under the auspices of private and government dispute resolution programs. He is the author of Taking and Defending Depositions, Second Edition (2016), co-author of Opinions—Essays on Lawyering, Litigation and Arbitration, the Placebo Effect, Chutzpah, and Related Matters (2016), and Effective Discovery (2017).

This article is excerpted from his ALI CLE book, Taking and Defending Depositions, Second Edition. For more information about the book or the author, please visit https://www.ali-cle.org/publications/Book/3779.

This article addresses 12 basic deposition principles, mechanics, strategies, and practices, including who may be deposed, when, where, and how to get them there, limitations on the number and duration of depositions, the relationship between depositions and paper discovery, Rambo litigation tactics, and other nuts, bolts, and screws that hold the deposition process together.

## 1. WHO MAY BE DEPOSED

A party may take the deposition of "any person, including a party."[1] That's *any* person.

An organization—"a public or private corporation or a partnership, an association, a governmental agency or other entity"—may be deposed, testifying through designated representatives.[2]

The party seeking a Rule 30(b)(6) deposition names in its notice or subpoena the organization as the deponent, and describes "with reasonable particularity the matters for examination." The organization must then "designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf." The "persons designated must testify about information known or reasonably available to the organization." The organization "may set out the matters on which each person designated will testify."

Rule 30(b)(6) designation may be required by notice to an organization-party or by Rule 45 subpoena advising "a nonparty organization of its duty to make this designation."[3] A party's Rule 30(b)(6) designees testifying on "behalf" of the party can make Federal Rule of Evidence (FRE) 801(d)(2) admissions binding on that party. Under Rule 32(a)(3), the "adverse party" may "use for any purpose the deposition of a party or anyone who, when deposed, was a party's officer, director, managing agent, or designee under Rule 30(b)(6)."

A Rule 30(b)(6) deposition is advantageous when you don't know who within an organization has the desired information or when multiple individuals have different pieces of it. It also provides an antidote to buck-passing by an organization's officials who have been individually noticed. The Rule 30(b)(6) deposition notice puts the burden on the organization to identify and produce *knowledgeable* witnesses.

Rule 30(b)(6) notices have consequences. On the one hand, a Rule 30(b)(6) notice may stimulate the organization to assign responsibility for litigation preparation, serving as the catalyst for overcoming organizational inertia. This may result in newly-invigorated resistance to your objectives. On the other hand, that inertia may have been postponing mutually-advantageous settlement discussions. A

Rule 30(b)(6) notice is going to get attention, likely from decision-makers on the other side. Like Newton said, there's going to be a reaction.

In addition, a party "may depose any person who has been identified as an expert whose opinions may be presented at trial."[4] In "exceptional circumstances," a party may take the deposition of an expert "retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial."[5] The deposing party generally will have the obligation to pay the expert "a reasonable fee for time spent" responding to that party's discovery under Rule 26(b)(4)(A) or (D).

## 2. HOW TO GET DEPONENTS TO DEPOSITIONS

Parties, including their Rule 30(b)(6) representatives, may be required to appear for deposition by service of "reasonable written notice" directing appearance at a designated time and place. The notice should be served on all parties[6] and specify whether the deposition will be recorded by "audio, audiovisual, or stenographic means."[7] The notice may be accompanied by a document request.[8]

Nonparties may be required by subpoena to appear.[9] The subpoena, too, may require nonparty document production.[10] The subpoena must be personally served on the deponent along with a witness fee and mileage (prescribed by 28 U.S.C. § 1821) and in compliance with other Rule 45(a) and (b) requirements.

All parties are entitled to timely service of notice of all depositions, whether the deponent is a party or is a nonparty witness compelled to appear by subpoena.[11]

Rule 30(b)(2) requires "reasonable written notice" but does not specify time limits. Rule 32(a) provides that a deposition "shall not" be used against a party who gets "less than 14 days' notice of the deposition" if the party "promptly" moved for a Rule 26(c)(1)(B) protective order seeking to bar the deposition or change the schedule. The notice number in Rule 32 used to be 11 days, not 14. The 1993 Advisory Committee Notes state that Rule 32(a) "is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations." The 11-day period was amended to 14 days in 2009. While the rule suggests that "less than 14 days' notice" is "short notice," circumstances dictate what notice period is reasonable. When it comes to scheduling depositions that you need sooner rather than later, do what you have to do when you have to do it. Either the deponent will comply or you will be called on to persuade the court that what you are doing is reasonable.

Unreasonable notice, and any other unreasonable conditions—time, place, distance, etc.—may be addressed informally among the lawyers or, if necessary, formally by the court resolving motions under Rules 26(b)(1), (2), and (c), 32(d)(1)-(3), 37(a) and (d), and 45(a)(1)(A)(iii), (c), and (d). Similarly, a deponent's failure to attend as noticed or subpoenaed may be addressed in motions under Rule 37(a) and (d) and 45(a)(1)(A)(iii), (c), and (d).

How you go about scheduling depositions will depend on your relationship with the opposing lawyers and their clients and the nonparty subpoena recipients and their lawyers. Consensus is good, but not always possible, because of resistance, inattention, telephone tag, and other vicissitudes of life in the new millennium. One way to get everyone's attention is to send the notice and subpoena scheduling the deposition, making your date, time, and location a fait accompli, subject to your offer of reasonable flexibility. For example:

> Re: *East v. West,* (U.S.D.C., E.D. Mich. case no.123456)
>
> Dear Counsel:
>
> Enclosed is a notice scheduling Virginia West's deposition for June 16 at my office, beginning at 9:30 a.m. If this is inconvenient for any of you, please let me know right away and we can discuss alternative dates. Thank you.

Setting the date in this way often promptly cures resistance, inattention, and telephone tag, and, at a minimum, gets the lawyers talking about the deposition schedule; but be sure to comply with any local rule that requires consultation with opposing counsel before scheduling depositions.

### 3. WHEN—THE TIMING AND SEQUENCE OF DISCOVERY

Generally, a "party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)."[12] Rule 26(f) requires that the parties confer "as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)."[13] Among other things, the parties are to confer "about preserving discoverable information" and to "develop a proposed discovery plan."[14]

Unless the discovery plan (or the judge) requires otherwise, "methods of discovery may be used in any sequence," and "discovery by one party does not require any other party to delay its discovery."[15] So, absent agreement or court order, generally there are no priorities or limitations on the timing and sequence of depositions after the Rule 26(f) conference, and there are no restrictions on the relationship between depositions and paper discovery.

Experts who are "retained or specifically employed, to provide expert testimony in the case" or "whose duties as the party's employee regularly involve giving expert testimony" may not be deposed until after they have supplied their Rule 26(a)(2)(B) reports.[16] These experts' reports are due, absent the parties' agreement or court order directing otherwise, 90 days before trial or, for experts intended to rebut opposition experts, within 30 days after the to-be-rebutted experts' reports.[17]

When it comes to timing and sequence, do what makes sense. If prompt depositions promote your objectives, even before interrogatories and document requests, serve deposition notices and subpoenas promptly. Or, if it makes sense to do paper discovery before depositions, do it.

Whether you decide to take depositions before, during, or after paper discovery, it is worth paying some attention to the order of the depositions. Do what serves your interests, subject to what is practical and possible. In some cases, it may be advantageous to begin depositions with the other side's key witnesses. In other cases, it may be better to leave the opposition key witnesses to the end, after building up to them with foundational depositions of neutral and incidental witnesses who will provide necessary material to inform the later key witness depositions. Plan the order, but be prepared to have limited control. Your careful tactical planning may go awry because of the influences of the other side's careful tactical planning, lawyer schedules, the witnesses' availability, and the court-imposed discovery cut-off deadline.

In some jurisdictions, and among some lawyers, there are conventions and entrenched preferences regarding the sequence of discovery—like paper discovery first, depositions always later; or plaintiffs' deposition first, or last; or depositions in strict notice order. When in Rome, it may make sense to do what the Romans do. But if you have good reason to do otherwise, do otherwise, and rely on Rule 26(d)(3)(A) and (B).

### 4. WHERE—YOUR PLACE OR MINE, OR THE HOLIDAY INN?

Location is subject to the parties' agreement and, ultimately, if the parties have a dispute, to whatever rule is imposed by the court. Generally, depositions of plaintiffs are appropriately held anywhere within the district in which the lawsuit is pending or in which plaintiffs work or reside. Generally, depositions of defendants are appropriately held anywhere defendants work or reside. Generally, corporate officers, directors, and managing agents can be deposed where they work or reside or at the corporation's offices, although there are exceptions, particularly when a corporation is the plaintiff in a jurisdiction where the corporation and its principals don't have offices, but chose for the litigation.

Nonparty deponents may be deposed wherever they agree, or as required by subpoena. Rule 45 provides guidelines. Generally, the court "must" quash or modify a subpoena if it requires a person who is neither a party nor an officer of a party to travel more than 100 miles from that person's residence or place of business,[18] or otherwise "subjects a person to undue burden."[19] The court has discretion with regard to subpoena duties, subject to the rules protecting subpoena recipients from "undue burden or expense."[20]

A Rule 26(f) plan might include principles for determining location. The parties may agree that the location of each deposition will be at the option of the deposing party or the deposed party. Or the parties may agree that all depositions taken by plaintiff will be at plaintiff's counsel's office, while all defense depositions will be at defense counsel's office. Or the parties may agree on neutral locations like hotel conference rooms, court reporter suites or, in contentious cases, in the magistrate judge's conference room. Or location can be determined deposition by deposition, as makes sense.

Expense may provide common sense answers to location questions. For example, it often is cheaper to pay a willing witness's travel and lodging expenses incurred in coming to the jurisdiction where the lawsuit is pending than for all the lawyers and parties to travel to the witness.

If there are irreconcilable disputes, the court will decide. An inappropriate or burdensome deposition location can be addressed in a motion for a Rule 26(c)(2) protective order. An inappropriate refusal to appear at the location selected by examining counsel can be addressed in a Rule 37(a) motion to compel. Courts apply a variety of standards, some mechanical—100 miles, district boundaries, business or residence locations—and some less so, imposing standards that make sense under the circumstances. One certainty, however, is that few judges will be happy about refereeing disputes over deposition locations. Work them out without judicial intervention if you can.

Location deserves careful consideration. One factor is the "home court advantage." A deponent's performance may be diminished by unfamiliar surroundings or enhanced by a familiar location. And *your* performance may be enhanced by friendly territory, minimal travel, and ready access to your files, photocopier, secretary, and favorite chair. On the other hand, it is easier to get the hostile deponent's "forgotten" document during the deposition if it's in the filing cabinet down the hall in the deponent's own office. Whether you opt for your office, the opposing lawyer's office, a party's office, the deponent's office, or the Holiday Inn should be decided case by case, weighing tactical advantages and disadvantages.

## 5. DEPOSITION LIMITS

### The 10-deposition limit

Rule 30(a)(2)(A)(i) limits the number of depositions to 10 per side. *Per side,* not per party. The rule specifies three sides: (i) plaintiffs; (ii) defendants; and (iii) third-party defendants. The Advisory Committee Notes to the 1993 amendment to Rule 30, which established the 10-deposition limit, state: "A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify."

The deposition limit is subject to alteration by the parties' "written stipulation" or by leave of court, which "must" be granted to the extent consistent with Rule 26(b)(1) and (2).[21] Rule 26(b)(1) requires that discovery be "proportional to the needs of the case" and specifies factors for assessing proportionality. Rule 26(b)(2) permits the court to "alter the limits" set by Rule 30 on the "number" and "length" of depositions. Rule 29 permits the parties, unless the court orders otherwise, to stipulate to modify procedures "limiting" discovery so long as the stipulation does not interfere with the discovery cut-off or the times set for hearings and trial. Of course, in some cases, ten depositions or fewer are more than enough. In other cases, the limit is unduly restrictive. The rule sets a presumption that can and should be altered whenever alteration makes sense.

### The one-day, seven-hour limit

Unless authorized by the court or stipulated by the parties, each deposition is "limited to one day of 7 hours."[22] The Advisory Committee Notes (Notes) to the 2000 amendments, which adopted the one-day, seven-hour limit, state that the rule "contemplates" that "the only time to be counted is the time occupied by the actual deposition," not time spent on "reasonable breaks during the day for lunch and other reasons." That's good news for restaurants, coffee drinkers, and manufacturers of chess clocks. The Notes also make it clear that for "purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." Arithmetic matters.

The court "must" allow additional time consistent with Rule 26(b)(1) and (2) if needed to "fairly examine the deponent" or if "the deponent, another person, or any other circumstance impedes or delays the examination."[23] The Notes list factors that may justify additional time, including:

- Questioning regarding "events occurring over a long period of time" or about "numerous or lengthy documents;"
- Questioning by multiple lawyers in multi-party cases;
- Questioning by the deponent's lawyer; and
- The need for "full exploration" of an expert witness's theories.

The Notes list other circumstances that may warrant additional time, including "a power outage, a health emergency, or other event." I'll leave it to law review commentators to explore the reaches of what "other events" may justify additional time under Rule 30(d)(1) but, just to prime the pump, I suggest they may include earthquakes, tsunamis, terrorism, pestilence, locusts, and sewer back-ups. Finally, you'll find it useful to know the Notes addressing the one-day, seven-hour limit instruct firmly in the passive voice: "preoccupation with timing is to be avoided."

### Stipulating out of the limits

As noted, the parties can stipulate out of, or the court can eliminate, the one-day seven-hour deposition limit set by Rule 30(d)(1) and the 10 depositions per side limit set by Rule 30(a)(2)(A)(i).[24] A good place to memorialize the parties' stipulation, or the court's permission, is in the court's order adopting, or adopting an alternative to, the parties' proposed Rule 26(f)(3) discovery plan. In particular, the parties' plan is to address discovery issues,[25] "what changes should be made in the limitations on discovery imposed under these rules or by local rule,"[26] and "any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c)."[27]

When considering whether to stipulate out of these limits again assess: cui bono? If you only need two depositions, praise the drafters' rationality and embrace the limits. If you need 23 depositions, some likely to be lengthy and contentious, it makes sense to nullify the unrealistic limits set by those impractical, egg-headed micromanagers.

## 6. INITIAL DISCLOSURES, THE RULE 26(f) CONFERENCE, AND THE DISCOVERY PLAN

Rule 26(a)(1)(A) generally requires pre-discovery initial disclosure of: (i) witnesses "likely to have discoverable information" that the disclosing party "may use to support its claims or defenses;" (ii) copies or identification of all documents and electronically stored information (ESI) "in the possession, custody or control" of the disclosing party that the party "may use to support its claims or defenses;" (iii) a computation of the party's damages, and related documents; and (iv) any relevant insurance agreements.

There is a duty to "supplement or correct" disclosures to include information later acquired if the initial disclosures "in some material respect" were "incomplete or incorrect" *and* the "additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."[28]

Failure to disclose information may preclude use of that information and justify other sanctions under

Rule 37(c). Initial disclosures, however, are not required if "otherwise stipulated" or "ordered by the court."[29]

How to deal with initial disclosures will be a subject of the parties' Rule 26(f) conference in which, among other things, the parties "make or arrange for the disclosures required by Rule 26(a)(1)" and attempt in good faith to develop a "proposed discovery plan" to submit to the court.[30] The discovery plan should express the parties' "views and proposals on: … what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made."[31] In addition, the Rule 26(f) conference is to address "the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues" as well as whether there should be changes in discovery limitations.[32]

The Rule 26(f) conference is to be held "as soon as practicable" and "in any event at least 21 days before a scheduling conference is held" or a Rule 16(b) scheduling order is due.[33] The Rule 26(f) conference is to result in a written report to the court outlining the parties' discovery plan.[34] Failure to participate in good faith in the development and submission of a discovery plan may result in sanctions.[35]

In some cases, you might want to pay early attention to ESI issues: what do you (or your IT expert) need to know about data, metadata, forms, formats, and other stuff addressed in Rules 26(a)(1)(A)(ii) and (f)(3)(C), 34 (a)(1)(A) and (b)(1)(C)(E)(i)-(iii), and 37 (e)? Do you need deposition(s) of the other side's IT expert (attended by your expert) to figure out ESI discovery? In my experience, beyond some questions about litigation holds and disappeared emails and text messages, ESI issues have been few and far between. My perception is that in some litigation, however—mostly, it seems, in battles to the death by corporate behemoths—ESI discovery is a big deal, and in great part that is what prompted the greater emphasis on discovery proportionality in the current version of Rule 26(b)(1). It certainly seems that in recent years ESI issues have gotten serious CLE attention and have supported a substantial army of ESI discovery consultants and related service providers.

So, if ESI questions are important to your new case, give them early attention. The wheels of justice grind slowly, but the wheels of ESI discovery grind almost imperceptibly, and expensively. Start discussing ESI in your Rule 26(f) conference and take seriously the ESI references in Rule 26(f)(3)(C). ESI questions can give new meaning to the Rule 26(c) concepts of "annoyance, embarrassment, oppression" and "undue burden or expense."

Here are two suggestions for approaching the Rule 26(f) conference.

First, identify your objectives and formulate your ideal discovery plan in advance, using the cui bono principle. Does it make sense for you to waive the ten deposition limit; to eliminate the one-day, seven hour limit; to agree to confine discovery to interrogatories and document requests for some designated period; to conduct discovery in phases (for example, bifurcating discovery on damages and liability, or beginning with discovery on statute of limitations issues, postponing discovery on the merits); to expand the 25 interrogatory limit; to develop principles for deposition locations or advance notice minimums or pre-deposition document production; to stipulate to a protective order prescribing confidentiality or use restrictions; to agree on who may and may not attend depositions, the order of depositions, custody of deposition exhibits, the selection of court reporters, automatic Rule 30(e) transcript review, power outages, or anything else?

Second, have your proposed plan in writing before the Rule 26(f) conference. Supply it to the other side. Take this initiative and you are likely to define the agenda for the conference and have maximum influence on the final written plan. This is the "drafter's advantage." It is also the "planner's advantage."

## 7. THE RELATIONSHIP BETWEEN DEPOSITIONS AND PAPER DISCOVERY

Often it makes sense to do paper discovery before taking depositions. Interrogatories can elicit the names of prospective deponents and detailed information about their backgrounds: education, training, work history, medical history, litigation history, criminal records, etc. Such inquiries would be unduly time-consuming at depositions, and the specifics may not be within the deponent's ready recall absent time at the filing cabinet. Similarly, interrogatories can elicit other sorts of information best compiled by the other side before the deposition, like names, addresses, dates, numbers, and other data in the collective possession of an institution requiring the efforts of multiple individuals to gather. In addition, interrogatory answers and documents produced in response to Rule 34 and 45 requests can inform decisions about who to depose, when, in what order, and the content and order of questions to be asked.

It doesn't always make sense to do paper discovery first, however. You may need early depositions to protect against important witnesses' trial unavailability. Or it may pay to seize an early advantage, bringing in opposing witnesses to testify on the record before they have formulated their theories. While there may be risk in taking depositions before you are fully educated—e.g., before you've gotten important documents from your opponent—the risk may be worth the opportunity to commit some opposition witnesses to sworn testimony early on. And if you couple the early deposition notice with a document request, human nature being what it is, the likelihood is that documents will come in after the early deposition, justifying continuation and resumption on a later date to address belatedly produced material.

As noted, among the subjects to be discussed at the Rule 26(f) conference is whether depositions should be done in phases or limited to—or focused on—particular issues.[36] So, go into the conference knowing whether it makes sense for you to stipulate to doing paper discovery first, with depositions beginning only after a sufficient period to exchange interrogatory answers and documents, and whether other discovery limitations may, or may not, be beneficial.

## 8. THE COURT REPORTER AND THE TRANSCRIPT

Unless otherwise agreed to, a deposition is to be "conducted" before "an officer authorized to administer oaths by federal law or by the law in the place of examination," or before a person appointed by the court or stipulated to by the parties.[37]

The officer—the court reporter—records the testimony "by audio, audiovisual, or stenographic means."[38] In some circumstances—by stipulation or court order—a deposition may be "taken by telephone or other remote means."[39] Many court reporters are now very high tech (compared to me, at least) and can help you arrange "remote" video depositions by computer, with participants appearing at multiple geographic locations, connected electronically, in Rod Serling's words, by "sight," "sound," and "mind." Ask the court reporter for technological solutions for logistical problems.

The "officer"—the court reporter—"must begin the deposition with an on-the-record statement that includes: (i) the officer's name and business address; (ii) the date, time, and place of the deposition; (iii) the deponent's name; (iv) the officer's administration of the oath or affirmation to the deponent; and (v) the identity of all persons present."[40] These items must be repeated "at the beginning of each unit of the recording medium" if "the deposition is recorded non-stenographically" and any "recording techniques" must not distort the participants' "appearance or demeanor."[41]

"Before testifying, a witness must give an oath or affirmation to testify truthfully"; the oath or affirmation "must be in a form designed to impress that duty on the witness's conscience."[42]

Deposition testimony "must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer."[43] When depositions are recorded by stenographic and video

means, it is typical for the court reporter to take the stenographic record while another person operates the video equipment and its audio component.

Of course, there is no general requirement that a transcript be prepared; transcripts are prepared only if ordered by a party or the deponent (absent a local rule or court order directing otherwise). If a deposition proves to be of little or no importance, it may be that a transcript never will be prepared.

If a deposition is important, however, a transcript generally will be prepared, ordered by one of the parties. If so, the transcript is everything. It pretty much doesn't matter what was said or done at the deposition; it pretty much only matters what makes it into the transcript. If, for example, the court reporter leaves out a "not" in the deponent's testimony, there is a serious problem for someone. ("I did … have sexual relations with that woman."). Pay careful attention to the transcript. Be "transcript aware." The transcript is everything.

Under Rule 32(d)(4), any objection to "how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known, or with reasonable diligence, could have been known." Mark your calendar promptly.

Rule 30(e) permits the deponent 30 days to "review" the deposition transcript or recording and to provide a signed statement listing "changes in form or substance" and "the reason" for those changes.[44] "Review" must be requested by "the deponent or a party before the deposition is completed."[45] Mark that in your calendar, too, before the deposition is completed.

The officer must note in the Rule 30(f)(1) certificate—attesting "that the witness was duly sworn and that the deposition accurately records the witness's testimony"—whether review was requested and "if so, must attach any changes the deponent makes during the 30-day period" prescribed by Rule 30(e)(1).[46]

The Rule 30(e) statement may include "changes" in "form" and "substance." The statement might say that transcript page 29, line 15—where the deponent's answer reads "I most emphatically did read the lease"—should be corrected to read "I most emphatically did not read the lease." The reason for the change would be, likely: "The transcript is not accurate. The court reporter or the transcriber erred, and the transcript should be corrected." Don't casually waive the right to object under Rule 32(d) or the Rule 30(e) review right. When you get the transcript, read it right away. Do this whether or not the deponent is your client and whether or not you were the deposer or an observer. Do this whether or not you requested Rule 30(e)(1) review. Things look different in writing. If you need to take action—to correct a transcription error, to follow-up with additional discovery, to change court reporters, to file a motion to compel or for a protective order, to amend your pleadings, etc.—the sooner you do it, the better.

Finally, remember this: the transcript is everything.

## 9. THE MANNER AND ORDER OF EXAMINATION

Examination and cross-examination of deponents "proceed as they would" at trial under the Federal Rules of Evidence, except Rules 103 [rulings on evidence] and 615 [sequestration]."[47]

Generally, depositions are conducted by cross-examination, which means that "ordinarily" leading questions are permitted.[48] But don't assume that leading questions are appropriate at every deposition. Leading questions are permitted under FRE 611(c) when the questioner is examining witnesses who are "hostile," adverse parties, or "identified with" an adverse party. If your opponent takes the deposition of a witness who is not hostile, adverse, or identified with your side—to preserve a friendly witness's testimony or to examine a neutral witness, for example—leading questions may be objectionable, and you must "timely" object to each correctible "error or irregularity" in the "manner of taking the deposition" or in "the form of the question or answer," and you must do so "during the deposition" to preserve them.[49]

Rule 30(c) excludes the application of FRE 103, which addresses trial rulings on evidence, and FRE 615, which addresses sequestration. Limits on attendees (including sequestration) and evidentiary or scope restrictions, as well as any other deposition matters in dispute or anticipated to result in dispute, can be addressed at the Rule 26(f) conference and in the discovery plan or in early discussion with the judge. They can also be addressed: (i) in a Rule 26(c) motion for protective order, which may be filed and served, answered, and considered at a hearing in advance of the deposition; (ii) in a phone call to the judge during the deposition; or (iii) after suspension of the deposition under Rule 37(a).

After the court reporter begins the deposition as prescribed by Rule 30(b)(5), typically the deponent is questioned by the party who caused the deposition to occur. Typically, that examination is followed by examination by counsel for other parties on the same side as the deposing party, followed by the deponent's counsel if the deponent is a party and deponent's counsel chooses to examine her client, and then followed by others on the deponent's side.

The first round may be followed by re-cross, re-direct, and so on, until everyone is exhausted, or someone invokes the seven-hour limit, or sanity otherwise prevails. Frequently, however, lawyers representing the deponent, and those with whom the deponent is aligned, do not question the deponent. Sometimes they question the deponent when they shouldn't, and sometimes they don't question the deponent when they should.

## 10. NO SHOWS, FAILURES OR REFUSALS TO ANSWER, OBSTRUCTION, AND MOTIONS TO COMPEL

When a properly noticed or subpoenaed witness doesn't show, refuses to answer for improper reasons, or otherwise obstructs the deposition, a party may move for a Rule 37(a) order compelling discovery. Of course, judges hate discovery motions. Or they hate lawyers who bring discovery motions. Or both. Hence the a-plague-on-both-your-houses attitude. ("Can't you experienced lawyers resolve your petty disagreements without taking up the time of this busy court?!"). Or judges blame the victim. ("Why are you taking up the time of this busy court with your petty disagreements?!").

As a last resort, if self-help fails, file a motion to compel. Try to avoid scheduling the hearing during golf season, the last two weeks in December, and on Mondays and Fridays.

Under Rule 37(a), a party may move for an order compelling discovery after that "movant" conferred, or attempted to confer, in good faith with the person or party failing to provide the requested discovery "in an effort to obtain" the requested discovery "without court action."[50] The motion may seek to compel an answer if a deponent fails to answer a deposition question or if a "corporation or other entity" fails to make a Rule 30(b)(6) designation. The party faced with the deponent's obstruction at the deposition "may complete or adjourn the examination before moving for an order."[51]

For "purposes" of Rule 37(a), "an evasive or incomplete" answer "must be treated as a failure" to answer.[52] So, your motion can address quibbling, filibustering, feigned ignorance, speaking objections, excessive and unnecessary objections, and any other conduct that improperly obstructs discovery.

If the Rule 37(a) motion is granted—or if the discovery response comes "after the motion was filed"—the court "must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." But the court "must not order this payment if" the movant did not—before filing the motion—try in good faith to get the requested discovery "without court action," or if the action of the accused obstructer was "substantially justified," or if "other circumstances make" "an award of expenses unjust."[53]

If the Rule 37(a) motion is denied, the court may issue a Rule 26(c) protective order and "must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party

or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." But the "court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust."[54]

If the Rule 37(a) motion is "granted in part and denied in part," the "court may issue" a Rule 26(c) protective order and "apportion the reasonable expenses for the motion."[55]

If a party or a party's Rule 30(b)(6) designee "fails, after being served with proper notice, to appear for that person's deposition," the court may order any of the sanctions listed in Rule 37(b)(2)(A)(i)-(vi) as may be appropriate and "must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."[56]

So, you ask: (i) how can you decide when to file a Rule 37(a) motion to compel; (ii) how can you differentiate between the circumstances when a court "must" award expenses and "must not"; and (iii) how can you tell when a seeming discovery infraction is or is not "substantially justified," at least to the extent that an award of expenses to be paid by the unsuccessful party—or attorney or both—would be "unjust"? Here's how, to borrow the late Aretha Franklin's style: D-I-S-C-R-E-T-I-O-N.

Do what you gotta do to get what you need in depositions, but if you can't do it without court intervention, ask for court intervention. But be prepared for application of the Law of Unintended Consequences.

## 11. PROTECTIVE ORDERS

A "party or any person from whom discovery is sought may move for a protective order"—in the court where the action is pending or, on matters relating to a deposition, in the court where the deposition will be taken—to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[57]

Rule 26(c)(1)(A)-(H) lists various issues that may be addressed in a protective order, including "forbidding" or limiting specified discovery or "inquiry into certain matters," designating who may be present at discovery (and who may not), and sealing a deposition.[58]

Joint motions for general protective orders—preserving confidentiality of commercial or personal information, for example—are not received with the same knee-jerk disapprobation accorded motions to compel. On the other hand, contested motions for protective orders—for example, seeking to shield against inquiry into certain subjects or asking the court to referee global relevance disputes—may be treated more like motions to compel, i.e., with judicial annoyance.

Like Gary Cooper in High Noon, do what you've got to do; if self-help and reason fail, file your motion to compel or for a protective order. Be conscious of the risks, though. Again, discovery motions often create occasions for application of the Law of Unintended Consequences. The court, sua sponte, can foreclose or limit discovery or expand it. And the court can impose sanctions on the non-prevailing party.[59]

Make your motion to compel or for a protective order timely, during the deposition if necessary, but only after you've "in good faith conferred or attempted to confer" with the wrongdoer.[60]

## 12. DISCOVERY ETHICS AND RAMBO TACTICS

Lawyers have a duty to pursue their clients' lawful objectives zealously, loyally, and with diligence.[61] At the same time, lawyers have a duty to be fair—to opposing parties, opposing lawyers, and others.[62]

The friction that sometimes arises at the intersection of zeal and fairness has generated rules, civility codes, and much commentary from the bar and bench, including countless remarks at numberless rubber-chicken bar association events.

While the devil is often in the details, there are basic principles to guide deposition behavior. A lawyer shall not "make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[63] At depositions, lawyers are to state objections "concisely in a nonargumentative and nonsuggestive manner."[64] A lawyer may properly instruct a deponent not to answer a deposition question only to preserve a privilege, enforce a court-directed limitation, or in anticipation of making a request for a protective order limiting the inquiry.[65]

Proper deposition conduct is given detailed definition in civility principles adopted by the U.S. District Court for the Eastern District of Michigan. Exemplifying similar principles adopted around the country, the Eastern District specifies "Attorneys' Responsibilities to Other Counsel" in the discovery process:

> (10) We will not use any form of discovery or discovery scheduling as a means of harassment.
>
> ...
>
> (19) We will take depositions only when actually needed to ascertain facts or information or perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.
>
> (20) We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
>
> (21) We will not obstruct questioning during a deposition or object to deposition questions unless appropriate under applicable rules.
>
> (22) During depositions, we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.

These principles—mostly phrased as things good lawyers "will not" do—provide both aspirational guidelines and a checklist of what uncivil lawyers do with sufficient frequency to warrant attention on a list of actions that good lawyers avoid.

Deviation from civility may have significant consequences. For example, Michigan's Attorney Discipline Board suspended a lawyer from practice for 60 days because he "grabbed opposing counsel at a deposition and briefly put him in a headlock until a third party took possession of an exhibit."[66] Headlocks qualify as excessive zeal.

Rules, civility principles, and disciplinary authorities notwithstanding, depositions present many opportunities for the obstructive, abusive, insidious, and unethical actions familiarly known as Rambo litigation tactics.

Rambo tactics by the deposing lawyer can involve improprieties in scheduling; burdensome and uncomfortable locations; improprieties in the number, nature, and behavior of observers; and abuses in the duration, tone, scope, manner, and content of questioning. Rambo tactics by the defender may involve last-minute cancellations; delay; failure to produce documents; tardiness; excessive breaks; disruptive interruptions; improper on-the-record comments; objections that are unnecessary, improper in form, number, duration, tone, or content; mid-deposition off-the-record conferences with the deponent; unjustified instructions not to answer; improper "coaching" during the deposition; headlocks; and the like.

Rambo tactics persist, unfortunately, because they can be effective and frequently carry no adverse consequences; Rambo litigators often get away with it.

Inappropriate deposition conduct may offend civility principles and be regulated by Rules 30(c)(2) and 37, but seeking court intervention is not always desirable. It may cause delay. It can be time-consuming and expensive. And often it is difficult to communicate the obstructive impact of the other side's behavior to someone who wasn't there, i.e., the judge. Worse, seeking court intervention often is ineffective because many judges are unable or unwilling to devote the time, effort, and attention necessary to understanding discovery motions.

Some judges are too busy. Some find discovery disputes beneath them. Some are lazy or impatient

with details. Too many react to discovery motions with the a-plague-on-both-your-houses attitude or by automatically blaming the victim. Most litigators spend most of their litigating time occupied with discovery, so judges ought to spend their valuable time addressing and deciding discovery disputes, but it's a fact of life that many judges just do not like discovery disputes.

So, even if you're in the right, bringing a motion to compel or for a protective order may produce judicial antipathy or worse. As noted, when you go to court on a discovery motion, you risk application of the Law of Unintended Consequences, which may result in judicial micromanagement, burdensome discovery limitations, undesirable discovery extension and expansion, merits prejudgment ("premature adjudication"), and sanctions for having the temerity to file a motion that is denied.

In short, self-help often is the preferable response to Rambo tactics. Measures that may be effective include firmness, self-control, and relentlessly pressing forward despite improper objections, evasions, and other obstructions, until you get answers. Sometimes repetition is necessary. Sometimes having the discipline to ignore your opponent is what works. Sometimes it takes lectures on the law and prediction of dire consequences attendant to continued misbehavior. It may be difficult to restrain your natural reaction to the Rambo litigator, but focus, persistence, and the courage of your convictions can work.

Q. Mr. Collinson, what do you understand the second paragraph of the safety memo to mean?

[Rambo counsel]: Objection. Calls for speculation. How does he know what the author intended? He already told you he didn't write the memo and doesn't know who did. He's not a mind reader, counsel. Move on. Do you have any intelligent questions?

Q. You can answer, Mr. Collinson. What is your understanding of the second paragraph?

[Rambo counsel]: I already told you, that's an improper question. It's irrelevant. The document speaks for itself. Move on.

Q. You can answer, Mr. Collinson. What do you understand the second paragraph to mean?

[Rambo counsel]: Hold it, hold it! Collinson, don't answer. This is a total waste of time. This has gone far enough. Move on to proper questions or this deposition is finished.

[Examining counsel]: Mr. Cheatham, I object to your repeated interruptions and to your comments. As you well know, you are entitled to state objections "concisely and in a nonargumentative and nonsuggestive manner." You are not entitled to disrupt, interrupt, obstruct, or make speeches unnecessary to a statement of the basis for your objections. You are not entitled to direct the witness to refuse to answer as you have done. I would appreciate it if you would confine your objections to statements of legal grounds, consistent with Rule 30(c)(2).

Q. Now, Mr. Collinson, what do you understand the second paragraph to mean?

[Rambo counsel]: Hold it! Stop! Here are my legal grounds counsel: speculation, mind-reading, the document speaks for itself, irrelevant, asked and answered, and stupid. S-t-u-p-i-d. Okay, go ahead and answer, Collinson. We'll play his stupid game for awhile.

A. Well, I could only speculate. I didn't write the memo and I can't read other people's minds, you know, and well, as Mr. Cheatham says, the document speaks for itself.

Q. We're talking about you now, Mr. Collinson. What is your understanding of the second paragraph?

A. Well, if you want me to speculate, I guess I thought it meant that you weren't supposed to operate the grinder without safety glasses on.

Q. Your understanding is that paragraph two of the safety assessment memo communicates that the grinder operator is required to wear safety glasses, is that correct?

[Rambo counsel]: Objection. Leading. Asked and answered.

Q. Is that correct?

A. Yes.

[Rambo counsel]: That's my cell phone. We'll take a break now.

Sometimes, too, an ounce of prevention is worth a pound of cure. Video depositions can discourage—or at least expose—the excesses of Rambo litigators. And video depositions can restrain or expose the excesses of obstreperous or otherwise difficult deponents. Unlike one-dimensional stenographically-recorded deposition transcripts, video depositions capture deponents' multi-dimensional hostility, obstruction, hesitation, discomfort, and other aspects of human behavior important to credibility assessment. Ounces of prevention, however, can be expensive. You will have to decide whether commissioning video depositions of your Rambo opposition will turn out in the long run to be less expensive and more effective than having to seek after-the-fact court intervention under Rule 37.

Focus, persistence, and the courage of your convictions, and video may also work when you are called on to protect your client from a Rambo questioner.

If self-help doesn't work, your ultimate weapon is a threat to go to the judge. Don't make the threat, however, unless you're prepared to follow through. As Davy Crockett said (at least according to Disney): "Be sure you're right, and then go ahead.



Notes

1 Fed. R. Civ. P. 30(a)(1). References to "Rules" in this article are to the Federal Rules of Civil Procedure.
2 Fed. R. Civ. P. 30(b)(6).
3 Id.
4 Fed. R. Civ. P. 26(b)(4)(A).
5 Fed. R. Civ. P. 26(b)(4)(B).
6 Fed. R. Civ. P. 30(b)(1) and 37(d).
7 Fed. R. Civ. P. 30(b)(3).
8 Fed. R. Civ. P. 30(b)(2) and 34.
9 Fed. R. Civ. P. 30(a)(1) and 45.
10 Fed. R. Civ. P. 30(b)(2), 34, and 45(a)(1)(C) and (D).
11 See Fed. R. Civ. P. 30(b)(2) and 45(b).
12 Fed. R. Civ. P. 26(d)(1).
13 Fed. R. Civ. P. 26(f)(1).
14 Fed. R. Civ. P. 26(f)(2)-(3).
15 Fed. R. Civ. P. 26(d)(3)(A)-(B).
16 Fed. R. Civ. P. 26(b)(4)(A).
17 Fed. R. Civ. P. 26(a)(2)(D).
18 Fed. R. Civ. P. 45(c)(1)(A) and (d)(3)(ii).
19 Fed. R. Civ. P. 45(d)(3)(A)(iv).
20 See Fed. R. Civ. P. 45(d).
21 Fed. R. Civ. P. 29 and 30(a)(2)(A).
22 Fed. R. Civ. P. 30(d)(1).
23 Id.
24 Fed. R. Civ. P. 29, 30(a)(2), and 30(d)(1).
25 Fed. R. Civ. P. 26(f)(3)(B) and (C).
26 Fed. R. Civ. P. 26(f)(3)(E).
27 Fed. R. Civ. P. 26(f)(3)(F).
28 Fed. R. Civ. P. 26(e)(1).
29 Fed. R. Civ. P. 26(a)(1)(A).
30 Fed. R. Civ. P. 26(f)(2).
31 Fed. R. Civ. P. 26(f)(3)(A).
32 Fed. R. Civ. P. 26(f)(3)(B) and (E).
33 Fed. R. Civ. P. 26(f)(1).
34 Fed. R. Civ. P. 26(f)(2).
35 Fed. R. Civ. P. 37(f).
36 Fed. R. Civ. P. 26(f)(2)-(3).
37 Fed. R. Civ. P. 28(a), 29, and 30(b)(5).
38 Fed. R. Civ. P. 30(b)(3)(A).
39 Fed. R. Civ. P. 30(b)(4).
40 Fed. R. Civ. P. 30(b)(5).
41 Fed. R. Civ. P. 30(b)(5)(B).
42 Fed. R. Evid. 603.
43 Fed. R. Civ. P. 30(c)(1).
44 Fed. R. Civ. P. 30(e)(1)(A) and (B).

45 Fed. R. Civ. P. 30(e)(1).

46 Fed. R. Civ. P. 30(e)(2).

47 Fed. R. Civ. P. 30(c)(1).

48 Fed. R. Evid. 611(c).

49 Fed. R. Civ. P. 30(d)(3)(B).

50 Fed. R. Civ. P. 37(a)(1).

51 Fed. R. Civ. P. 37(a)(3)(C).

52 Fed. R. Civ. P. 37(a)(4).

53 Fed. R. Civ. P. 37(a)(5)(A)(i), (ii), and (iii).

54 Fed. R. Civ. P. 37(a)(5)(B).

55 Fed. R. Civ. P. 37(a)(5)(C).

56 Fed. R. Civ. P. 37(d)(1)(A)(i) and (d)(3).

57 Fed. R. Civ. P. 26(c)(1).

58 See Fed. R. Civ. P. 26(c)(1), (f)(3)(B), (D), (E), and (F) and 16(b)(3), and (c)(2), and (d).

59 Fed. R. Civ. P. 26(c)(2) and (3), 30(d)(3)(C), and 37(a)(5) and (d)(3).

60 Fed. R. Civ. P. 26(c) and 37(a)(1).

61 Model Rules of Prof'l Conduct R. 1.5 (2009) 1.2, 1.3, 1.7, and 1.8.

62 See Model Rules of Prof'l Conduct R. 3.4 and 4.4.

63 Model Rules of Prof'l Conduct R. 3.4(d).

64 Fed. R. Civ. P. 30(c)(2).

65 Fed. R. Civ. P. 30(c)(2) and (d)(3).

66 Mich. Lawyers Weekly, Mich. Grievance Administrator v. McKeen, at 17 (May 7, 2003), available at https://milawyersweekly.com/wp-files/opin/adb/34123.htm.