Daniel Webster-Batchelder American Inn of Court

Depositions: Nuts and ~~B~~Jolts

Table 6

April 3, 2019

DEPOSITION CHECKLIST

I. Purposes of the Deposition

- Discover information from key witness without prior filtering by opposing counsel.
- Assess the credibility and presentability of key witness.
- Identify and authenticate key documents necessary for trial and/or summary judgment.
- Discover weaknesses and strengths in adversary's case and formulate plans to rebut strengths and expose weaknesses.
- Bolster your credibility to opposing counsel and his or her client by demonstrating a command of the facts and legal theories.
- Discovery necessary facts and lay the foundation for summary judgment.
- Facilitate settlement.

II. Scheduling of Deposition

- Determine location.
- By agreement in accordance with Structuring or Dispositional Conference order. Superior Court Rule 26(d); RSA 517:4.
- By Notice and Subpoena (Duce Tecum, Sup. Ct. R. 26(d)); Proper caption and information
- By Court Order. RSA 517:2

III. Investigation of Witness and Exhibits

- Copy Discovery Responses as possible exhibits
- Copy any subpoenas
- Statements or reports of witness
- Produce any reliable literature or publications that apply
- Google Research/Review Witness' Social Media Accounts and Statements
- Copy any diagrams, photographs or illustrations that apply
- Search electronic documents for witness and review all associated documents

IV. Prepare Deposition Outline

- Identify Key Issues
  - Determine Objectives for each issue (what is the goal?)
  - Anticipate potential objections

- Divide Questioning into Individual Chapters and Themes
- Organize Exhibits in the Order in which you intend to use them
- Mark Exhibits in order with originals and copies for witness and counsel

V. Concluding Deposition

- Clarify reading and errata stipulation
- Place on the record any requests made for additional documents, witness names or other information
- Verify list of exhibits marked and identified
- Verify custodian of original exhibits

MEMORANDUM

TO: Daniel Webster Batchelder Inns of Court
FM: David P. Slawsky
RE: Table 6, Nuts and Bolts of Depositions
DATE: March 21, 2019

Here are a few random thoughts about deposition practice. dps

Clinical issues

Here are some standard techniques for preparing to take a deposition:

- **Open-ended questions**: How did the crash occur? What did the scene look like?
- **Exhaustion**: Please state all the reasons you believe Dr. Smith conformed to the standard of care. Have we now discussed all of your opinions in this case?
- **Estimating dates, distances, times & measurements**: Since you don't remember exactly what time you arrived, was it before 5 pm? Was it as late as 11pm?
- **Restating and summarizing**: Let me make sure I understand what you just said. You made 3 points – the first was _____. Correct?
- **Boxing in**: Did you see the red car before impact? Since you're not sure, let's approach this a different way; when was the first time you saw the red car?
- **Expert depositions**: This is my only chance to discuss the case with you before trial so I need you to tell me all the opinions you have in the case. What facts are you relying on? What assumptions are you relying on? Daubert support (or the lack thereof) for those opinions.
- **The evasive witness**: (Q) Would you agree that it would be improper for a nursing home to hire a nurse who had been convicted of patient abuse? (A) What do you mean by "patient abuse"? (Q) What does that phrase mean to you?

Stipulations

This is an example of a standard stipulation used in New Hampshire (italics added).

> It is agreed that the deposition shall be taken in the first instance in stenotype and when transcribed may be used for all purposes for which depositions are competent under New Hampshire practice.
>
> Notice, filing, caption, and all other formalities are waived. *All objections except as to form are reserved and may be taken in court at time of trial.*
>
> It is further agreed that if the deposition is not signed within 30 days after submission to counsel, the signature of the deponent is waived.

Some attorneys object to leading questions at a deposition. I suppose that, as a technical matter, leading is a "form" of a question and therefore objectionable, but is that really an appropriate objection? For example,

> Q: Good morning. We're here to take your deposition in the matter of A vs. B. I understand that, until recently, you were employed as CEO of the defendant corporation. Is that correct?
>
> Objection. Leading.

- What do you do if this becomes a problem during the deposition?

Some trial judges will, if available, accept a telephone call and get involved. In the federal court, Magistrate Judge Andrea Johnstone gets these calls (though very infrequently). Judges Laplante invites attorneys to contact him for an informal telephone conference to discuss discovery disputes with the idea that issues like these may get resolved informally without motion practice. Experienced counsel are proactive – they either file motions in advance of the deposition, or deal with issues in the discovery plan.

- What does the standard stipulation mean where it says that depositions, when transcribed, "may be used for all purposes for which depositions are competent under New Hampshire practice."?

  Evidence Rules 612 (Writing Used to Refresh a Witness's Memory) and Evidence Rule 613 (Witness's Prior Statement).

  Superior Court Rule 26 (Depositions).

Videotape deposition practice

State court. Superior Court Rule 26(l)(1) and (2). Does this mean you can use parts of a video deposition, if admissible, in your opening statement? Can you run the video yourself (as they do on the television series, Suits), or do you need a professional videographer? RSA 517 (Depositions in Civil Actions) was adopted before videotape depositions were in regular use in this state. RSA 517:3 disqualifies certain persons from writing or recording the testimony of a witness. Does that prohibit the attorney or his/her staff from running a video camera at a deposition?

> No person shall write the testimony of a witness, record the testimony of a witness, or act as magistrate in taking the same, if:
>
> I. Such person is a party to the action;
>
> II. Such person is a relative, employee, or attorney of a party to the action;
>
> III. Such person has a financial interest in the action or its outcome;

IV. Such person has entered into an arrangement with a person or entity which has a financial interest in the action or its outcome, where the arrangement purports to create a relationship in which the person transcribing the deposition or recording the deposition will be providing exclusive deposition transcribing or deposition recording services for the interested person or entity; or

V. Such person is employed by or is an independent contractor working for a person or entity which has entered into an arrangement with a person or entity which has a financial interest in the action or its outcome, where the arrangement purports to create a relationship in which the person's employer will be providing exclusive deposition transcribing or deposition recording services for the interested person or entity.

Source. RS 188:18. CS 200:18. GS 210:6. GL 229:6. PS 225:7. PL 337:3. RL 393:3. 2000, 216:1, eff. Jan. 1, 2001.

Superior Court Rule 26(l)(3) – "A party objecting to a question asked of, or an answer given by, a witness whose testimony is being taken by videotape shall provide the court at the Trial Management Conference with a transcript of the videotape proceedings that is sufficient to enable the court to act upon the objection before the trial of the case, or the objection shall be deemed waived."

State. RSA 517:13 (Discovery Depositions in Criminal Cases).

Federal. Rule 30(b)(3) (Notice of the Deposition; Method of Recording) and Rule 32, Fed.R.Civ.P. (Using depositions in court proceedings).

Rule 30(b)(3)(A) states: "Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition."

Correcting depositions

State. Superior Court Rule 26(f): "No deposition, as transcribed, shall be changed or altered, but any alleged errors may be set forth in a separate document attached to the original and copies."

Federal. Rule 30(e), Fed.R.Civ.P.

Depositions of corporate representatives

State. Superior Court Rule 26(m)

Federal. Rule 30(b)(6), Fed.R.Civ.P.

Out-of-state depositions

State. RSA 517:15 (Appointment of Commissioner to take Depositions)

Federal. Nationwide service of process, Rule 45.

Depositions to Perpetuate Testimony

State. RSA 518 (Depositions in Perpetual Remembrance)

Federal. Rule 27, Fed.R.Civ.P.

Superior Court Decisions on Deposition Practice

Production of documents reviewed by non-party witness to prepare for deposition and work product privilege	*Bartlett v. American Medical Systems, Inc., et. al.,* No. 216-2014-CV-810, (Hills. Sup. Ct., N. Dist. April 19, 2016)(Ruoff, J.).
Deposition Guidelines – Non-retained Treating Physician	*Rivera v. Southern New Hampshire Medical Center, et. al.,* No. 226-2016-CV-00214, (Hills. Sup. Ct., S. Dist. Nov. 6, 2018)(Temple, J.).
Changing Deposition Testimony/Errata Sheets	Brockway Smith Inc. v. WH Silverstein, Inc., et. al., (2012-CV-00037, (Merr. Sup. Ct. Feb. 2, 2015)(McNamara, J.).

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

BLANCHE E. BARTLETT, et al.

v

AMERICAN MEDICAL SYSTEMS, INC., et al.

Docket No. 216-2014-CV-810

ORDER ON PLAINTIFF'S EMERGENCY MOTION TO COMPEL DEPOSITION (Production of Documents)

Before the Court is plaintiffs' Motion to Compel the Production of Documents for a deposition that is scheduled to take place on April 20, 2016, at 6:00 PM in New York. A hearing was held this morning on plaintiffs' motion. Defendant American Medical Systems Inc. (AMS) objects. Defendant Jennifer Donofrio, MD (Donofrio) takes no position with respect to the request. For the reasons that follow, plaintiffs' motion is **GRANTED**.

An elusive but central witness in this case, Sean O'Hara, was recently located by AMS's attorneys. Documents describe Sean O'Hara as the "territory manager" for AMS at the time of the allegations in this case. It is undisputed that Mr. O'Hara has not been employed by AMS for quite some time. In fact, AMS had difficulty - or so it claims - locating Mr. O'Hara in order to facilitate his deposition.

By email dated March 1, 2016, AMS informed plaintiffs that it had located Mr. O'Hara, but declined to provide an address so that plaintiffs could serve him with the

process necessary to start a deposition. To date, AMS has not disclosed that information. Counsel for AMS informed plaintiffs that it would coordinate the deposition of Mr. O'Hara.

On March 21, 2016, plaintiffs forwarded a notice of deposition with *subpoena duces tecum* to the counsel for AMS. The request for documents attached to the plaintiffs' request specifically informs Mr. O'Hara--and whoever else happened to read the document--that he was to bring with him:

1) a current copy of his *curriculum vitae* summarizing his professional qualifications, publications, presentations, and affiliations, and professional licensure;
2) any and all documents viewed by him concerning this lawsuit;
3) any and all documents reviewed by you in preparation of this deposition;
4) for any and all documents in your possession (or were provided to you by AMS) relating to the Monarch sling;
5) any and all documents in your possession (or provided to you by AMS) relating to the Monarch sling in your work with defendant Manchester OB/GYN Associates or Dr. Donofrio.

Plaintiffs' request does not expressly request a list of documents provided to the witness by Mr. O'Hara's or AMS's counsel.

It is clear from the text of this document production request that at no time did anyone from AMS's legal team inform plaintiffs that they intended to act as Mr. O'Hara's counsel of record. In fact, AMS admits that it wasn't until 5 days after receiving the notice, on March 26, 2016, that the attorneys representing AMS agreed to represent of Mr. O'Hara. Counsel for AMS (and now counsel for Mr. O'Hara) voluntarily admitted that they met with their client after receiving the notice of deposition with the requested document production and reviewed a small subset of previously produced documents that were hand selected by "his" lawyers. The only reason plaintiffs are now aware that all documents reviewed by Mr. O'Hara were provided by his and AMS's attorneys is because they have volunteered that information.

The Court cannot escape the conclusion that the attorneys representing Mr. O'Hara were subjectively aware of the fact that any documents they showed Mr. O'Hara were subject to a demand for production by plaintiffs. By logical extension, it appears that the documents shown to Mr. O'Hara were procured from AMS's discovery file. Now, it seems, AMS is claiming the work product privilege for documents that its own attorneys revealed to a former employee.

At the hearing, counsel for AMS asserted that it was acting in his capacity as counsel for Mr. O'Hara and AMS in asserting the work-product privilege. However, their argument only makes sense if AMS is making the claim. As counsel for Mr. O'Hara – a non-party witness in the litigation – the mental impressions of his attorney when selecting documents from the AMS database would be irrelevant to plaintiffs. The true party in interest in this argument is AMS – which is why AMS's pleading states: "Plaintiffs seek to discover the small set of document, culled from thousands of documents produced in this litigation, which counsel for AMS showed Mr. O'Hara to prepare him for his deposition." (emphasis added). If "counsel for AMS" was showing the documents to Mr. O'Hara, as stated in the pleading, then they are not protected under the attorney work-product doctrine.

The Court notes that Mr. O'Hara was a "territory manager," and not an officer, director, manager or corporate officer of AMS. Therefore the representation of Mr. O'Hara is not covered by the traditional rubric of "corporate representation" when a law firm represents a corporate entity.

In this context, the Court finds the reasoning of the United States District Court for the Southern District of Illinois in In re Pradaxa Products Liability Litigation, No. 3:12 – M.D. – 02385 – DRH – SCW, very persuasive. In that case, plaintiffs requested all

documents reviewed by the deponent prior to his testimony. The defendants in that case objected and voluntarily informed all parties that the documents reviewed were supplied by defendants' counsel and, therefore, providing them to the plaintiff would violate the work product doctrine. The court found that voluntarily admitting the fact that the documents were produced by the deponent's attorneys was an intentional ploy to create a "zone of privacy." The court did not allow the defendant's to orchestrate, or fabricate, a work-product violation. This Court agrees with that analysis.

AMS's objection is based on its assertion that the documents requested, or at least the list of the documents requested, is precluded from disclosure by the attorney work product doctrine. However, as noted above, the only reason plaintiffs - or anyone for that matter - now know that the documents reviewed by Mr. O'Hara were provided by AMS counsel is because they have asserted that fact. Had AMS (or Mr. O'Hara's counsel) simply provided the requested documents they would not be in the position of prejudice that they are now claiming.

In the normal course of deposition practice, interrogating counsel is allowed to ask the deponent what documents the witness had reviewed to prepare for the deposition. In this case, the parties agree that millions of pages of documents have been exchanged in discovery. Going forward the Court adopts the behest from the Pradaxa Court: "either party should be allowed to know what documents a witness reviewed prior to a deposition for purposes of efficacy. Neither side will be permitted to ask which, if any, of the documents reviewed were selected by counsel." Id.

Plaintiffs in this case may use the produced documents during the course of the deposition of Mr. O'Hara. They are not allowed to inquire about his review of them with

his counsel, the order in which he reviewed them with his attorneys or, of course, any conversation he had with his attorneys about the documents.

SO ORDERED.

4/19/2016
Date

David W. Ruoff
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
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http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **Steven Rivera, et al v Southern New Hampshire Medical Center, et al**
Case Number: **226-2016-CV-00214**

Enclosed please find a copy of the court's order of November 06, 2018 relative to:

ORDER ON PENDING MOTIONS

November 07, 2018

Marshall A. Buttrick
Clerk of Court

(293)

C: Leslie Carr Nixon, ESQ; Stephen M. Fiore, ESQ; Martin C. Foster, ESQ; Ronald J. Lajoie, ESQ; Justin Robert Veiga, ESQ; William N. Smart, ESQ; David P. Slawsky, ESQ; Elizabeth E. Ewing, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2016-CV-00214

Steven Rivera, Individually and through his Guardian Sabrina Oliveira

v.

Southern New Hampshire Medical Center, et al.

ORDER ON PENDING MOTIONS

The plaintiff, Steven Rivera, has filed this action seeking to recover damages for medical negligence. Currently pending before the Court are: (1) the plaintiff's discovery motion requesting an order prohibiting defense counsel from making improper coaching and speaking objections during depositions, (Court Index Nos. 48, 60, 64), to which the defendants object, (Court Index Nos. 50, 52, 71); and (2) defendant Nashua Anesthesia Partners, Inc.'s ("NAPI") motion for a protective order related to the deposition of Lisa Saunders, M.D., (Court Index No. 51), to which the plaintiff objects, (Court Index No. 54). The Court held a hearing on these motions on August 29 and again on October 10, 2018, at which it heard arguments from all counsel. After considering the record, the arguments, and the applicable law, the Court finds and rules as follows.

Legal Standard Governing Discovery and Discovery Depositions

Generally speaking, "parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action[.]" Super. Ct. R. 21(b). Thus, during a deposition, a deponent "shall ordinarily be required to answer all questions not subject to privilege or excused by the statute relating to depositions[.]" Super. Ct. R. 26(j). A party may not refuse "to answer a particular question" on the basis "that the testimony would be inadmissible at trial" so long as "the

testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege." Id. Although these "rules are to be given a broad and liberal interpretation, the trial court has discretion to determine the limits of discovery." N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429 (2009) (citation omitted). "The trial court, therefore, is permitted to keep discovery within reasonable limits and avoid open-ended fishing expeditions or harassment to ensure that discovery contributes to the orderly dispatch of judicial business." Id. at 430 (citations omitted).

Analysis

The discovery disputes before the Court concern the depositions of unretained treating physicians and nurses. Although these treating professionals may qualify as experts, "courts have drawn a distinction between treating [professionals] and [professionals] retained for the purpose of giving expert opinion testimony." Vention Advanced Med. Components, Inc. v. Pappas, 2016 N.H. Super. LEXIS 3, at *6 (Jan. 28, 2016). For instance, retained experts are subject to expert disclosure requirements, while unretained treating experts are not. Id.; see also In re Nicholas L., 158 N.H. 700, 702 (2009) (expert disclosure requirements only apply "with respect to a witness who is retained or specially employed to provide expert testimony in the case"). Courts have justified this distinction because "unretained experts, who formed opinions from pre-litigation observation, invariably have files from which any competent trial attorney can effectively cross-examine," whereas the retained expert "has no such files and is thus required to provide [a] report to enable effective cross-examination." Sprague v. Liberty Mut. Ins., 177 F.R.D. 78, 81 (D.N.H. 1998) (citations omitted).

Because unretained treating experts are not subject to disclosure requirements, the scope of their permissible testimony is limited. Generally, a treating professional may "testify as to matters as to which the source of the facts which form the basis for a treating physician's opinions derive from information learned during the actual treatment of the patient." Razzaboni v. Halle, No. 05-C-0475, 2006 N.H. Super. LEXIS 5, at *19–20 (May 16, 2006) (quotation omitted). A treating physician may also "express[ ] opinions as to causation, diagnosis, prognosis and extent of disability where [those opinions] are based on the treatment." Sprague, 177 F.R.D. at 81 (citations omitted). Otherwise put, a treating physician or nurse can express opinions that are based on the treatment of the patient if those opinions can be fairly gleaned from the treatment records. However, the treating physician or nurse may not base any opinion on reports or records he or she has reviewed in response to the pending litigation. See Soraghan v. Mt. Cranmore Ski Resort, Inc., No. 03-C-009, 2006 N.H. Super LEXIS 39, at *17–18 (May 8, 2006) (limiting treating physician's testimony "to the information contained in the doctor's notes, his surgical findings and recovery information specific to his treatment of the plaintiff" and "preclud[ing] any testimony not specifically stemming from the doctor's treatment of the plaintiff for her knee injury").

With these standards in mind and based on the applicable law and court rules, the Court issues the following guidelines for deposition examinations in this case:

1. Coaching of a witness and speaking objections at a deposition are strictly prohibited. This type of conduct undermines the requirement of Superior Court Rule 26(j) that the deponent be required to answer all questions not subject to privilege. Thus, deposition objections shall be limited to the form of the question

(in which case the deponent shall then be instructed to answer the question) and privilege.

2. The experience, education, training and responsibilities of each deponent are subject to discovery under Superior Court Rule 26 through a deposition.
3. The facts and circumstances surrounding the deponent's treatment and care of Mr. Rivera are subject to discovery in a deposition.
4. Treating physicians and nurses may be asked questions regarding their opinions which are based on their treatment of Mr. Rivera. The bases of these opinions must be fairly reflected in the notes or the entries they made in the medical record. Inquiries regarding a treating physician's opinions or a treating nurse's opinions derived from information learned during the actual treatment of Mr. Rivera are subject to discovery. Opinion testimony that does not specifically stem from the deponent's treatment of Mr. Rivera is not subject to deposition inquiry.
5. Knowledge as to the applicable protocols, policies, customs and practices, as well as the standard of care, specifically related to the deponent's treatment and care of Mr. Rivera are subject to deposition inquiry.
6. Nursing supervisors and/or administrators are subject to inquiry regarding the education and training of doctors and nurses in areas related to the care and treatment of Mr. Rivera. They may also be questioned about their administrative involvement regarding the care of Mr. Rivera.

7. Deposition questions related to the preoperative, surgery, and post-surgery examinations, diagnosis, and treatment of Mr. Rivera are all areas of proper inquiry under Rule 26(j).
8. Expert type opinions that are not related to the deponent's specific care or role (supervisory or otherwise) regarding Mr. Rivera's treatment are not subject to deposition discovery under Rule 21 and Rule 26(j). This type of deposition inquiry is not reasonably calculated to lead to the discovery of admissible evidence.
9. Expert opinions as to the treatment, standard of care, causation, or damages outside of the deponent's treatment or role in the plaintiff's care are not subject to deposition inquiry. Again, this type of inquiry is not reasonably calculated to lead to the discovery of admissible evidence.
10. Opinions of treatment providers as to the opinions of disclosed expert witnesses in this case are not subject to discovery. Treating physicians and nurses shall not be required to issue opinions based on review of medical records unrelated to their care of Mr. Rivera. Additionally, the treatment providers are not subject to hypothetical questions grounded in facts unrelated to their treatment of Mr. Rivera.

The parties should use these guidelines going forward, including at the deposition of Lisa Saunders, M.D. As far as the depositions that have already occurred, the Court has reviewed the transcripts of them provided by the parties and finds that many of them do not comply with these guidelines. Suffice it to say that the Court is concerned with both the overall number of objections by defense counsel (primarily

Attorney Fiore) and the repeated use of speaking objections. While the Court appreciates the dispute over opinion evidence, especially as it relates to Dr. Hattamer's deposition, the nature and extent of the objections leveled in the depositions of the various nurses and Vice President Gagne is disturbing to the Court. Therefore, the Court finds that it is fair and reasonable to require the parties to redepose Steven Hattamer, M.D., Michelle Caisse, R.N., Laura Forgione, R.N., Cheryl Gagne, Maureen Mugariri, R.N. and Karen Tollick, R.N. in compliance with these guidelines.

Conclusion

The plaintiff's motion and NAPI's motion are GRANTED to the extent the relief sought therein is consistent with this order, but are otherwise DENIED.[1] It bears repeating that discovery depositions, including the new ones ordered by the Court, are designed to allow a party to obtain relevant evidence that is reasonably calculated to lead to the discovery of admissible evidence. N.H. Ball Bearings, Inc., 158 N.H. at 429. Importantly, any objection made on the basis that the information sought will not be admissible at trial is not appropriate so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. See Super. Ct. R. 21(b). These types of objections should be used sparingly (if at all) during discovery depositions. If there is any doubt regarding relevance, the parties should allow the witness to answer and then raise any objections by filing motion(s) in limine prior to trial.

So ordered.

Date: November 6, 2018

Hon. Charles S. Temple,
Presiding Justice

[1] The Court will not address the issue of deposition costs at this point in the proceeding. Requests for recovery of these deposition costs will be addressed at the end of the trial.

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Brockway Smith, Inc.

v.

WH Silverstein, Inc. and Traditional Living Inc.

Traditional Living, Inc.

v.

WHS Homes, Inc.

NO. 2012-CV-00037

ORDER

This case is a breach of contract dispute between Traditional Living Inc. ("TLI") and WHS Homes, Inc. ("WHS") involving an asset purchase agreement ("APA") and several leases executed by the parties. WHS filed a Motion for Summary Judgment alleging that under the APA, WHS was permitted to choose among $1.7 million of liabilities owed by TLI which it would assume as part of the purchase and that "Assumed Liabilities" under the APA included executory contracts which TLI had entered into. The Court denied the Motion for Summary Judgment in an order dated June 13, 2013, finding that the APA was ambiguous in defining "Assumed Liabilities". Now, based on deposition testimony of the 100% shareholder of TLI, Tod Schweizer ("Scweizer"), WHS renews its Motion. For the reasons stated in this Order, the Motion is DENIED.

TLI has also filed Motions seeking sanctions and other remedies for what it alleges are discovery abuse. From the responsive pleadings it appears that some of the disputes have been resolved. The Clerk shall schedule a prompt hearing on the Motions,

which may be by teleconference if the parties wish. Prior to the teleconference, the parties shall meet and confer and provide the Court with a written submission outlining what disputes remain to be resolved.

I

The prior summary judgment motion can be succinctly summarized. Section 1.2 of the APA executed by the parties provides, in relevant part:

> 1.2 Assumption of Liabilities. At the Closing, Buyer will assume only the following liabilities ("the Assumed Liabilities"):
>
> (a) Liabilities reflected on the balance sheet (and schedules) of Seller attached as Exhibit A hereto (the "Closing Balance Sheet");
>
> (b) Liabilities of Seller under the Assumed Contracts, including warranty issues, but excluding any obligations for pre-Closing default or breach by Seller for which Seller shall remain liable; and
>
> (c) Liabilities of Seller for vacation time accrued by the Seller Employees (as defined in Section 2.12) and not yet used as of the Closing Date, but only to the extent such amounts are set forth on Schedule 2.13(a).
>
> The total amount of the Assumed Liabilities shall not exceed One Million Seven Hundred Thousand Dollars ($1,700,000). Buyer expressly shall not assume, or be responsible for, any other liabilities or obligations of Seller or Stockholder, whether actual or contingent, matured or unmatured, known or unknown, and whether arising out of occurrences prior to, at or after the Closing (the "Excluded Liabilities").

(WHS's Renewed Mot. Summ. J. Ex. 1 at 2 (emphasis in original)). At the time of the closing, according to WHS, liabilities existed in certain categories: 1.2(a) Trade Payables $1,831,032.07; 1.2(b) Customer Contracts $1,270,789.28; and 1.2(c) Employee Vacation Time $119,840.61. (WHS's Mot. Summ. J. 3).

WHS maintains that it fulfilled its obligations under the APA when it assumed $2,208,449.57 of liabilities—some $500,000 more than it was required to pay. Specifically, WHS asserts that it:

> [A]ssumed all of the existing TLI customer contracts (Item 1.2 (b)), and all of the employee vacation time (Item 1.2 (c)). It selectively assumed and paid trade payables, according to whether the relationship would be useful in WHS' ongoing business or the deliverables from the vendor were necessary to complete a TLI project which WHS had committed to complete.

(WHS's Mot. Summ. J. TLI Cross-cl. 6).

TLI objected to WHS's initial Motion for Summary Judgment on two grounds. First, TLI argued that the parties understood that liabilities under the APA related to trade payables, and not customer contracts. It also argued that the deposits on customer contracts that WHS assumed should not count toward the $1.7 million cap on "Assumed Liabilities" because those deposits may never be refunded and would likely turn into revenue as contracts were fulfilled.

Second, TLI argued that the term "Assumed Liabilities" is ambiguous because: (1) the balance sheet referred to in Section 1.2(a) was not attached to the APA and WHS submitted two different documents purporting to be the balance sheet; and (2) the term "liability" could refer to an "accounting liability, a legal liability, or a common sense understanding of the term." (Surreply to Mot. Summ. J. 3). WHS, on the other hand, argues that the term "Assumed Liabilities" is not ambiguous because: (1) the two different balance sheets are consistent; and (2) the term "Assumed Liabilities" has a definite and precise meaning under the APA and according to relevant accounting authority.

In June, 2013, after considering all the facts and circumstances surrounding the contract and the language of the contract, the Court found that the term "Assumed Liabilities" was ambiguous, and therefore found that there was a genuine issue of material fact which precluded summary judgment for WHS. (Order, June 13, 2013 at 6–

11). WHS's Renewed Motion for Summary Judgment is based entirely on the October 28, 2014 deposition of Schweizer, the 100% shareholder of TLI, in which he stated that under the APA he understood that it was up to WHS to decide which of the categories of liabilities, including the customer contracts, he could apply the assumption of liabilities provision of the APA to. (Renewed Mot. Summ. J. 3). In other words, WHS takes the position that Schweizer's testimony was an admission that the customer contracts are "Assumed Liabilities" under the APA and that there is therefore no genuine issue of material fact, so that it is entitled to summary judgment.

TLI objects and points out that during the same deposition, Schweizer testified that non-refunded customer deposits were not considered liabilities because they would be eventually converted to cash. (Obj. to Renewed Mot. Summ. J. 5 (citing Schweitzer deposition at 62:5-14)). Moreover, Schweizer amended his deposition to make it clear that his answer indicating that WHS could determine what categories of liabilities the 1.7 million credit could be applied to was "focus[ed] on the vendor liabilities". (Obj. to Mot. for Summ. Judg. 5–6).

WHS argues that the Court should not consider the change to the deposition, because "unlike FRCP 30(e) (1) (B) which allows "changes in substance" through the subsequent review, Superior Court Rule 26(f) only allows errors to be noted and specifically prohibits changes or alterations". (Reply to Obj. to Renewed Mot. Summ. J. 3). The Court disagrees.

II

Federal law regarding substantive changes to depositions is not pristine. FRCP 30(e) (1) (B), by its terms, seems to allow substantive changes in all circumstances. But

the rule has not been interpreted in that way. Analysis of law under the federal rule is helpful in considering Superior Court Rule 26(f), which has not been subject to judicial gloss.

FRCP 30(e) (1) (B) provides in relevant part:

> (e) **Review by the Witness; Changes.**
>
> (1) **Review; Statement of Changes**. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
>
> (A) to review the transcript or recording; and
>
> (B) If there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

A

Despite the apparently clear language of the rule, there is a split of authority with respect to the substantive changes that may be allowed. A few courts follow the much cited decision in Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992):

> The purpose of rule 30(e) is obvious. Should the reporter make a substantive error, i.e., he reported "yes" but I said "no," or a formal error, i.e., he reported the name to be "Lawrence Smith" but the proper name is "Laurence Smith," then corrections by the deponent would be in order. The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.

This approach appears to be taken by the Sixth Circuit and many lower Fourth Circuit courts. See, e.g., Trout v. v. FirstEnergy Gen. Corp., 339 Fed. Appx. 560, 565–66 (6th Cir. 2009); E.I. DuPont de Nemours v. Kolon Industries, Inc. , 277 F.R.D. 286, 297 (E.D. Va. 2011). However, Greenway is a minority view. See 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2118 (3d

ed. 2010).

It appears that the majority view permits a deponent to change deposition testimony so that the fact and extent of the change are treated as subjects for impeachment that may affect a witness's credibility. See Poole v. Gorthon Lines AB, 908 F.Supp.2d 778, 786 (W.D.La. 2012); E.E.O.C. v. Skansa USA Building, Inc., 278 F.R.D. 407 (W.D. Tenn. 2012) (collecting cases); Devon Energy Corp. v. Westacott, 2011 WL 1157334 at *4–5 (S.D. Tex. Mar. 24, 2011). Such courts reason that a witness cannot be forced to testify falsely at trial so allowing the witness to alter or his or her testimony gives the opposing party opportunity to reopen the deposition so that the revised answers may be followed up on and the reasons for the correction explored. Glenwood Farms, Inc. v. Ivey, 229 F.R.D. 34, 35 (D. Me. 2005). At least the First, Second, and Ninth Circuits take this sort of a flexible approach to substantive changes. See, e.g., Pina v. The Children's Place, 740 F.3d 785, 792 (1st Cir. 2014); Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997); Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 1225 (9th Cir. 2005). The Third, Seventh, and Tenth Circuits follow a so-called "sham affidavit approach,"[1] allowing the deponent to change his deposition from what *he said* to what *he meant* if the change does not directly contradict the original testimony, but holding that a change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the collection of an error in transcription, such as dropping a "not." See, e.g., EBC, Inc. v. Clark Bldg. Sys., Inc., 618 F.3d 253, 268 (3d Cir. 2010); Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000); Burns v. Board of County Comm'rs, 330 F. 3d 1275, 1282 (10th

[1] This is the approach utilized by most federal courts when a witness provides an affidavit supposedly

Cir. 2003).

Lower First Circuit courts have developed a significant body of law to determine when revisions materially alter the answers such as to require the deposition to be reopened. See generally Pina v. The Children's Place, 740 F.3d 785, 792 (1st Cir. 2014); Tingley Sys. Inc. v. CSC Consulting, Inc. f/k/a CSC Partners, Inc., 152 F. Supp.2d 95, 120 (D. Mass. 2001); Glenwood Farms v. Ivey, 229 F.R.D. 34, 35 (D. Me. 2005). Of course, courts recognize that the timing of changes may result in undue expense and cause unfairness to a party. Management tools other than, or in addition to, reopening the deposition are available to federal trial courts dealing with potential discovery abuse, including sanctions, attorneys' fees and issue preclusion. See generally E.E.O.C. v. Skanska USA Building, Inc., 278 F.R.D. at 410–11 (collecting cases involving the exercise of discretion by federal district courts).

B

Superior Court Rule 26(f) simply provides:

> No deposition, as transcribed, shall be changed or altered, but any alleged errors may be set forth in a separate document attached to the original and copies.

As noted, there are no reported cases interpreting this Rule or its predecessors. However, there is little reason to believe that Rule 26(f) by its terms would bar substantive changes in a deposition.

The Rule specifically allows the correction of *erroneous* testimony. It does not state that the error must be that of the court reporter. Plainly, for example, a corporate designee's testimony that no employment manual exists, when in fact it does, would be error. To fail to correct this testimony would make the deposition *erroneous*, as well as

---

contradicting his deposition testimony in order to defeat summary judgment.

seriously affect the truth finding process. There is no rule or practice that suggests that a witness' testimony at any deposition prohibits a witness from testifying otherwise at trial; indeed, a witness cannot be required to commit perjury. But obviously the prior answer can be used for impeachment.

The case law surrounding FRCP 30(e) (B) (1) is helpful in considering how Rule 26(f) should be interpreted. Certainly, in some circumstances, allowing substantive amendment to depositions where there is no good-faith basis for the change could be prohibited. But in the ordinary course, allowing substantive changes to deposition prior to trial eliminates the likelihood of deviations from the original deposition, thus reducing the likelihood of surprise at trial. Poole v. Gorthon Lines AB, 908 F.Supp.2d 778, 786 (W.D. La. 2012) (citing Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981)). The Superior Court's broad authority to control discovery gives it the ability to remedy unfairness when a witness makes substantive changes to a deposition by reopening a deposition, perhaps at the expense of the party that submits the corrected deposition, awarding fees, or imposing other sanctions, up to and including evidence or issue preclusion or full or partial judgment in favor of the injured party in an appropriate case. Super. Ct. R. 21(d). But there is no reason to provide WHS with any remedies in this case.

III

Schweizer did not assert in the changes to the deposition a position inconsistent with the position he had taken prior to that time, any prior summary judgment motion and in fact, in other parts of the deposition. TLI always took the position that "Assumed Liabilities" did not include existing customer contracts. Schweizer's modification of his

testimony that he understood that it was up to WHS to decide which of the categories of liabilities WHS could apply the 1.7 million credit to, by adding language that the $1.7 million credit was "focus[d] on the vendor liabilities" is not akin to creating an "sham affidavit", changing or providing testimony simply to defeat summary judgment. Rather, it is an assertion of the position taken consistently by TLI throughout the litigation.

The corrections in Schweizer' s deposition may be considered by the Court in considering the Renewed Motion for Summary Judgment. There is no basis to strike the correction to deposition testimony or reopen discovery. Based upon all the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, there is a genuine issue of material fact and, the Renewed Motion for Summary Judgment must be DENIED. RSA 491-8-a.

SO ORDERED.

2/12/15

DATE

s/ Richard B. McNamara

Richard B. McNamara,
Presiding Justice

RBM/

NEW HAMPSHIRE BAR ASSOCIATION
LITIGATION GUIDELINES

Amended by the New Hampshire Bar Association Board of Governors March 3, 2016
Originally Adopted December 2, 1999

PREAMBLE:

The following is a revised set of the original Litigation Guidelines adopted by the Board of Governors of the New Hampshire Bar Association to serve as aspirational goals for attorneys who practice in New Hampshire. The guidelines represent a means of maintaining civility in New Hampshire trial practice and have been revised to reflect the evolution in practice and technology that has occurred since they were adopted in 1999. While certain of these Litigation Guidelines do not have the force of law or court rule, attorneys practicing in New Hampshire are encouraged to incorporate the spirit of the guidelines into their legal practices and communicate these guidelines to lawyers whom they are charged with training and mentoring so that the guidelines will be a familiar part of practice from one generation of New Hampshire lawyers to the next. The Board of Governors encourages New Hampshire judges to make these guidelines part of their expectations of attorneys' conduct in litigation in New Hampshire Courts and to commend to counsel unfamiliar with the guidelines, such as *pro hac vice* admittees, that they review and abide by them. These guidelines are intended to proclaim that conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive, impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct tends to delay and often to deny justice.

The guidelines set forth herein, which are aspirational only, are not to be used as a basis for litigation, liability, discipline, sanctions or penalties of any type.

1. CONTINUANCES AND EXTENSIONS OF TIME

A. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, automatic disclosures, discovery, or motions, should ordinarily be assented to as a matter of courtesy unless time is of the essence. A first extension should be allowed even if counsel requesting it has previously refused to grant an extension.

B. After a first extension, any additional reasonable requests should be assented to unless the need for expedition in light of the litigation schedule would not permit such accommodation. Deference should be given to an opponent's schedule of professional and personal engagements. Consideration also should be given to the reasonableness of the length of extension requested as it applies to the task, the opponent's willingness to grant reciprocal extensions, and whether it is likely a court would grant the extension if asked to do so.

C. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."

D. A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

E. A lawyer should not attach to extensions unfair and extraneous conditions. Reasonable conditions, such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions, are permissible.

2. CASE STRUCTURING PRINCIPLES

A. Upon receipt of an appearance and answer in any litigation, counsel should confer regarding the proposed scheduling order, considering what, within reason and given the issues, will be required for length of discovery, length of trial, and discussion of alternative dispute resolution. Every effort should be made to reach agreement for submission of a proposed schedule to the Court.

B. When relevant, counsel for the parties should confer prior to the start of discovery to discuss electronically stored information ("ESI") in order to establish parameters for ESI related discovery, limit the risk of future disputes after discovery has begun, and discuss document production format. When defining parameters, consideration should be given to the significance of the issues and the proportionality between cost and the necessity and likelihood of discovering relevant information.

3. SERVICE OF PAPERS

A. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

B. Whenever practicable, parties should agree to service by electronic mail. Parties should always serve copies of papers upon one another so that they are received simultaneously and concomitant with the posting or delivery – by mail, in person or otherwise – of the papers with the court.

C. Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

D. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a holiday.

E. Service should be made personally or by electronic mail when it is likely that service by mail, even when allowed, will prejudice the opposing party.

4. WRITTEN SUBMISSIONS TO A COURT, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS AND DECLARATIONS

A. Written briefs or memoranda of points and authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic, or sociological data if such data appear in or are derived from generally available sources.

B. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

5. COMMUNICATIONS WITH ADVERSARIES

A. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.

B. Communications should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.

C. Communications intended only to make a record should be used sparingly and only when thought to be necessary under the circumstances. When such confirmatory communications are used, they should be concise and accurately reflect the events/record.

D. Unless necessary to resolution of the issue, communications between counsel should not be sent to judges.

E. Counsel should not lightly seek court sanctions.

6. DEPOSITIONS

A. Depositions should be taken only where actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment, embarrassment, or to generate expense.

B. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.

C. When a deposition is noticed by another party in the reasonably near future, counsel should not notice another deposition for an earlier date without the agreement of opposing counsel.

D. Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.

E. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.

F. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.

G. Counsel at deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought or to enforce a limitation on depositions or evidence directed by the court or to present a motion pursuant to Fed.R.Civ.P. 30(d).

H. While a question is pending, counsel should not through objections or otherwise, coach the deponent or suggest answers.

I. Counsel should not direct a client to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass. Counsel shall not direct the deposition conduct of a non-client witness.

J. Counsel shall not make any objections or statements which might suggest an answer to a witness or which are intended to communicate caution to a witness with respect to a particular question. There should be no lengthy or narrative objections. Counsel's statements when making objections and any explanation of the objection, if any is necessary, shall be succinctly stated, without being argumentative and without attempting to suggest to the witness any particular or desired response. Further explanation of the objection should be provided only if opposing counsel requests clarification, and such further explanation should be succinctly and directly stated. Where more extensive discussion is required on the record, counsel should consider excusing the deponent during such discussion.

K. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. Parties and their counsel are expected to act reasonably, and to cooperate with and be courteous to each other and to deponents at all times during the deposition, and in making and attempting to resolve objections.

L. Opposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copy shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and his or her counsel do not have the right to discuss documents privately before the witness answers questions about them.

7. DOCUMENT REQUESTS

A. Requests for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

B. Requests for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.

C. In responding to document requests, counsel should strive to recognize New Hampshire's expansive view of discovery and to provide all materials that are or could be reasonably responsive to a request.

D. Counsel should encourage the client to act in good faith and with due diligence to locate the documents requested and to acquire them when to do so would not be overly burdensome and when the client has reasonable access to them.

E. Counsel should not interpret the requests for production in an artificially restrictive manner in order to avoid disclosure. Within reason, requests with subsections should be read as one unless the subsections clearly request documents of a different nature.

F. Documents withheld on the grounds of privilege should comply with local rule and current case law requirements of a detailed privilege log.

G. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents. Counsel are encouraged to include control numbers such as bates numbers on documents produced or some other manner of organization of responses.

H. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason. Regardless of the rule-imposed deadline, counsel should consider producing documents in a manner and at a time that allows the case to proceed efficiently and without unnecessary delay.

I. Counsel should attempt to resolve discovery disputes in the spirit of compromise. Discovery motion practice should be avoided.

8. INTERROGATORIES

A. Interrogatories should never be used to harass, embarrass, or impose undue burden or expense on adversaries.

B. Before propounding interrogatories, counsel should review discovery already received and avoid interrogatories with duplicate and redundant questions.

C. Counsel should strive to recognize New Hampshire's expansive view of discovery when assisting and counseling the client with responding to interrogatories so that the information is the product of good faith and due diligence and includes pertinent details.

D. Counsel should not interpret the interrogatories in an artificially restrictive manner in order to avoid disclosure of information. Within reason, interrogatories with subsections should be read as one unless the subsections clearly request information of a different nature.

E. Responses withheld on the grounds of privilege should comply with local rule and specify the basis for the invocation of the privilege.

F. Responses should not be delayed to prevent opposing counsel from being prepared for scheduled depositions or for any other tactical reason. Regardless of the rule-imposed deadline, counsel should consider providing answers in a manner and at a time that allows the case to proceed efficiently and without unnecessary delay.

G. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

H. Counsel should attempt to resolve discovery disputes in the spirit of compromise before engaging in motion practice. Discovery motion practice should be avoided.

9. MOTION PRACTICE

A. Before filing a motion other than concerning the merits of the case, and unless exigent circumstances prevent it, counsel should engage in a meaningful discussion of its purpose in an effort to resolve the issue.

B. A lawyer should not unreasonably withhold his or her assent so as to force his or her adversary to make a motion and then not oppose it.

10. DEALING WITH NON-PARTY WITNESSES

A. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition. (RSA 516:3)

B. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel. (RSA 517:4; RSA 516:4; RSA 516:5)

C. Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made promptly available to the adversary at the adversary's reasonable expense even if the deposition is cancelled or adjourned.

D. Counsel should, whenever practicable, confer with opposing counsel on all aspects of the third party deposition, including on the scope of the document requests.

11. EX PARTE COMMUNICATIONS WITH THE COURT

A. A lawyer should avoid ex parte communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending. (Rule 3.5 N.H. Rules of Professional Conduct)

B. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application, except that where the rules permit an ex parte application or communication to the court in an emergency situation, a lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there are bona fide circumstances such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.

12. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

A. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

B. Counsel should not falsely hold out the possibility of settlement as a means for delaying discovery or trial.

C. In every case, counsel should consider whether the client's interest could be best served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

13. TRIALS AND HEARINGS

A. Counsel should be punctual and prepared for any court appearance.

B. Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel, and judicial officers with courtesy and civility.

C. Counsel should confer and cooperate on pre-marking exhibits.

A Practical Guide to Discovery and Depositions in New Hampshire

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CHAPTER 12

Depositions

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Depositions*

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Scope Note

This chapter discusses all aspects of depositions, including necessary preparations, technical procedures, strategies, and how to utilize deposition testimony. A sample deposition notice and subpoena are included as exhibits.

§ 12.1 INTRODUCTION

A deposition is defined generally as the testimony of a witness under oath or affirmation, reduced to writing, that typically is conducted by oral examination with the opportunity for cross-examination. *Manchenton v. Auto Leasing Corp.*, 135 N.H. 298, 301 (1992). Many seasoned trial lawyers consider depositions to be the most important of pretrial discovery tools, and cases are often won, lost, or settled because of deposition testimony. Well-planned depositions can help lawyers

- discover information firsthand from key witnesses without prior filtering by opposing counsel,
- assess the credibility and presentability of key witnesses,
- expose weaknesses in the adversary's case,
- discover strengths in the adversary's case in order to formulate a plan for weakening those strengths at trial,
- bolster counsel's credibility by demonstrating to opposing counsel a strong command of the facts and legal theories of the case,
- lay the groundwork for a summary judgment motion, and
- facilitate settlement.

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* Updated for the 2018 Supplement by MCLE.

Despite the importance of depositions, lawyers often take the process for granted and fail to take full advantage of this vital discovery tool. Novice and experienced lawyers should familiarize or refamiliarize themselves with the rules governing depositions as well as strategies for preparing for, taking, and defending depositions. This chapter is intended to serve as a primer for newer attorneys and a refresher for more seasoned attorneys as to the fundamentals of deposition practice in New Hampshire.

This chapter focuses on deposition practice under New Hampshire rules and statutes. Although the chapter is not intended as a guide to deposition practice pursuant to the Federal Rules of Civil Procedure, certain important differences between New Hampshire and federal deposition practice are highlighted where appropriate.

§ 12.2 THE RULES AND STATUTES GOVERNING DEPOSITIONS

Unlike many states, New Hampshire does not have rules of civil procedure that closely mirror the Federal Rules of Civil Procedure. Instead, New Hampshire practitioners are guided by the rules of the Superior Court, Family Division, Probate Division, and District Division. Superior Court Rule 26 provides the main guidelines for deposition practice, and has similar counterparts in the District, Family, and Probate Division rules. *See* Dist. Div. R. 1.9; Fam. Div. R. 1.25; Prob. Div. R. 38–45-A. Revised Statutes Annotated c. 517, 517-A, and 518 provide additional directives to attorneys, and many of the provisions in these statutes overlap with the rules of the Superior Court and the District, Family, and Probate Divisions. The applicable New Hampshire statutes and court rules govern most aspects of deposition practice, and practitioners must be familiar with them before engaging in deposition practice.

§ 12.3 DEPOSITION PROCEDURE

It is common in New Hampshire for most aspects of deposition procedure to be conducted pursuant to agreement of counsel. Thus, many of the rules regarding the noticing and scheduling of depositions are often replaced in practice by depositions being arranged by counsel conferring and agreeing on dates and locations of depositions. New Hampshire lawyers should look to the *New Hampshire Bar Association Litigation Guidelines* adopted by the New Hampshire Bar Association Board of Governors in 1999, and amended most recently in 2016, for guidance. That being said, a working understanding of the applicable rules and statutes is crucial.

§ 12.3.1 Who May Be Deposed?

In New Hampshire, any party or nonparty witness may be deposed, so long as the deposition is being taken pursuant to a pending case. *Swinglhurst v. Busiel*, 84 N.H. 327, 328 (1930). Counsel may depose anyone who may have relevant information, including the parties, their agents and employees, their former employees, and their attorneys, as well as witnesses who have no connection to the parties. *See* 4 Richard V. Wiebusch, New Hampshire Practice: Civil Practice and Procedure § 27.01 n.3 (2d ed. 1997) ("Any person with information relating to the parties' claims or the case who is subject to the in personam jurisdiction of the court may be compelled to give his deposition."). Depositions should be taken only to perpetuate testimony or to gather information that is likely to lead to admissible evidence. Depositions may not be used to harass a witness or generate expense for the opposing party. N.H. Bar Ass'n Litig. Guideline 6.A.

§ 12.3.2 Persons Before Whom Depositions May Be Taken

(a) *Generally*

Both statutes and court rules govern before whom depositions may be taken in New Hampshire. Under Super. Ct. R. 26(e), depositions shall be "transcribed by a competent stenographer agreed upon by the parties or their attorneys present at the deposition." If the parties cannot agree to a specific stenographer, upon motion, the stenographer will be designated by the court. Rule 26 further provides that "[f]ailure to object in writing to a stenographer in advance of the taking of a deposition shall be deemed agreement to the stenographer recording the testimony." Super. Ct. R. 26(e). In District Court, the objection must be made within five days of the filing of the petition for deposition. Dist. Div. R. 1.9(C). In practice, parties taking the deposition generally engage one of many private stenographer services and parties defending the deposition rarely, if ever, object.

(b) *Disqualification for Interest*

Revised Statutes Annotated § 517:3 mandates that depositions may not be transcribed by or before certain individuals who have an interest in the case. Relatives of a party or someone who has a financial interest in the action, for example, cannot transcribe the deposition. The prohibitions set forth in Rev. Stat. Ann. § 517:3 are not surprising, and rarely does this become a disputed issue.

§ 12.3.3 Timing of Depositions

Under Super. Ct. R. 26, "[n]o deposition shall be taken within 30 days after service of the Complaint, except by agreement or by leave of court for good cause shown." Super. Ct. R. 26(b); *cf.* Dist. Div. R. 1.9A (twenty days). When expedited discovery is necessary—for example, when irreparable harm may be imminent and injunctive relief is sought—counsel should move promptly after filing the complaint to obtain leave of court to conduct expedited discovery.

The delay "is for the benefit of the defendant, not the witness, and, if the parties are willing to agree to take the deposition of a witness prior to the twenty-first day without a court order, the witness cannot object." 4 Richard V. Wiebusch, *New Hampshire Practice: Civil Practice and Procedure* § 27.05 (2d ed. 1997) (describing the twenty-day delay under the previous version of the rule). In District Court, there is an additional requirement that no depositions may be taken within thirty days of the trial date. Dist. Div. R. 1.9B.

The New Hampshire court rules do not regulate the sequence or priorities of depositions. A specific "no priority of discovery rule" is articulated in Super. Ct. R. 21(f): "methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery." The sequence and order of depositions commonly are arranged according to a mutually agreed-upon schedule, and all of the rules and statutes governing deposition timing may be superseded by agreement of counsel. If opposing counsel is stonewalling and agreement cannot be reached on a schedule, counsel should seek court relief. The court has broad discretion to control the sequence of discovery "for the convenience of parties and witnesses and in the interests of justice." Super. Ct. R. 21(f); *Blagbrough Family Realty Trust v. A&T Forest Prods.*, 155 N.H. 29, 40 (2007) (holding that trial court has broad discretion to control pretrial discovery).

§ 12.3.4 General Limitations for Depositions: Scope, Number, and Time Limits

Superior Court Rule 21(a) outlines the methods by which a party may obtain discovery and authorizes depositions by "oral examination or written questions." Rule 21(b) provides the general scope of discovery, authorizing inquiry with respect to "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . ." The New Hampshire Supreme Court has noted that "the use of depositions and discovery has been given a broad and liberal interpretation in this jurisdiction." *Miller*

v. Basbas, 131 N.H. 332, 338 (1988) (quotations omitted); *see also Durocher's Ice Cream v. Pierce Constr. Co.*, 106 N.H. 293, 294 (1965) ("While it is impossible to state in advance the precepts of relevancy, it has been the policy in this state not to place any crippling limitations on the use of discovery and depositions.").

The federal rule is subtly narrower, referring to "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Under both the state and federal rules, the standard is not whether the "information sought will be admissible at the trial," but instead whether "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Super. Ct. R. 21(b); *see* Fed. R. Civ. P. 26(b)(1).

Both the New Hampshire rules and the federal rules place a time limit on the total number of deposition hours. Depositions in Superior Court are limited to twenty total deposition hours "unless otherwise stipulated by counsel or ordered by the court for good cause shown." Super. Ct. R. 26(a). The number of depositions is not limited—"[a] party may take as many depositions as necessary to adequately prepare a case for trial." Super. Ct. R. 26(a).

The federal rules limit each side to ten depositions, unless the parties have agreed otherwise (some judges may impose stricter limitations in certain cases), and prohibit the deposing of a person more than once absent a stipulation or court order. Fed. R. Civ. P. 30(a)(2)A–B. Moreover, "[u]nless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours." Fed. R. Civ. P. 30(d)(1). For purposes of the seven-hour limitation, "the only time to be counted is the time occupied by the actual deposition," not "reasonable breaks . . . for lunch and other reasons." Fed. R. Civ. P. 30 advisory comm. note (2000). With respect to Rule 30(b)(6) depositions of a corporate representative, the seven-hour limit applies to each deponent designated by the corporation or other entity, not to the deposition as a whole. Fed. R. Civ. P. 30 advisory comm. note (2000).

Practice Note

Other factors, such as economic considerations and the right of a party or deponent to seek protective orders for abuse, may also limit the number and length of depositions. The number of depositions generally is determined by the complexity of the case and amount in controversy. In larger, complex matters, all significant opposing witnesses likely will be deposed, whereas in smaller matters, economics may dictate that only one or two key depositions be taken. It is unusual for any individual to be deposed more than once, and attempts to depose individuals more than once may be challenged by a request for a protective order.

§ 12.3.5 Scheduling Depositions

(a) *Scheduling by Agreement*

The common practice in New Hampshire is for counsel to arrange for depositions by agreement. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights. N.H. Bar Ass'n Litig. Guideline 6.B. When depositions are arranged by agreement of the parties and the witness, it obviates the requirement to serve notices on opposing parties and the need for witness subpoenas. Attorneys who normally do not practice in New Hampshire often are surprised to learn that notices of depositions and subpoenas are the exception rather than the rule.

(b) *Scheduling by Notice and Subpoena*

When the parties cannot arrange their depositions by agreement, the party wishing to take the deposition must either mail or hand deliver a notice of the taking of the deposition to the other parties or to their attorneys, Super. Ct. R. 26(d), and must serve a subpoena on the party or witness whose deposition is to be taken.

Revised Statutes Annotated § 517:4 permits a party to serve a notice on "the adverse party, or one of them." Read literally, this allows a party to send a notice to only one party in a case that may involve several codefendants and third parties. Such a practice is not advisable, however, because it risks that one of these codefendants or third parties will claim it received insufficient notice. To avoid this risk, a party should send notice to all other parties.

In addition to mail or hand delivery, the notice can be left at the adverse party's home if he or she lives in New Hampshire within twenty miles of the party taking the deposition or of the place of taking, *see* Rev. Stat. Ann. § 517:4, or at the adverse party's agent's or attorney's abode if he or she does not. Rev. Stat. Ann. § 517:5. Notice normally is effected simply by providing all counsel in the case with the proper notice.

Pursuant to Super. Ct. R. 26, to be deemed reasonable, notice must be provided at least three days, exclusive of the day of service and the day of caption, before the day of the actual deposition. Super. Ct. R. 26(b). The rule further provides that twenty days' notice will be deemed reasonable in all cases, unless otherwise ordered by a court.

The notice must contain the following information (see **Exhibit 12A** for a sample deposition notice):

- the caption of the case;
- the name of the witness and the name of the party taking his or her deposition;
- the name of the stenographer proposed to record the testimony, Super. Ct. R. 26(c); and
- the day, hour, and location of the deposition, Rev. Stat. Ann. § 517:4.

Pursuant to Rev. Stat. Ann. § 517:4, the notice must also be signed by a justice of the peace or notary public, who typically is the attorney for the party taking the deposition. A separate notice also must be given for each person whose deposition is to be taken.

(c) *Scheduling by Court Order*

Although not commonly practiced in New Hampshire, counsel may request the court to schedule a deposition and to appoint a magistrate to supervise the taking. *See* Rev. Stat. Ann. § 517:2. The notice and subsequent court order must contain the same information as required for a notice of deposition. Subpoenas need not be served on a witness who is a party; however, a subpoena must be served on any nonparty whose testimony is desired.

§ 12.3.6 Location of Deposition

There are no specific requirements in New Hampshire regarding the location of a deposition, and like most aspects of depositions in New Hampshire, counsel usually are able to work out agreements as to the location of depositions. It is fairly typical that the deposition of a party will be taken at the office of that party's counsel. This mainly is done out of convenience, as the deponent often will be meeting with counsel immediately before the deposition.

In some cases, if an attorney is deposing a number of witnesses in one day, the attorney may seek to conduct the depositions at the attorney's own office so he or she has easy access to documents and assistance if necessary. In other cases, the deposing attorney may arrange to schedule a number of witnesses one after another, and out of convenience, may schedule them all at the location of the witnesses' employment. For instance, in a medical negligence case, the plaintiff's counsel may depose a number of nurses or physicians at the hospital. There

ultimately are many factors that go into choosing the location for any particular deposition, and counsel typically agree as to the location.

If an agreement cannot be reached as to the location of a particular deposition, the deposing attorney can opt to subpoena the deponent to counsel's preferred location in New Hampshire, so long as the deponent is within the subpoena jurisdiction of the New Hampshire court. If the opposing party objects to the location, counsel for that party should raise the objection immediately. This frequently is done by filing a motion to quash the notice of deposition or deposition subpoena.

§ 12.3.7 Compelling Attendance of Witnesses—Deposition Subpoenas

There is no New Hampshire Superior Court Rule equivalent to Federal Rule of Civil Procedure 45, which specifically governs subpoenas. Certain sections of Rev. Stat. Ann. c. 516, however, provide guidance on subpoena procedure in New Hampshire. Subpoenas must follow the specific form described in Rev. Stat. Ann. § 516:1, and must also be signed by a justice of the peace or notary public, which often is an attorney. See **Exhibit 12B** for a sample subpoena. The subpoena should contain the caption of the case, the witness's name, the day and hour when the deposition will commence, and the location of the taking, and all information in the subpoena must be consistent with the notice of the taking of the deposition. It should also briefly describe the subject of the witness's testimony. Subpoenas can be served by any person who is not a party and who is at least eighteen years old. Revised Statutes Annotated § 516:5 provides that the subpoena be served in hand or read to the witness, and requires that the witness be tendered "the fees established for his travel to and from the place where his attendance is required, and for one day's attendance."

The federal rules allow attorneys, as officers of the court, to issue subpoenas. Fed. R. Civ. P. 45(a)(3). Rule 45 requires that a subpoena for a trial, hearing, or deposition may be issued only

> (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
>
> (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
>
> (i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

Fed. R. Civ. P. 45(c). The subpoena "must issue from the court where the action is pending." Fed. R. Civ. P. 45(a)(2). Rule 45 of the Federal Rules of Civil Procedure also differs from New Hampshire practice in that a subpoena must include a statement of the rights and duties of witnesses—specifically, the subpoena must include the text of subsections (d) and (e). Fed. R. Civ. P. 45(a)(1)(A)(iv). Moreover, Fed. R. Civ. P. 45 provides that parties have fourteen days to respond to a subpoena and includes a broad provision on procedure for quashing subpoenas. Fed. R. Civ. P. 45(d)(2)(B).

§ 12.3.8 Requiring the Deponent to Bring Documents to the Deposition

Deponents, whether parties or nonparty witnesses, generally are not required to bring any documents with them to a deposition, and most are instructed by their counsel not to do so. Thus, whenever possible, counsel should obtain all pertinent documents through normal discovery methods prior to the deposition to ensure that counsel is fully informed and prepared to conduct the deposition and inquire about those documents.

(a) *Party Deponents*

New Hampshire does not have a counterpart to Fed. R. Civ. P. 45, which allows counsel to attach a request for production of documents to the notice of deposition. *See* Super. Ct. R. 26(d) ("If a subpoena duce tecum is to be served on a deponent, the notice . . . must be served before service of the subpoena . . . ."). Most depositions are scheduled by agreement in New Hampshire, and formal notices of deposition are not the norm. Accordingly, counsel should obtain all necessary documents through interrogatories and requests for the production of documents before scheduling the deposition of a party deponent.

If counsel chooses not to or is unable to schedule a party's deposition by agreement, counsel can issue a notice of deposition and subpoena the party to a deposition pursuant to Rev. Stat. Ann. c. 516. Although Rev. Stat. Ann. c. 516 does not authorize the production of documents by subpoena, attorneys in New Hampshire utilize subpoenas duces tecum to require the production of documents when necessary. Of course, a party on the receiving end of a subpoena duces tecum can always challenge the subpoena and the document requests on the basis of timing, scope, etc., so under normal circumstances, it is simplest to obtain documents by document requests pursuant to the normal rules of discovery.

(b) *Nonparty Deponents*

Although there is no New Hampshire equivalent to Fed. R. Civ. P. 34 authorizing subpoenas duces tecum to a nonparty, it is not uncommon for attorneys to issue to nonparty witnesses subpoenas incorporating a request for documents. When attorneys issue these so-called subpoenas duces tecum, they should attach a detailed list of the documents that they are requesting to be produced at the deposition. If counsel seeks only documents from the third party, these subpoenas will typically target the "keeper of the records" of an organization. Frequently, through a cover letter or subsequent discussion with the witness or the witness's counsel, the attorney issuing the subpoena duces tecum will indicate that he or she is not planning to actually depose the witness, but rather to simply inspect the documents produced by the witness.

§ 12.3.9 Who May Attend the Deposition?

Depositions normally are attended by the deponent along with his or her attorney, as well as the attorneys for all parties to the case. The New Hampshire rules and statutes are silent as to who else may attend depositions. Parties themselves generally have the right to attend depositions in their case unless excluded by court order for good cause shown. *Marston v. Brackett*, 9 N.H. 336 (1838). As far as other witnesses or members of the public, there are no hard-and-fast rules in New Hampshire. Most take the view that depositions are not public events. *See, e.g.*, 4 Richard V. Wiebusch, *New Hampshire Practice: Civil Practice and Procedure* § 27.05 (2d ed. 1997); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (noting that pretrial depositions were not open to the public at common law and are generally conducted in private as a matter of modern practice); *State of N.Y. v. Microsoft Corp.*, 206 F.R.D. 19, 22 (D.D.C. 2002) ("While the public traditionally has had a right to attend judicial proceedings, pretrial depositions and interrogatories are not components of a civil trial.").

Some may argue, however, that depositions, like trials, are public proceedings, and that anyone can attend a deposition. Indeed, Fed. R. Civ. P. 30(c) states that at depositions, "the examination and cross-examination of a deponent proceed as they would at trial under Federal Rules of Evidence, except rules 103 and 615 [which deals with exclusion of witness]." *See, e.g., Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) ("As a general proposition, pretrial discovery must take place in public unless compelling reasons exist for denying the public access to the proceedings."); *United States v. Kattar*, 191 F.R.D. 33, 37 (D.N.H. 1999) (depositions are conducted in the same manner as though the witness was testifying at trial, "with the exception that there is no judge there to rule on objections or admissibility and others may not be precluded from sitting in on the deposition").

In some situations, the presence of a third party at a deposition causes no concern. For example, some deponents are anxious about the process and seek to have a spouse, relative, or friend attend simply for support. Parties may seek to have their retained experts attend the depositions of key witnesses, including that of the opposing party's retained expert.

In other situations, a party may object to the presence of a particular individual at a deposition. For instance, when the parties agree to depose a number of witnesses one after another on a single day, deposing counsel may seek to prohibit the witnesses from sitting in on each other's depositions. Similar to the considerations relating to sequestration of witnesses at trial, deposing counsel may want to prevent one witness's testimony from being influenced by what he or she heard while sitting in on another witness's deposition. In other situations, deposing counsel may seek to exclude a particular individual who seeks to attend the deposition because that witness may be there to intimidate or harass the deponent.

Because there is no clear law in New Hampshire, if a party wishes to have a third party present at a deposition, the party's counsel should notify opposing counsel of this prior to the deposition if there is concern that the attendance of the third party will be controversial. This allows the issue to be resolved prior to the deposition and avoids counsel having to spend time trying to resolve it at the deposition itself, or in the extreme case, the deposition being continued until a judge can resolve the dispute.

New Hampshire courts certainly have the discretion and authority to order that particular individuals be prohibited from attending depositions. Superior Court Rule 29(a) provides that the court may enter a protective order "that discovery be conducted with no one present except persons designated by the court." Thus, a court has the power and discretion to prohibit any person from attending a deposition, including a party.

§ 12.3.10 Taking Depositions in Another State

Parties seeking to take depositions outside of New Hampshire relating to litigation pending in New Hampshire often will do so by agreement. If the witness is agreeable to submitting to a deposition and counsel for the parties can agree to a time and place for the deposition, counsel can arrange for the deposition by agreement. Deposing counsel must be diligent in selecting a stenographer who is authorized to issue the appropriate oath in the state where the deposition is being taken.

If the parties cannot arrange to take the deposition by agreement or the witness does not voluntarily submit to a deposition, counsel seeking the deposition must seek the assistance of the New Hampshire court. This process differs significantly from federal practice pursuant to Rule 45 of the Federal Rules of Civil Procedure, and in many ways is significantly more time-consuming. Counsel in state court cases that involve out-of-state depositions need to consider additional time burdens of New Hampshire practice when mapping out their discovery plans. Counsel must file a motion with the Superior Court, pursuant to Rev. Stat. Ann. § 517:15, to have someone appointed commissioner to take the deposition in the foreign state.

Revised Statutes Annotated § 517:15 vests Superior Courts with the power to appoint commissioners to take depositions outside of New Hampshire, "for use in causes pending in or returnable to said court." Rev. Stat. Ann. § 517:15. The New Hampshire Supreme Court has interpreted this rule as giving the Superior Court the power to "appoint a person as commissioner to take depositions outside the State." *State v. Sands*, 123 N.H. 570, 609 (1983). In *Sands*, the court further held that "once such a commissioner is appointed, he may then also take depositions within the State, even though he may never have exercised his out-of-state powers." *State v. Sands*, 123 N.H. at 609. The statutory authority to appoint commissioners does not extend to District and Probate Court judges, and Superior Court judges cannot appoint such commissioners to take depositions in District and Probate Division actions. District Division Rule 1.9(F), however, recognizes the "prima facie" authority of someone who takes a deposition out of state.

Revised Statutes Annotated § 517:16 provides that

> [a]fter the appointment of such commissioner, the notice of the time and place of taking depositions before him, the proceedings in taking such depositions, the certificates to be made by him, and all other formalities with reference to taking, filing and using such depositions shall be the same, so far as applicable, as for taking other depositions in civil causes.

These appointed commissioners "have and exercise all the powers conferred by the laws of other states, territories and foreign countries upon commissioners or other persons authorized to take depositions in said other states, territories and foreign countries for use in causes pending in this state." Rev. Stat. Ann. § 517:17.

Many states will require an additional step before a witness can be compelled to a deposition in that state for a proceeding outside of the state. For instance, Massachusetts requires that the party seeking the deposition apply to the court for an

order authorizing the witness to be subpoenaed to the deposition. *See* Mass. G.L. c. 223A, § 11. Accordingly, when counsel knows of the need to arrange for a deposition of a witness outside of New Hampshire, it is important to leave sufficient time to carry out these procedural prerequisites before the deposition is scheduled.

§ 12.3.11 Responsibility for Costs of Deposition

The party taking the deposition is responsible for the costs associated with the deposition, including the cost of the stenographer, and if the deponent is appearing pursuant to a subpoena, the witness fees and mileage fees. If a deponent is appearing by agreement and the witness has to travel to the deposition, counsel taking the deposition frequently will pay the travel costs of the witness by agreement.

The individual parties typically pay the costs for their respective copies of the deposition transcripts. In some cases, counsel agree beforehand that the party taking the deposition shall be responsible for paying the costs for each party to receive one copy of the original deposition transcript, and this convention is then followed for all depositions in the case.

Stenographers now offer many options for deposition transcripts. Most stenographers are equipped to provide an immediate "draft" transcript in cases where counsel need the transcript immediately to prepare for a subsequent deposition or an impending trial. Min-U-Scripts and indexed transcripts are commonly provided, and many stenographers are willing to e-mail an electronic version of the transcript. Sophisticated case management and trial preparation software allows deposition transcripts to be quickly loaded and portions of testimony easily integrated into case preparation. For complicated cases with multiple depositions, the ability to quickly integrate deposition transcripts into case management software can be invaluable. Depending on the stenographer, some of these transcript options cost extra, and deposing counsel should work with opposing counsel to work out the apportionment of costs.

§ 12.3.12 Deposing Expert Witnesses

The timing of expert depositions is usually addressed by the governing case structuring order, which typically provides deadlines for expert disclosures and expert depositions. Depositions of retained experts testifying at trial are not to occur until after the expert witness presents his or her report as part of the required expert disclosure. Rev. Stat. Ann. § 516:29-b, IV.

Deposing an adversary's expert can be costly, and counsel should assess the likely costs before scheduling the deposition. Although there are no definitive rules, it is common practice for deposing counsel to pay for the opposing party's expert's fees for sitting for the deposition, and the party who retained the expert normally pays for the expert's time in preparing for the deposition. Of course, parties can agree otherwise, and any disputes are often resolved by counsel because there is anticipated quid pro quo for the deposition of all experts in the case.

§ 12.3.13 Deposing a Business Organization

Depositions of business organizations are governed by Super. Ct. R. 26(m). Previous to the adoption of Rule 26(m), there was no specific New Hampshire rule governing depositions of such entities. The commentary to Rule 26(m) directs that the "jurisprudence used by the federal courts interpreting cognate Federal Rule of Civil Procedure 30(b)(6) should be used as a guide in the interpretation of Rule 26(m)." Rule 30(b)(6) allows for a litigant to request the deposition of an organization with regard to certain delineated topics. The organization must then designate one or more individuals to serve as the representative or representatives and sit for the deposition on those particular topics. The New Hampshire rule dictates a substantially similar process.

Practice Note

Rule 26(m) does not just apply to businesses, it also applies to governmental entities: "a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency . . . ."

Practice Note

Note that Standing Order 8 of the Business and Commercial Dispute Docket is identical to Super. Ct. R. 26(m).

The deposition of a corporate representative can be a powerful tool in the discovery arsenal, and planning for the noticing and taking of such a deposition requires careful advance preparation. Counsel has the opportunity to depose an individual who likely will bind the corporation by way of his or her testimony on a particular topic. The topic or topics of interest should be carefully considered, and the deposition should be well planned in advance. Counsel may want to depose various other employees of the business to learn as many pertinent facts as possible before deposing the representative of the entity. For similar reasons, counsel who receive a subpoena pursuant to Super. Ct. R. 26(m) or a notice of deposition or subpoena pursuant to Standing Order 8 must give careful consideration to the appropriate entity representative for each topic to be inquired about.

Practice Note

The federal rule imposes certain obligations on the business to educate the designated entity representative if no one with existing knowledge is available. *See* Fed. R. Civ. P. 30 & cmts.

§ 12.3.14 Depositions in Perpetual Remembrance

New Hampshire law provides a mechanism for depositions to be taken for the purpose of preserving a witness's testimony on the public record. Rev. Stat. Ann. § 518:2. This type of deposition, known as a deposition in perpetual remembrance, is for possible use at a later trial. Although depositions in perpetual remembrance are not something that most New Hampshire lawyers will take more than a few times in their career, they play an important role in that they allow for the preservation of testimony of witnesses that likely will not be available at trial due to old age, poor health, or because they are about to depart the state. *See, e.g., New Castle v. Rand*, 101 N.H. 201, 203 (1957) (depositions in perpetual remembrance may be taken if there is a likelihood that the testimony may be subsequently unavailable due to age or physical condition of prospective witness). A critical difference from a typical deposition is that a deposition in perpetual remembrance can be sought even if a related case has not yet been brought.

Any person with an interest in the expected testimony of a witness may petition a court to take a deposition in perpetual remembrance. Rev. Stat. Ann. § 518:2. This includes persons who are, or expect to be, parties or witnesses in cases that already are pending or that may be brought in New Hampshire or other jurisdictions, or whose legal rights are otherwise expected to be affected by the anticipated testimony. Rev. Stat. Ann. § 518:2. Generally, whether a court grants a party's request for a deposition in perpetual remembrance depends on three factors:

- the importance of the interest the petitioner seeks to protect,
- the precariousness of the continued availability of the testimony, and
- how critical the witness's testimony is to the preservation of that interest.

4 Richard V. Wiebusch, *New Hampshire Practice: Civil Practice and Procedure* § 28.02 (2d ed. 1997). If granted, a court may appoint a commissioner before whom the deposition is to be taken. Rev. Stat. Ann. § 518:1.

Once a court grants a request for a deposition in perpetual remembrance, the petitioner must provide notice to all persons who have an interest in the testimony.

Rev. Stat. Ann. § 518:3. If the request is made in conjunction with a pending case, notice normally will occur simply by providing a copy to all counsel of record. Due to the typical urgency associated with depositions in perpetual remembrance, notice is frequently of short duration. In those situations where the names or addresses of interested persons are unknown, however, the petitioner must give notice by publishing once each week for three successive weeks in a newspaper printed in Concord and a newspaper published in the county where the petition was filed. Rev. Stat. Ann.§ 518:5. Publication must begin at least eight weeks before the taking of depositions. Rev. Stat. Ann. § 518:5.

Depositions in perpetual remembrance are conducted in the same manner as normal depositions, and must be recorded in writing. Rev. Stat. Ann. § 518:6. They can then be used in any trial in which the testimony is pertinent. Rev. Stat. Ann. § 518:9. If a deposition in perpetual remembrance relates to real estate, or to any transaction connected therewith, the deposition transcript, along with the related petition and notice, must be recorded within ninety days in the registry of deeds in the county where the real estate lies. Rev. Stat. Ann. § 518:8.

§ 12.4 PREPARING TO TAKE THE DEPOSITION

§ 12.4.1 Initial Considerations

(a) *Whether to Take Depositions*

The preliminary question in any case, of course, is whether to take depositions at all. It is often a knee-jerk reaction of lawyers that depositions are a necessary step in every pretrial discovery plan. That should not be the case. Rather, counsel must assess the pros and cons of depositions and consider whether to take any depositions before trial.

The advantages of depositions are considerable, and include the following:

- learning facts not yet uncovered in discovery,
- assessing witnesses before trial,
- avoiding surprises at trial,
- evaluating opposing counsel before trial,
- locking in testimony of witnesses before trial,

- preserving testimony of witnesses that may not be available at trial,
- establishing testimony for summary judgment, and
- establishing facts to induce settlement of the case.

The disadvantages of depositions are likewise considerable, and include the following:

- the expense of depositions,
- educating the opponent on the theory of the case,
- preserving harmful testimony of a witness that may not be available at trial,
- identifying harmful witnesses previously unknown to opposing counsel, and
- providing a "dress rehearsal" for the opposing party.

Aside from the costs factor, the advantages of depositions frequently outweigh the disadvantages. Depositions are a powerful tool in the discovery process because they provide the only mechanism before trial for counsel to elicit information directly from the opposing party and other witnesses. Unlike interrogatories, the opposing party's responses to deposition questions are not filtered through opposing counsel and are not answered after strategizing with opposing counsel.

But costs can be significant, and the decision of whether to take depositions frequently hinges entirely on the cost factor. In addition to the attorney fees generated by the considerable time necessary to prepare for depositions, there are the fees associated with the time conducting the depositions. There are also the stenographer fees, transcript costs, and potential travel expenses of witnesses and counsel. Ultimately, the decision as to whether to take depositions should be made after consultation with the client and careful consideration of all of these factors.

(b) *When to Take Depositions*

Once the decision has been made to take depositions, counsel then must determine the best time in the discovery process to take those depositions. It is common for counsel to first want to review answers to written interrogatories as well as documents produced by the opposing party. This approach has many advantages.

Armed with the interrogatory answers and documents, counsel will be better educated about the facts of the case and the opposing party's rendition of the facts. Counsel will have the time to analyze these facts and formulate an effective line of questioning to challenge certain facts.

Counsel also will have time to assess critical documents and prepare to ask questions about the documents and have them marked at the deposition. Additionally, it may be that counsel will want to consult with a retained expert before taking depositions and will want to have the expert's opinion of critical documents before depositions are taken. Waiting to take depositions certainly allows counsel to go into a deposition well prepared and with an informed game plan.

On the other hand, waiting for written discovery to be completed has its downsides. While conducting written discovery allows deposing counsel to do his or her homework before the deposition, it also forces the opposing party and counsel to do their homework before the deposition. Upon receiving interrogatories, the opposing party likely will work with opposing counsel to assess the deposing counsel's strategy based on the interrogatories asked. By carefully formulating answers to interrogatories, the opposing party naturally will be preparing the strategy for his or her case.

Then, in preparing the deponent shortly before the deposition, opposing counsel will be able to review interrogatory answers with the deponent as well as critical documents that have been produced. This not only assists the witness in refreshing his or her recollection regarding critical facts, but also helps the witness prepare for the presentation of the case at the deposition.

Furthermore, by waiting to depose witnesses until written discovery is completed, the deposition process can be delayed considerably. Even if interrogatories and document requests are served early in the litigation, the opposing party may seek an extension of time to respond, and there may be objections asserted to certain interrogatories and document requests, which could lead to motion practice and further delays. This period of delay allows the opposing party and counsel more time to assess potential weaknesses and formulate a plan to deal with those weaknesses. Important documents and witnesses frequently are identified during depositions, and if depositions end up being taken later in the discovery phase, there may not be sufficient time to obtain and fully assess those documents or depose those witnesses prior to trial.

In some cases, therefore, it may be advantageous to take depositions early in the discovery phase, before the facts have been extensively developed. Deponents will then be forced to provide their answers, unfiltered by counsel, to questions asked for the first time. This approach often leads to the most candid answers

from witnesses and may allow for testimony that will support an early summary judgment motion.

Sometimes a balanced approach may be more appropriate. Instead of serving interrogatories, counsel may serve a focused set of document requests to obtain the most critical documents before deposing the opposing party. After learning more information at the deposition, counsel can then follow up with interrogatories and more extensive document requests.

(c) *Choosing Order of Depositions*

Another preliminary consideration is the order in which to depose the witnesses. There is no conventional approach, and this decision depends on each case and the preference of counsel. In some cases, it may be best to depose the opposing party first and then subsequently depose other witnesses. This is done to lock in the opponent party's testimony before the opponent and his or her counsel hear the testimony of other witnesses.

In other cases, counsel may prefer to educate himself or herself about certain issues before deposing the opposing party or other critical witnesses. For instance, if the opposing party is a business, counsel may seek to depose some lower-level employees to understand the nature and structure of the business in order to be better informed before deposing the company's CEO. The decision as to the order of depositions should be made on a case-by-case basis and only after counsel has decided on an initial theory of the case and preliminary discovery plan.

(d) *Choosing the Form of Deposition*

The most common form of deposition in New Hampshire is a deposition upon oral examination. Other forms of depositions, however, are allowed by court rules, and counsel should consider the alternative forms of depositions.

Depositions Upon Written Questions

Depositions upon written questions are permitted by Super. Ct. R. 21(a), but they are not commonly utilized in New Hampshire. Unlike Fed. R. Civ. P. 31, the New Hampshire rules do not set out specific requirements for depositions upon written questions. The process generally involves the submission of written questions to a deponent, and the deponent then answers those questions under oath, with the testimony being recorded by a stenographer.

Counsel may choose to schedule a deposition upon written questions to save money, but doing so forgoes many of the advantages of depositions upon oral examination, as discussed above. It has been noted that depositions upon written questions are today reserved for the deaf and persons who are not fluent in English. 4 Richard V. Wiebusch, *New Hampshire Practice: Civil Practice and Procedure* § 27.02 (2d ed. 1997).

Depositions Upon Oral Examination

Depositions upon oral examination is by far the most common form of deposition in New Hampshire practice. The advantages over depositions upon written questions—the ability to follow up, to probe, to challenge, to exhaust a witness's memory, and to evaluate a witness—render them a much more effective discovery tool.

Telephone and Videoconferencing Depositions

Unlike Fed. R. Civ. P. 30(b)(4), there is no specific rule or statute in New Hampshire permitting depositions to be taken over the telephone. But because so much of New Hampshire's deposition practice is dictated by agreements between counsel, telephone depositions occasionally are used by agreement when appropriate. Location of a witness and the attendant cost of taking the deposition in person may make a telephone deposition appropriate.

Telephone depositions typically are arranged such that the deponent and stenographer will be in one location in a conference room with a speakerphone and the lawyers will be in another location with a speakerphone. Although there is no requirement that the lawyers be in the same room together, logistically, that is most practical, as it facilitates the lawyers working to resolve in person any disputes that arise. Deposing counsel may object to the deponent's counsel being located in the same location as the deponent, because deposing counsel will not be able to observe any interaction or discussion between the deponent and his or her counsel.

Some lawyers may prefer to have the stenographer in the same room as the lawyers. This allows for the stenographer to determine which lawyer is making an objection if there are multiple lawyers. This practice may pose difficulties if the stenographer in the lawyer's location is not able to administer the oath in the state where the deponent is located.

Although telephone depositions are not common, they should be considered as alternative means for a deposition when travel costs would otherwise advise against taking the deposition and when the deponent is not a critical witness.

Before scheduling a telephone deposition, all of the logistics discussed above should be considered and agreed upon with opposing counsel. If deposing counsel anticipates questioning the witness about particular documents or other items of evidence, arrangements should be made to have the exhibits premarked and sent to the stenographer beforehand.

The proliferation of videoconferencing technology allows more commonly for videoconferenced depositions. Many stenographers in New Hampshire and other businesses offer affordable videoconferencing facilities, and videoconferencing overcomes the disadvantages of deposing counsel not being able to see, gauge, and assess the deponent. If the location of a witness and travel costs militate against an in-person deposition, counsel should consider a videoconferencing deposition and should make necessary arrangements to have any exhibits sent to where the witness will be before the deposition takes place.

Videotaped Depositions

New Hampshire Superior Court Rule 26(1) allows for and governs the taking of videotaped depositions. In the past, videotaped depositions often were considered only when necessary to "preserve" the live testimony of witnesses who may not be available for trial. Today, however, videotaped depositions are becoming more common for a variety of reasons, discussed below. Previously, videotaped depositions were not allowed as a matter of right, but rather only by agreement or by leave of court. Under the current rules, however, a party may record a videotape deposition so long as that party indicates their intent to do so in the deposition notice. Super. Ct. R. 26(l)(1).

There are a number of reasons why counsel may choose to take a videotaped deposition. Perhaps the most common reason is to preserve the testimony of a party or helpful witness who likely will not be available for trial. In the case of a party, it may be that the individual is elderly or sickly and may not survive until the time of trial. In the case of a nonparty witness, it may be that the witness will be outside the jurisdiction of the court at the time of trial and could not be subpoenaed to appear at trial.

Although the written transcript can be used at trial for an unavailable witness, it usually does not have the same impact as the videotaped testimony of a witness. When a deposition transcript is read to a jury, the jurors do not see the face of the deponent, do not hear the voice of the deponent, and simply cannot assess the full credibility of the witness.

Videotaped depositions overcome these important limitations of a written transcript by allowing jurors to appreciate facial expression and body language, and in some sense, get to know the witness. In personal injury or medical malpractice

cases, videotaped depositions will allow jurors to appreciate the physical condition of a witness. Furthermore, a videotaped deposition allows for the presentation of a particular exhibit, and a witness's reaction to and testimony about the exhibit.

Another benefit of a videotaped deposition is that it naturally controls any disruptive behavior of opposing counsel. When the videotape is rolling, opposing counsel is far less likely to disrupt a deposition with improper coaching or repetitive objections, delay tactics, obnoxious finger drumming or sighs, etc. The presence of the video camera will subdue even the most disruptive lawyer. For this reason alone, some counsel opt to depose an adversary by way of videotape even if counsel does not plan to necessarily use the videotape at trial.

The major downside of videotaped depositions, of course, is expense. Normal depositions ordinarily are expensive, but videotaped depositions can enhance costs significantly. Not only does the videotaping itself increase costs, but counsel usually must spend more time to prepare for the videotaped deposition.

If counsel chooses to conduct a videotaped deposition, additional preparations are vital. Assuming that the videotaped deposition will be used at trial, counsel must ensure that the deponent has a proper appearance and is advised as to how to conduct himself or herself before the camera. Counsel will want to arrive for the deposition sufficiently early to work with the videographer so that the background, lighting, and seating are appropriately planned. Counsel and the witness should be prepared to move through testimony efficiently without unnecessary delay. If the deposition is of a physician, for example, it may be important to have a light box available and positioned so x-rays can be reviewed with the witness and on camera. Any documents to be introduced should be organized properly to avoid awkward paper ruffling or delays, both of which could cause a jury to lose interest.

Superior Court Rule 26(l)(1) contains specific procedures for videotape depositions:

- at the commencement of the videotape deposition, counsel representing the deponent should state whose deposition it is, what case it is being taken for, where it is being taken, who the lawyers are that will be asking the questions, and the date and the time of the deposition;

- care should be taken to have the witnesses speak slowly and distinctly;

- care should be taken that papers be readily available for reference without undue delay and unnecessary noise; and
- counsel and witnesses shall comport themselves at all times as if they were actually in the courtroom.

Any issues regarding the admissibility or inadmissibility of evidence "should be handled in the same manner as written depositions." Super. Ct. R. 26(l)(2).

Rule 30(b)(3) of the Federal Rules of Civil Procedure governs audiovisual depositions. The notice must state that the deposition will be audiovisually recorded. Fed. R. Civ. P. 30(b)(3). Upon the request of any party, deposition testimony must be offered in audiovisually recorded form, if available, unless offered for impeachment purposes or if the court orders otherwise. Fed. R. Civ. P. 32(c). Counsel seeking to use an audiovisual deposition at trial or in support of a motion must provide the court with a transcript of the portions of the audiovisual recording being offered. Fed. R. Civ. P. 32(c). Rule 26(a)(3)(A) of the Federal Rules of Civil Procedure requires counsel, as part of the pretrial disclosures, to disclose if he or she intends to use an audiovisual deposition at trial.

§ 12.4.2 Determining Objectives of Deposition

In preparing to take a deposition, counsel must assess carefully the primary objectives of the deposition. Generally, the two principal objectives are to discover factual information and to obtain admissions. If counsel seeks to depose a witness primarily to gather as much information as possible, both favorable and unfavorable, counsel's demeanor and questioning techniques at the deposition should be geared toward getting the witness to open up and volunteer as many facts as possible.

On the other hand, if counsel's primary objective is to obtain admissions from a witness, counsel should frame questions narrowly and try to pin witnesses down on a particular topic, and then move to the next topic without asking the witness to provide additional information or opinion. These admissions will help support a motion for summary judgment or will allow for effective impeachment of the witness at trial.

(Text continues on p. 12–25.)

Other objectives may be to preserve favorable or necessary testimony from a witness who is elderly, sick, outside the jurisdiction of the trial court, or for some other reason is unlikely to be available at trial. Another potential goal of a deposition is to establish that a witness is incompetent to testify at trial because of lack of relevant knowledge, or perhaps to exclude a retained witness because his or her opinion is unreliable. Some counsel may seek to depose an opposing party or a key witness to gather vital information that will expedite settlement discussions.

Counsel often will have a combination of these deposition objectives in mind, but counsel should settle on the primary objectives in order to prepare properly. As discussed further below, questioning techniques will depend heavily on the ultimate objectives of deposing counsel.

§ 12.4.3 Final Preparations to Take the Deposition

(a) *Research the Applicable Law*

Before taking a deposition, it is essential for counsel to understand the legal theories of the case and to know the legal elements of each claim brought and defense asserted in the litigation. The legal theories and elements will dictate which facts must be developed during a particular deposition. It is unpleasant for counsel to learn after deposing a witness that counsel failed to elicit a certain fact that is necessary to support a summary judgment or to refute a certain defense. Proper preparation and legal research guard against this.

(b) *Review Available Facts*

Even though a primary purpose of deposing a witness is to gather factual information, counsel should review previously discovered facts, including prior deposition testimony of other witnesses. Counsel also should research information available through other sources, such as online information about companies or particular individuals. This may be helpful to explore inconsistencies in testimony or to obtain factual information that will help discredit other unfavorable witnesses.

Having a command of all relevant information gives counsel greater control over a witness. If the deponent senses that deposing counsel thoroughly knows the facts, the deponent will be less likely to be untruthful or evade answering questions. Furthermore, being knowledgeable about the case makes a strong impression on opposing counsel.

(c) *Prepare a Deposition Outline*

Although some seasoned attorneys will start out a deposition with a blank pad, most utilize some form of outline. Outlines serve as helpful checklists of all the topics that attorneys want to cover at a deposition, and attorneys will often review their entire outline one last time before concluding a deposition to ensure that they have addressed all the critical topics.

Not only do deposition outlines guide attorneys during the deposition, but the process of preparing a deposition outline is invaluable. Preparing an outline forces counsel to gather and evaluate the relevant facts and organize his or her thoughts and develop his or her case theory *before* taking the deposition. For this reason, some attorneys will not delegate this task to another attorney before taking a deposition, but would rather prepare the outline themselves.

Outlines should be just that—outlines. They should not be a scripted list of questions. It is common for less experienced attorneys to fall into the trap of listing out all questions in advance, and then sticking religiously to that script. While it may seem like a good plan to carefully set up all of the questions in advance, deponents rarely follow the interrogator's plan and answer the questions as anticipated.

The key to taking a good discovery deposition is listening. Deposing counsel must listen to all answers carefully, and depending on the deponent's answers, determine the next question or the next line of questions. If deposing counsel is on a mission to stick to the script of questions, he or she may miss valuable opportunities to explore unexpected territory opened up by the witness. When a witness brings up, sometimes out of the blue, a new topic, a new name, or a new date, deposing counsel must be willing to take a detour from the outline and pursue the new topic immediately while the witness is thinking about it.

Good discovery depositions flow much like casual conversations between two strangers trying to learn everything they can about each other. Each answer spurs on a new question, and counsel has to be listening very carefully to discern any helpful clue to new information. Counsel should not be looking at his or her script, planning for the next question, while the witness is answering the pending question.

That being said, it may be a good idea to supplement an outline with a number of specific questions carefully worded such that they can be read precisely into the record. This is important when counsel is anticipating using the deposition to either preserve specific testimony or to obtain a precise admission for the purpose of a summary judgment motion. If a critical element must be established through a particular question, counsel should not leave it to chance that he or she

will ask the question perfectly during the deposition. Rather, counsel should anticipate the precise question in advance, write it out in full in his or her outline, and then ask it as written at the right time during the deposition.

(d) *Preparing and Organizing Exhibits*

Before heading into a deposition, counsel should be familiar with the key documents and should know which documents he or she likely will address with the witness. Sufficient copies of each document (assuming they are not voluminous) should be made so the deponent and each attorney can view the document when questions are being asked about it. Typically, the copy shown to the deponent is marked as a deposition exhibit.

Counsel should plan when he or she will introduce each document, and if possible, note this on counsel's deposition outline. To facilitate the deposition, counsel should organize the exhibits beforehand so that they are in the order counsel plans to introduce them. The more organized counsel is before the deposition, the smoother the deposition will flow and the more able counsel will be to listen to the testimony and plan the next line of questions.

§ 12.5 STRATEGY—TAKING THE DEPOSITION

There is more than one right way to conduct a deposition, and much of how a deposition is conducted depends on counsel's planned objectives for the deposition. This section addresses some of the usual components of depositions as well as common strategies for successful depositions.

§ 12.5.1 Beginning the Deposition—The "Usual Stipulations"

At the outset of depositions in New Hampshire, it is common for counsel to agree to enter into the "usual stipulations." While the "usual stipulations" themselves are not set in stone and may vary from state to state, the following are the most commonly used in New Hampshire:

- it is agreed that the deposition may be taken in the first instance by stenograph and, when transcribed and then signed by the deponent, may be used for all purposes for which depositions are competent under the laws of the State of New Hampshire;
- form, filing, notice, caption, and other formalities are waived;

- all objections except as to form are waived and preserved until the time of trial;
- if the deposition remains unsigned thirty days after delivery to the deponent's counsel, signature shall be deemed waived and the deposition may be used the same as if signed.

4 Richard V. Wiebusch, *New Hampshire Practice: Civil Practice and Procedure*§ 27.08 (2d ed. 1997). That being said, not all attorneys in New Hampshire know or adhere to these "usual stipulations" and counsel should not merely accept the "usual stipulations" without reading and understanding what they actually mean. Particularly if one of the attorneys does not normally practice in New Hampshire, it is essential to go over the stipulations so foreign counsel do not later object on the basis that they were not informed of a particular stipulation.

Moreover, it is not advisable for counsel to accept these stipulations at all depositions. For instance, if counsel is particularly skeptical about a witness's veracity, counsel may be concerned that if the signature requirement is waived, the witness will try to evade impeachment at trial by suggesting that the deposition transcript was erroneous and that he or she never reviewed or signed it. If the witness is required to read and sign the transcript of his or her testimony, counsel can highlight the fact that the witness not only gave the testimony but also later read and signed the deposition transcript. When your client is the witness, it is especially important to have him or her read the transcript to ensure accuracy.

§ 12.5.2 Swearing in the Witness

In New Hampshire, any justice or notary public, or any commissioner appointed to take depositions in other states, can swear in the witness. Rev. Stat. Ann. § 517:2. Stenographers normally are either justices of the peace or notaries public and typically swear in the witness prior to starting the deposition. Many attorneys also are justices or notaries and sometimes prefer to swear in the witness themselves in order to show control at the outset of the deposition.

§ 12.5.3 Providing Instructions to the Deponent

There are different schools of thought as to whether deposing counsel should provide opening instructions to the deponent at the outset of the deposition. The author of this chapter believes it is a critical step to provide certain deposition ground rules for almost all depositions. Many deponents are being deposed for the first time, and may have little idea about the deposition process. Providing some instruction to the witness will facilitate the deposition flowing more

smoothly. Deponents must understand the mechanics of the deposition and appreciate that even when objections are posed, the witness normally must still answer the question. Firm instructions regarding the limited nature of objections in depositions can also serve to signal to opposing counsel on the record that improper objections will not be tolerated. Additionally, by advising the deponent about the rules, it makes it more difficult for the witness to evade impeachment at trial by asserting that he or she did not understand the deposition process or the questions being asked. A well-planned explanation of the rules will thwart this tactic.

Some lawyers believe that because the deponent most likely has been advised about the mechanics of depositions before the actual deposition, providing instructions at the outset is unnecessary. Counsel may find that providing instructions to the witness immediately puts the witness at ease because the instructions are just what the deponent's counsel said they would be, and counsel may not want to put the witness at ease. Rather, counsel will seek to avoid putting the witness at ease and instead will jump right into difficult questions, so as to take control of the witness.

In most situations, it is advisable to provide certain deposition ground rules for the deposition. Many deponents are being deposed for the first time, and may have little idea about the deposition process. Providing some instruction to the witness likely will help the deposition flow more smoothly. Furthermore, by advising the deponent about the rules, it is more difficult for the witness at trial to evade impeachment by asserting that he or she did not understand the deposition process or the questions being asked. Although jumping right into difficult questions may demonstrate control by counsel, the deposition may become disjointed and less effective if the witness continually evades questioning by asking questions about the process. The benefits of providing well-crafted instructions generally outweigh those of not providing any instruction.

Sample introductory ground rules include the following:

- I will be asking you a series of questions, and the reporter will be taking down my questions and your answers. Nods and shakes of the head cannot be transcribed, so you need to answer verbally, okay?
- Do you understand that you will be answering questions under oath and that you have sworn to tell the truth?
- If you do not hear a question, say so, and I will repeat it, okay?
- If you do not understand a question, say so, and I will rephrase it.

- If you do not tell me otherwise, I will assume that you have heard and understood the question, okay?
- If you find that you are tired or confused, or need to use the restroom, you should say so and we will take a break.
- If any of the counsel present assert an objection, they are doing that for the record. Unless you are instructed by your counsel to not answer a question, you must still answer the question posed after an objection is made.
- Do you understand the instructions that I have just explained to you?

With these introductory instructions, it will be easier to control the witness during impeachment at trial if the witness tries to change a deposition answer by explaining that he or she did not hear or understand the question properly. It is most effective to finish the ground rules by asking the deponent to affirmatively acknowledge that he or she understands each ground rule.

§ 12.5.4 Effective Questioning of the Deponent

Questioning witnesses at a deposition is a skill that is continually refined by trial attorneys as they gain more experience. There are a number of legal treatises and continuing legal education courses focusing solely on deposition technique, and it is not possible to cover the subject in one section of this chapter. Notwithstanding those limitations, set forth below are some fundamental guidelines for effective depositions.

(a) *Tailor Your Questions and Style Depending on Your Objective*

If your primary objective is to gather as much information as possible from the witness, good or bad, your style should reflect that. You should put the witness at ease as much as possible at the outset, and frame your questions to encourage conversational dialog. The more comfortable the witness feels, the more likely he or she will open up and even volunteer to "help" counsel gather information. Questions should be open ended, and counsel should not be afraid of where the answers may lead. Counsel should not be afraid to ask "dangerous" questions. After all, counsel would rather learn about any unfavorable evidence at the deposition, rather than at the trial.

If, on the other hand, your primary objective is to obtain favorable admissions from the witness, your style likely will be different. Rather than trying to put the witness at ease at the outset, you may want to make it clear to the witness that you ask the questions and you are in complete control of the deposition. If the deponent is the adverse party, leading questions are appropriate, and you should use them abundantly to obtain the admissions you need.

(b) *Visualize the Deposition Transcript*

Because you may get caught up in the dialog and the back-and-forth conversation, you need to constantly be envisioning what the transcript will look like as the deposition is playing out. Be sure that you complete each question before you allow the witness to answer, and let the witness finish his or her answer before you jump to the next question.

After the deposition is done, nobody will remember or know about different gestures, nods, or key inflections made during the deposition. You should not allow the witness to answer with a nod or some other gesture—insist on a verbal answer. You should not allow "uh-huh" type answers, even though they may be clear from the witness's inflection. Even if it was clear during the deposition that the witness meant "yes" with his or her "uh-huh," the witness may change his or her story at trial.

When the witness is speaking, you should be listening and not thinking of a question to ask. But when it comes time to ask the question, proceed deliberately and picture the transcript, as if you were dictating a memo or a letter. For those key questions that can make all the difference for a dispositive motion, it is best to write them out verbatim so as to make the question read perfectly on the transcript.

(c) *Be Curious and Suspicious*

Perhaps the most common mistake of inexperienced counsel is that they fail to be persistent with their questioning. Deponents will often resort to short answers and often respond to questions by claiming that they "don't know." Nevertheless, counsel must be persistent and remain suspicious that the witness is going out of his or her way to be unhelpful.

For example, if a witness continually answers "I cannot remember," counsel may then ask: "Even if you cannot remember everything that happened, please tell me everything that you do remember." When the witness gives small tidbits of information, probe them until those points are exhausted. If the witness answers "I don't know" to a question about which you think the witness has some knowledge, follow up with: "Did you once know?" "Who did you tell?" "Did you

you write anything down about it—if so, where?" "Who would know?" "Who would I ask if I wanted to find out?"

Sometimes witnesses evade questions regarding numbers or dates by answering that they do not know or cannot remember. If so, then ask them for an estimate. Continually narrow a number or date range with questions to pin down the witness to a certain range.

(d) *Box in the Witness*

A deposition is counsel's chance before trial to impose limits on the witness's testimony at trial. Be sure that on each critical topic, you question a witness in such a manner that you put a fence around the witness's testimony. For example, if a significant issue in a case relates to a certain meeting of higher-level employees, it may be important for counsel to establish who was at the meeting. If at the deposition, the witness can only identify five individuals he or she can recall being present at the meeting, counsel should ask the witness about each and every individual, what he or she recalls each witness saying, etc. Counsel should then circle back and persistently ask the witness to confirm that he or she has no recollection of others being at the meeting.

Should the witness start testifying at trial about what a sixth individual at the meeting said or did, counsel will have key cross-examination material. Counsel can challenge the witness by going through the questions at the deposition where the witness specifically confirmed that he or she only recalled five witnesses at the meeting. The factfinder will evaluate the witness's deposition testimony and why his or her memory had improved at trial.

§ 12.5.5 Handling Difficult Opposing Counsel

Despite the fact that depositions are intended to be straightforward question-and-answer conversations "to determine what the witness saw, heard, knew and thought," *United States v. Kattar*, 191 F.R.D. 33, 38 (D.N.H. 1999), they can easily be clouded by the disruptive and improper behavior of counsel. Trial lawyers inevitably will run into other lawyers who will insist on obnoxious and obstructionary tactics. Dealing with these difficult situations is an essential skill for any attorney, particularly those attorneys with less experience taking depositions. While there are many intuitive techniques that attorneys can employ to counter overly aggressive opposing counsel, a basic understanding of the rules governing deposition practice and the available remedies against disruptive behavior is essential.

(a) *New Hampshire Superior Court Rule 26*

Superior Court Rule 26(j) requires that the deponent answer all questions "not subject to privilege" and states that a deponent cannot refuse to answer a question simply because the testimony would be inadmissible at trial "if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege." Super. Ct. R. 26(j). Accordingly, as with other methods of discovery in New Hampshire, courts generally allow for broad discovery. Although discovery rules are to be given a broad and liberal interpretation, the trial court also has broad discretion to determine the limits of discovery. *N.H. Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, 429–30 (2009).

Counsel are also advised to review the *New Hampshire Bar Association Litigation Guidelines*, which reflect how deposition practice should and generally does take place in New Hampshire. While these guidelines are intended as aspirational goals for bar members and not hard-and-fast rules, a court may use them as the standard of practice against which disruptive opposing counsel should be measured.

(b) *Ethical Obligations*

Attorneys have an ethical obligation not to engage in disruptive or illegitimate discovery tactics. Rule 3.4(d) of the New Hampshire Rules of Professional Conduct states that a lawyer may not, "in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." N.H. R. Prof. C. 3.4(d). Likewise, Rule 3.4(c) provides that a lawyer may not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." N.H. R. Prof. C. 3.4(c). The Supreme Court has held that "rules of a tribunal" for purposes of Rule 3.4(c) includes Super. Ct. R. 21(b), which requires compliance with legitimate discovery requests. *Feld's Case*, 149 N.H. 19, 28 (2002) (holding that an attorney's invocation of a privilege was "not legitimate, but rather a bad faith effort to impede" the other side's discovery).

(c) *Motions to Compel and Motions for Sanctions*

Motions to Compel

Superior Court Rule 26 provides that if a deponent refuses to answer a question either because of counsel's objection or otherwise, counsel taking the deposition may file with the court a motion to compel the answer. Super. Ct. R. 26(k). The

motion to compel is often filed after the deposition is complete, but in extreme circumstances, counsel may suspend the deposition and attempt to get a judge on the phone immediately to resolve the situation. If the answers a party is seeking can be found in other parts of the deposition and if those answers are not necessary for the preparation of the moving party's case, a court may deny a motion to compel. *See Woodward v. Bailey*, 106 N.H. 359, 361 (1965) ("[I]t is apparent that the Court could properly have concluded that in other parts of the deposition the witness had answered, in substance, the questions to which answers were sought to be compelled . . . [and] we cannot say as a matter of law that they were necessary for the proper preparation of the defendants' case.").

If the motion is granted and the court finds that there was no substantial justification for the refusal to answer or the refusal was frivolous or unreasonable, the court "may, and ordinarily will" require the deponent or the deponent's attorney to pay the moving party's "reasonable expenses incurred in obtaining the order." Super. Ct. R. 26(k). Likewise, if the motion is denied and the court finds that there was no substantial justification for the motion or that it was frivolous or unreasonable, the court may order the moving party to pay the other side's expenses incurred in defending the motion. Super. Ct. R. 26(k).

Motions for Sanctions

In addition to motions to compel, counsel may employ a motion for sanctions to curb disruptive behavior by opposing counsel at depositions. Superior Court Rule 21(d) lists a number of sanctions that a court may order against a party for so-called discovery abuse. The rule also lists several types of discovery abuse (it is not an all-inclusive list). Of particular relevance to depositions are the following:

- employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or undue burden;
- making, without substantial good faith justification, an unmeritorious objection to discovery;
- responding to discovery in a manner that the responding party knew or should have known was misleading or evasive; and
- failing to confer with an opposing party or attorney in a good faith effort to resolve informally a dispute concerning discovery.

(d) *Techniques for Dealing with Disruptive Behavior*

Knowing the rules governing deposition conduct is perhaps the most valuable preparation for dealing with difficult opposing counsel. In addition to knowing the rules, counsel should also have in mind various techniques that can help diffuse the impact of disruptive conduct. Some of these techniques are described below.

Focus on the Objective of the Deposition

It is important for deposing counsel to always keep in mind that the primary goal of difficult opposing counsel often is to disrupt the flow of a deposition. When depositions do not flow well, the attorney taking the deposition frequently becomes sidetracked and fails to focus on the goals that he or she set out to attain. This usually results in the attorney failing to discover all important admissible evidence.

Therefore, counsel should do his or her best to ignore opposing counsel's disruptive conduct. It is all too easy, particularly for less experienced attorneys, to take the bait and make the entire focus of the deposition controlling opposing counsel and winning that battle. But a better strategy is to ignore the interruptions, improper objections, and unethical tactics and press forward to obtain as much information as possible.

For example, when opposing counsel continually objects, rather then spend valuable time arguing with him or her over the propriety of the objection, deposing counsel should acknowledge the objection and instruct the witness to answer, or repeat the question if appropriate. If repeated, continuous objections are interfering with a deposition, deposing counsel should request that the objections stop, acknowledge that there is a standing objection to the particular line of questioning, and ask the question anyway. Be persistent and continue asking questions to get the information you are seeking.

Confront the Improper Behavior on the Record

When improper conduct interferes with a deposition, deposing counsel should be prepared to confront opposing counsel with the applicable rule on the record. For instance, if opposing counsel continually instructs the witness not to answer on grounds of relevance, explain to opposing counsel that Rule 26 does not allow such instruction and that such objection is improper. If opposing counsel repeatedly whispers to the deponent during the course of the deposition, be sure to note that for the record.

If there are repeated "speaking objections," do not hesitate to call them just that and ask opposing counsel to stop. If opposing counsel continues to be disruptive, resist the temptation to go off the record to address the issue. Be sure that all discussion relating to improper objections or speaking objections is captured on the record.

Insist on a Videotaped Deposition

If you anticipate disruptive and improper behavior during an important deposition based on your past experience with opposing counsel, consider arranging for the deposition to be videotaped. The effect of a camera can be dramatic, as counsel are much less likely to act improperly knowing that a judge or jury could end up seeing and/or hearing their conduct.

§ 12.6 PREPARING A WITNESS FOR A DEPOSITION

Preparing to take a deposition is essential, but many trial lawyers would contend that preparing clients and favorable witnesses for their deposition is even more important. It is often said that preparing a witness for deposition is where lawyers truly earn their pay.

Needless to say, there is no single right way to prepare a witness; different counsel use any number of different ways to prepare witnesses. However, there are many wrong ways to prepare a witness, and undoubtedly the biggest mistake would be no preparation at all. No matter how smart, articulate, sophisticated, or adept a client may be, allowing him or her to be deposed without any preparation is a recipe for disaster. Set forth below are some basic concepts for witness preparation.

§ 12.6.1 Ease Anxiety About Deposition Process

Most witnesses facing a deposition have never been deposed before and know little about the process. Naturally, they are nervous about the process and are anxious that they may "blow the case" through their deposition testimony. Because much of their nervousness is due to the unknown, an essential component of witness preparation is explaining the process and putting witnesses at ease as much as possible.

Rather than starting the preparation session by emphasizing the deposition's significance to the case, start by going over the basics. Explain what a deposition

is and what it is not. Explain where it will take place, who will sit where, and how the stenographer works. If possible, describe opposing counsel and his or her likely demeanor and idiosyncrasies. Emphasize the fact that you will be sitting beside the witness and will object to improper questioning, and that there will be breaks during the deposition when the witness can ask you questions. Let the witness know that no deposition is mistake free, and that mistakes are often correctable. Most importantly, put the witness at ease by emphasizing the fact that his or her principle job is simply to tell the truth.

Depending on the witness and the economics of a particular case, it is best to meet with a witness more than once to prepare for a deposition. The first meeting, which should be the more substantive meeting, should occur sometime one to two weeks before the actual deposition. A second meeting ideally should occur the day before the deposition. The second meeting can be much shorter, and can be used to briefly go over the critical issues and to continue building the witness's confidence before heading into the deposition.

If the case economics do not allow for a second separate meeting, be sure to have the witness show up for the deposition at least one hour prior to the scheduled time to go over any last-minute questions and to put the witness at ease before the deposition starts. Indeed, regardless of how many preparation sessions are held, it is not advisable to arrange for the witness to show up mere minutes before the start time. By showing up early, the witness can see the conference room where the deposition will be held and take a few minutes to drink some water, relax, and put himself or herself at ease.

Practice Note

It is a mistake to prepare the witness only once immediately before the deposition—this should be avoided if at all possible. Witness preparation at 9 a.m. for a deposition at 11 a.m. simply is not a good game plan.

The key for effective preparation is to do whatever is necessary to make the witness feel confident and fully prepared for the deposition. Unprepared witnesses often go into depositions feeling worried and overwhelmed about the process, and those witnesses usually will not help your case. Ultimately, witnesses should understand that their role is easy in the sense that their only job is to tell the truth, and if they listen carefully and answer only the questions asked and answer them truthfully, they will do just fine.

§ 12.6.2 Consider Attorney-Client Privilege Issues

If the deponent is your client, go over the attorney-client privilege and explain how you will instruct the witness not to answer if deposing counsel asks about discussions between you and the client. If there is no attorney-client privilege, counsel should have that in mind during the deposition preparation, and should ensure that the witness understands that the discussion during the preparation session could be discoverable.

§ 12.6.3 Separate Process of Fact Gathering and Deposition Preparation

Frequently, counsel will meet with clients or important witnesses for the sole purpose of gathering pertinent information relating to the case. During these meetings, counsel will implore the client or witness to be as forthcoming and open as possible about all facts, both favorable and unfavorable to the case. Counsel will utilize open-ended conversation and questioning to elicit as much information as possible.

The fact-gathering meeting should be held separately from the deposition preparation meeting. Not only will counsel benefit from going into the deposition preparation meeting with all the pertinent factual information, but most importantly, the two separate functions of fact gathering and deposition preparation will not be confused.

Rather than encouraging the witness to volunteer as much information as possible, the deposition preparation session should be focused on the key concepts and facts of the case, and how to answer deposition questions succinctly and narrowly. Holding the fact-gathering and deposition preparation meeting together can inadvertently cause the witness to be confused when it comes time for him or her to respond to deposition questions. If one meeting is held for the two different purposes, counsel must draw a line and clearly delineate the two separate goals.

§ 12.6.4 Review Critical Case Concepts, Facts, and Documents

The witness's job at a deposition is to answer questions and provide facts about which he or she has knowledge. But even inexperienced counsel realize that how the facts are presented and conveyed can make all the difference in litigation. Thus, counsel should not assume that the client or witness to be deposed understands all the important facts and the how those facts are critical to the case.

Counsel should take the time to carefully go over the important facts involved in the case and to provide some explanation as to why the facts are critical. This will give the witness a greater understanding of the case and an appreciation for what factual information likely will be pursued at deposition.

Counsel also should go over the core legal concepts that are applicable. Witnesses may not understand the legal significance of certain words that may be used at the deposition. For instance, in a personal injury case, counsel should discuss key terms such as negligence, possibility versus probability, causation, duty, damages, and comparative negligence. With a better understanding of the important legal concepts, the witness will be more attuned to the significant issues when they are addressed at the deposition.

Counsel should assess the documents that will be important for the witness to review prior to the deposition. Often, this will comprise the client's answers to interrogatories and key documents that have been produced in discovery. Counsel should have in mind that any documents reviewed by the witness to prepare and refresh his or her recollection for purposes of the deposition may well be discoverable pursuant to N.H. R. Evid. 612.

Rule 612(a)–(b) provides as follows:

> This rule gives an adverse party certain options when a witness uses a writing to refresh memory . . . [such as] to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it and to introduce in evidence any portion that relates to the witness's testimony.

It is common for deposing counsel to ask about the documents that the deponent reviewed to prepare for the deposition and to follow up with a request to review the documents that the witness reviewed prior to the deposition.

Thus, counsel should not show the witness work product documents, such as attorney notes, or deposition or case summaries. There may be an argument that the work product doctrine protects the disclosure of certain documents, but counsel should be cautious and presume that any documents shown to the deponent could be subject to discovery. *See, e.g., Nutramax Lab., Inc. v. Twin Lab., Inc.*, 183 F.R.D. 458, 461 (D. Md. 1998) (citing cases and explaining that work product doctrine generally applies to counsel's selection of documents to show witness for deposition preparation, but there may be circumstances where documents are still discoverable pursuant to Fed. R. Civ. P. 612).

§ 12.6.5 Review Deposition Techniques with Witness

Individual attorneys have different styles for conducting depositions, but there are certain tricks of the trade that many attorneys utilize. When preparing a witness for a deposition, counsel should go over some of these tricks of the trade, along with any particular known habits of the attorney who will be taking the deposition. For example, some counsel have a habit of prefacing their leading questions on the key issues with phrases such as "it is fair to say," "you will agree with me then that," or "it is more likely than not that." Counsel should tell the witness to be alert for these types of phrases and to listen carefully to the remainder of questions beginning with these common phrases.

It may be that the attorney who will be taking the deposition normally will go out of his or her way to befriend the witness at the outset of the deposition in an effort to have the witness open up and volunteer as much information as possible. Some attorneys effectively play ignorant as to the key facts, thereby inducing the witness to volunteer more information to show how much the witness knows. The witness should be prepared to expect these techniques and focus on the task at hand by simply answering the questions asked. No matter how friendly deposing counsel may be, the witness should understand that deposing counsel has one goal—to take a deposition that will be favorable to his or her client.

§ 12.6.6 Teach Witness the Importance of Listening

The witness should understand that in order to tell the truth during the deposition, he or she must be sure to listen carefully to the precise question that is asked. Counsel should remind the witness that deposing counsel likely will try to put words in the witness's mouth and then have the witness agree to the statement. Sometimes this is done very effectively by counsel rattling off a number of short, leading questions in quick succession. The witness must not fall into the trap of quickly agreeing to all that was asserted. Ultimately, the witness needs to understand that he or she must answer only the questions asked and only those to which he or she knows the answer.

§ 12.6.7 Role Play to Build Confidence

Once counsel has gone over all the facts and legal concepts of the case and has explained deposition procedure, he or she should do some focused mock deposition questioning of the witness. The overarching goal of deposition preparation is to build the witness's confidence, so counsel should be careful not to overdo it with aggressive questioning that makes the witness feel uncomfortable.

Rather, counsel should test the witness's ability to listen carefully to the question being asked and make sure that the witness is becoming skilled at answering only the question asked and does not fall into the trap of volunteering more information than is necessary to answer the question. Counsel should further ensure that the witness is learning to answer "I don't know" when appropriate.

With some practice, the witness will begin to appreciate how to properly answer questions at the deposition, and he or she will gain more confidence about the process. The more confidence the witness has, the more likely he or she will perform well and answer only the questions asked, and answer them truthfully. This process takes time, but the time is well spent, and in some cases will prove to be the attorney's most important contribution to the case.

§ 12.6.8 Ethical Obligations

Preparing a witness before a deposition is good lawyering, and preparing a witness as to how to truthfully answer questions raises no ethical concerns. However, when preparation approaches the level of coaching the witness as to what to say, attorneys must be mindful of their ethical obligations. Rule 3.4 of the New Hampshire Rules of Professional Conduct prohibits lawyers from counseling or assisting a witness to testify falsely.

In one particularly good article regarding witness preparation, the author commented as follows:

> We should teach our new attorneys the difference between preparation and coaching. Preparation is helping the witness say what she actually wants to say, by providing word choices or assisting with organization or refreshing recollection. Coaching is improperly adding content to the witness's testimony, attempting to make it more useful to one's side. A simple rule of thumb: If the substantive content of the testimony comes from the attorney, it's coaching; if it comes from the witness, its preparation.

D. Malone, "Talking Green, Showing Red—Why Most Deposition Preparation Fails, and What to Do About It," 24 *Litig.* 27 (Summer 1998). Counsel should always have this rule of thumb in mind during witness preparation.

§ 12.7 DEFENDING THE DEPONENT

§ 12.7.1 Make the Witness Feel Secure

During deposition preparation, counsel should have taken steps to relieve the witness's anxiety and to make the witness as confident as possible heading into the deposition. At the deposition itself, counsel should continue doing everything possible to make the witness feel secure. After the witness arrives, counsel should try to be at the witness's side as much as possible before the deposition and during breaks in the deposition.

Before the deposition starts, counsel should remind the witness that he or she should focus on nothing other than listening carefully to the question and telling the truth, and that counsel will take care of everything else. Counsel should also go over the rules governing objections and explain that there may be very few objections during the deposition, but that does not mean that all the testimony will be admissible at trial. Finally, the witness should be reminded that if he or she needs a break as the deposition proceeds, for whatever reason, the witness should alert counsel and counsel will request a break. All of these preliminary instructions will help the witness settle down and feel more secure before the deposition gets started.

§ 12.7.2 Make Sure the Record Accurately Reflects Testimony

During the deposition, it is counsel's job to be vigilant in making sure that the record correctly reflects the witness's answers. Counsel should be sure to clarify the witness's answer if the witness answers with a nod or other gesture, or if he or she gives an inaudible response. When the witness gives an especially significant or helpful answer, it is important to ensure that the record clearly reflects the full content of the answer. When the question posed is confusing, for example, as to a certain time frame, counsel should clear up any confusion to ensure that the substance of the witness's testimony is recorded accurately.

§ 12.7.3 Make Necessary Objections

As discussed above, Super. Ct. R. 26 provides the primary guidance on the scope of permissible testimony during depositions. There are no other rules or statutes that specifically address objections, but Rule 26(j) provides that a deponent

> shall ordinarily be required to answer all questions not subject to privilege or excused by the statute relating to depositions, and it is not grounds for refusal to answer a particular question that the testimony would be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege.

Super. Ct. R. 26(j).

Most depositions in New Hampshire are taken pursuant to the "usual stipulations," whereby all objections, except as to form, are preserved until the time of trial. This means that objections only need to be made when the form of the question is improper and can be remedied at the time of deposition. There is no need, for instance, to make objections when the question asks for information that is irrelevant or calls for hearsay. Counsel should avoid making nonform-type objections, which serve only to prolong the deposition and can confuse and distract the witness.

Common objections to form include the following:

- vague, unintelligible questions;
- leading questions (to nonhostile witness);
- argumentative questions;
- compound questions;
- questions containing an assumption to which the deponent has not yet testified; and
- questions including an inaccurate quote or summary of earlier testimony.

Counsel must remain alert and diligently make objections to form when necessary. Otherwise, counsel may be prohibited from making the objection at trial if another party uses the transcript at trial. Because counsel should avoid "speaking objections," the objections to form should be simply asserted as "objection as to form." If deposing counsel is confused as to the basis of the objection, he or she can then ask for more explanation of the objection. After asserting an objection as to form, the witness is allowed to answer the question asked.

§ 12.7.4 Instructing Witness Not to Answer

Although not common, it is sometimes necessary for attorneys to instruct their clients not to answer a question during a deposition. Generally, witnesses are instructed not to answer when counsel taking a deposition asks for information that is protected by one of the privileges, such as the attorney-client privilege or work product doctrine. Witnesses may also be instructed not to answer a question seeking information that is confidential or trade secret information. It is not, however, grounds to instruct the deponent not to answer simply because the question asks for information that is inadmissible at trial—for example, hearsay or irrelevant information. *See* Super. Ct. R. 26.

Instructing a witness not to answer a question can be a difficult and somewhat risky decision, and counsel should consider several factors before making such an instruction. First, counsel should understand that if a client is allowed to respond to a question asking for potentially privileged information and the client's response contains privileged information, the answer likely constitutes a waiver of the privilege. Additionally, counsel should consider the costs that may be associated with defending a motion to compel or filing a motion for a protective order. If counsel asserts a privilege and instructs a witness not to answer, and a court finds that the assertion of the privilege was unfounded, counsel raising the privilege may have to pay the attorney fees and costs associated with the motion to compel and perhaps the costs associated with redeposing the witness.

Under the Federal Rules of Civil Procedure, defending counsel can move to terminate a deposition when it is being conducted in bad faith. Fed. R. Civ. P. 30(d)(3). One federal magistrate judge has emphasized that if an attorney conducting a deposition is consistently asking improper or annoying questions, the remedy "is not to simply instruct the deponent not to answer, but rather, it also requires suspending the deposition and filing a motion under Rule 30(d)(3)." *McDonough v. Keniston*, 188 F.R.D. 22 (D.N.H. 1998).

§ 12.7.5 Seek Protective Orders When Necessary

When counsel encounters serious problems at a deposition, he or she may seek the assistance of the court through a protective order. New Hampshire Superior Court Rule 29(a) gives courts broad authority to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Super. Ct. R. 29(a).

A party seeking a protective order under Rule 29(a) has the "burden of demonstrating that a private right was endangered by disclosure." *Douglas v. Douglas*, 146 N.H. 205, 207 (2001). When deciding whether to issue a protective order, a

court will balance the interest in protecting persons from the burdens listed in Rule 29(a) against the interest in allowing for broad discovery and promoting a "truth-seeking adversary system." *See Barry v. Home*, 117 N.H. 693, 695–96 (1977). A party is not entitled to a protective order merely because of inconvenience or detriment, however.

Under Rule 29(a), upon motion and for good cause shown, a court may make one or more of the following orders:

- that the discovery not be had;
- that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- that discovery be conducted with no one present except persons designated by the court;
- that a deposition after being sealed be opened only by order of the court;
- that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or
- that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

The categories of possible protective orders outlined in Rule 29(a) are not exhaustive, and motions for protective orders may arise in a variety of other circumstances. If a court denies a motion for protective order, Rule 29(c) permits courts to, "on such terms and conditions as are just, order that any party or person provide or permit discovery."

§ 12.7.6 Questioning Your Own Witness

When deposing counsel concludes questioning, defending counsel must determine whether he or she wants to ask any questions of his or her own witness. In

the majority of depositions, it is not necessary. So long as you expect your witness to be available at trial, you generally should wait until trial to ask questions of your witness.

The reason for waiting is that asking your own witness questions can lead to more harm than good. For one, without proper preparation, your witness may not answer your question well, or worse, may give an unexpected, harmful answer. Furthermore, asking more questions of your witness inevitably leads to follow-up questions by opposing counsel, which in turn may open up additional doors for more topics to explore.

However, there are exceptions. If you are concerned that a favorable witness will not be available for trial, you will want to preserve that witness's testimony. Or if the favorable witness's testimony needs to be clarified and the witness waits until trial to explain or clarify, jurors may not believe the witness's justifications for changing his or her testimony at trial. Perhaps most importantly, if you are concerned that without clarification, deposing counsel has established facts that could successfully form the basis for a summary judgment, you should ask the necessary questions to clarify.

§ 12.7.7 Avoid Improper Tactics

Courts have grown increasingly intolerant of disruptive behavior by counsel defending a deposition, and counsel should avoid disruptive or obnoxious tactics when defending depositions. Such tactics include, but are not limited to, coaching witnesses, excessive or lengthy objections, unsubstantiated objections or instructions not to answer questions, and periodic interruptions of the deposition questioning. Counsel who engage in such tactics may find themselves facing sanctions from a judge and may lose the respect of their fellow New Hampshire attorneys.

While the New Hampshire rules and statutes do not contain any specific limitations on the conduct of attorneys during depositions, the U.S. District Court for the District of New Hampshire has issued several opinions that reflect how attorneys are expected to act when defending depositions in the state.

Because depositions are expected to be conducted similarly to in-court proceedings, objections should be concise and counsel should state only "objection to form" or the fundamental basis of the objection (e.g., "leading," "compound question," etc.) when objecting. This rule is designed to maintain the flow of questioning and to protect against witness coaching through elaborate or suggestive objections. *See United States v. Kattar*, 191 F.R.D. 33, 38 (D.N.H. 1999) ("Frequent and suggestive objections can completely frustrate [the objective of

depositions] and obscure or alter the facts of the case and consequently frustrate the entire civil justice system's attempt to find the truth."). In *McDonough v. Keniston*, the court noted that the 1993 amendments to Fed. R. Civ. P. 30 were "intended to curtail lengthy objections and colloquy which often suggested how deponents should answer." *McDonough v. Keniston*, 188 F.R.D. 22, 24 (D.N.H. 1998). While the court noted that "[s]peaking objections and coaching objections are simply not permitted in depositions in federal cases," *McDonough v. Keniston*, 188 F.R.D. at 24, it is generally understood that this rule applies with equal force in state court cases in New Hampshire.

In *McDonough*, the court also cautioned against instructing witnesses not to answer on grounds other than those provided in the rules. *McDonough v. Keniston*, 188 F.R.D. at 24; *see also United States v. Kattar*, 191 F.R.D. at 38 ("[Counsel] repeatedly counseled the witnesses not to answer questions on grounds not appropriate under Rule 30."). In *Kattar*, the court held that the attorney in question violated Fed. R. Civ. P. 30 because he made argumentative and suggestive objections and interrupted the questioning at unscheduled times by abruptly leaving the room with deponents. *United States v. Kattar*, 191 F.R.D. at 38. In another federal case involving improper deposition practice, the court noted the following examples of impermissible behavior that attorneys should avoid when defending depositions:

- interrupting questioning without objecting first,
- objections or interruptions that were actual statements of more than a few words,
- objections or interruptions that suggested answers to pending questions, and
- excessive amounts of "ill-founded" objections to the form of the question.

Phinney v. Paulshock, 181 F.R.D. 185, 206 (D.N.H. 1998).

In addition to the case law, the *New Hampshire Bar Association Litigation Guidelines* provide a general framework for how depositions should be conducted and defended in New Hampshire. Section 6 of the guidelines contains the recommendations for deposition practice. The guidelines provide that "[p]arties and their counsel are expected to act reasonably, and to cooperate with and be courteous to each other and to deponents at all times during the deposition, and in making and attempting to resolve objections." N.H. Bar Ass'n Litig. Guideline 6.K. The guidelines further admonish counsel defending a deposition to limit objections to those that are well founded and necessary for the protection of a client's interest.

Counsel should bear in mind that most objections are preserved and should be interposed only when the form of a question is defective or privileged information is sought. The guidelines advise against making any objections or statements that might suggest an answer to a witness or that are intended to communicate caution to a witness with respect to a particular question. All counsel defending depositions should review the guidelines, which provide a good summary of appropriate conduct for defending a deposition in New Hampshire.

§ 12.8 POSTDEPOSITION PROCEDURE

Following a deposition, the stenographer prepares a transcript of the testimony and submits it to the deponent and the deponent's attorney for review. Revised Statutes Annotated § 517:7 requires that the witness sign his or her deposition. verifying that it contains the truth, the whole truth, and nothing but the truth, "relative to the cause for which it was taken." Typically, the parties agree to waive this signature requirement as part of the "usual stipulations"; however, it is always recommended that witnesses review the transcripts of their testimony.

Superior Court Rule 26(f) provides that "No deposition, as transcribed, shall be changed or altered, but any alleged errors may be set forth in a separate document attached to the original and copies." Most stenographers provide an "errata sheet" upon which the deponent will note any errors and then subscribe to the truth of the deposition. Counsel taking the deposition must be sure that each of the parties present at the deposition receives a copy of the completed errata sheet.

Although most corrections are made to errors in transcription, some deponents, upon review of the transcript, will note corrections to their substantive deposition testimony. This seemingly is allowed pursuant to Rule 26 allowing for "errors" to be set forth on the errata sheet.

If a deponent makes extensive or substantive changes to key portions of testimony during the deposition, deposing counsel will need to devise a strategy as to how to best deal with these changes. One way is to request further deposition of the witness to inquire into the reasons for the change. Another is to simply use the changes when impeaching the witness at trial. Even though errors are noted on an errata sheet, the original transcript is not changed or altered and it is fair game for counsel to use for impeachment purposes if it makes sense to do so.

Needless to say, counsel should always advise clients to carefully review their deposition transcript and be sure that there were no transcription errors impacting the accuracy of the testimony. Counsel should advise the witness that if during the review of the transcript, the witness realizes his or her testimony was erroneous

in substance, he or she should confer with counsel about the mistake. Counsel should then be sure that the witness properly notes the error on the errata sheet.

§ 12.9 USING DEPOSITION TESTIMONY

Some of the value of taking a deposition exists outside of the transcript. For example, the act of taking the deposition allows counsel to evaluate the witness and opposing counsel, and normally gives counsel some insight into the opposing party's case strategy. By having some of the critical facts disclosed during a deposition, the parties should be able to better assess the value of a case, which should move the parties closer to settlement. Some parties find the adversarial nature of the deposition process so unpleasant that it further induces the motivation to settle before having a similar experience at trial.

Of course, the ultimate product of a deposition is the transcript of the deponent's testimony. The transcript can be useful before trial to support a motion for summary judgment or simply to prepare for trial, and it can further be used at a trial either as substantive evidence or to impeach a witness.

§ 12.9.1 Summary Judgment

Motions for summary judgment in New Hampshire are required to be accompanied by "an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify." Rev. Stat. Ann. § 491:8-a, II. Deposition transcripts can replace the traditional affidavit to support a motion for summary judgment. *Manchenton v. Auto Leasing Corp.*, 135 N.H. 298, 302 (1992) ("[A]lthough the distinctions between a deposition and an affidavit are well defined, it is apparent that testimony given in the form of a deposition may also satisfy the definition of affidavit.").

Indeed, when counsel is able to obtain the requisite admissions from the opposing party at deposition, the deposition testimony is often used to support a motion for summary judgment. The New Hampshire Supreme Court has stated that "there are no definite time limits for filing depositions in support of a motion for summary judgment," and "depositions need not be formally filed . . . with the trial court to be considered on a motion for summary judgment." *Tanguay v. Marston*, 127 N.H. 572, 575 (1986).

§ 12.9.2 Using Deposition Testimony to Prepare for Trial

Deposition transcripts are invaluable in trial preparation, and counsel should be sure to maximize their value during the preparation stage. Reviewing the transcripts of important witnesses will help refresh counsel's memory of the facts and will help counsel work in the facts to the planned theme of the case. Perhaps most importantly, the transcripts are extremely useful for preparing a cross-examination of the deponents when they appear at trial. Knowing a witness's answers to particular questions allows counsel to formulate trial questions effectively.

To get the most out of a deposition transcript, many counsel will have the depositions summarized so important sections can be found quickly at trial. It is often helpful to have transcripts cross-indexed by certain factual topics so counsel can easily summarize what each important witness has to say about each particular topic.

§ 12.9.3 Using Deposition Testimony at Trial

Generally, deposition testimony is used at trial when the deponent is not available to testify at trial or to challenge the testimony of a witness's testimony at trial.

(a) *Deponent Unavailable at Trial*

The New Hampshire Supreme Court views depositions as a "class of secondary evidence," or hearsay, that are "admissible only when the viva voce testimony of the deponent is not available." *Cote v. Sears, Roebuck & Co.*, 86 N.H. 238, 241 (1933). Deposition testimony may be used at trial if the party offering the testimony demonstrates that the witness is considered unavailable to testify under N.H. R. Evid. 804(a). Witnesses are deemed unavailable if they

- are exempted from testifying by some testimonial privilege,
- persist in refusing to testify concerning the subject matter of their statement despite an order of the court to do so,
- testify to a lack of memory of the subject matter of their statement,
- are unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity, or

- are absent from the hearing and the proponent of the witness's statement has been unable to procure their attendance by process or other reasonable means.

N.H. R. Evid. 804(a); *see also Caledonia, Inc. v. Trainor*, 123 N.H. 116, 121–22 (1983) (holding that the master properly admitted the defendant's deposition into evidence after he invoked the privilege against self-incrimination and refused to testify at trial). If the declarant is deemed unavailable, any deposition testimony is not excluded by the hearsay rule if the party against whom the testimony is now offered, or a predecessor in interest, had "an opportunity and similar motive to develop [the testimony] by direct, cross-, or redirect examination." N.H. R. Evid. 804(b)(1)(B). The testimony may come from a deposition taken in the pending case or any other case. N.H. R. Evid. 804(b)(1)(A).

(b) *Challenging Testimony at Trial*

If a witness testifies at trial in a way that contradicts his or her deposition testimony, counsel can use the deposition testimony to impeach the witness and challenge his or her credibility. N.H. R. Evid. 613; *Angelowitz v. Nolet*, 103 N.H. 347, 348 (1961) ("Although it is true ordinarily that this defendant's deposition would not have been admissible since he was in court, it could have been used either to contradict him or to clarify or explain his answers.") (citations omitted). Because the prior inconsistent statement was provided under oath, it can be entered as substantive evidence as well as for impeachment purposes. N.H. R. Evid. 801(d)(1)(A).

In some situations, counsel may not want to impeach the credibility of a witness whose testimony at deposition and trial generally was helpful. But if the witness's testimony at trial contradicts his or her deposition testimony, and the deposition testimony was favorable, counsel may use the deposition testimony to refresh the witness's recollection. N.H. R. Evid. 612. Counsel should do so with the goal of having the witness reaffirm his or her deposition testimony at trial or at least establish that the witness's deposition testimony likely was more reliable because it was closer in time to the actual event testified about.

(c) *Using Deposition Testimony to Support Offer of Proof*

If the court sustains an objection and excludes evidence, counsel often will preserve an issue for appeal by making an offer of proof as to the testimony counsel was planning to introduce into evidence. Counsel may support the offer of proof by using prior deposition testimony. By reviewing the deposition testimony, the appellate court can then assess what the excluded evidence would have been and rule accordingly.

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Ethics and Professionalism Commentary*

Depositions, perhaps more than any other discovery tool, have the potential to present attorneys with challenging ethical and professionalism issues. Some are discussed in § 12.5.5(a) and § 12.5.5(b), above. Additional situations and professional conduct rules are discussed below. At the outset, however, this commentary discusses the professionalism considerations found in the New Hampshire Bar Association's Litigation Guidelines (the Litigation Guidelines).

New Hampshire Bar Association Litigation Guidelines

The Litigation Guidelines adopted by the New Hampshire Bar Association Board of Governors in 1999 and amended in 2016 devote an entire section to the conduct of practitioners who are conducting or defending depositions. While the guidelines are deemed aspirational in nature, the U.S. District Court for the District of New Hampshire has chastised counsel for not comporting their conduct to these standards. *See, e.g., Taal v. Zwirner*, 2003 WL 1191394 (D.N.H. 2003).

Some of the Litigation Guideline provisions are devoted to the general nature, spirit, and attitude of civility with which depositions should be conducted. They provide, inter alia, that depositions "should never be used as a means of harassment or to generate expense"; that "counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment"; that "[c]ounsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems"; that "[c]ounsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer"; and that counsel should not inquire into a deponent's "personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition." N.H. Bar Ass'n Litig. Guidelines 6.A, 6.D, 6.E, 6.F, 6.K.

Other provisions of the Litigation Guidelines are directed at specific situations that may arise in deposition discovery. For instance, "[w]hen a deposition is noticed by another party in the reasonably near future, counsel should not notice another deposition for an earlier date without the agreement of opposing counsel." N.H. Bar Ass'n Litig. Guideline 6.C.

The common problem of witness coaching is addressed in Guidelines 6.H and 6.J, which instruct respectively that "[w]hile a question is pending, counsel

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* Ethics and professionalism commentary for this chapter was provided by Anne E. Trevethick, Esq., for the 2011 Edition and has been updated by MCLE for the 2018 Supplement.

should not through objections or otherwise, coach the deponent or suggest answers"; and that "[c]ounsel shall not make any objections or statements which might suggest an answer to a witness or which are intended to communicate caution to a witness with respect to a particular question."

Limitations on appropriate objections are set forth in Litigation Guidelines 6.G and 6.J, which underscore that most objections are preserved automatically; advise that objections should be limited to those that are "well founded and necessary for the protection of the client's interest"; and caution against "narrative objections," particularly those designed to suggest a desired response.

And on the subject of deposition exhibits (and again witness coaching), Guideline 6.L states as follows:

> Opposing counsel shall provide to the witness' counsel a copy of all documents shown to the witness during the deposition. The copy shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and his or her counsel do not have the right to discuss documents privately before the witness answers questions about them.

Practitioners should have detailed familiarity with the Litigation Guidelines applicable to depositions. They define the standards that most experienced New Hampshire practitioners apply; and they reflect a level of professionalism that—if adopted by all lawyers in a lawsuit—will ensure mutual respect among opponents and the most efficient possible use of this very costly form of discovery.

New Hampshire Rules of Professional Conduct

In addition to the various provisions of Rule 3.4 of the New Hampshire Rules of Professional Conduct that have been discussed in § 12.5.5(b), above, several other rules may be implicated during depositions.

Rule 4.4(a)

Rule 4.4(a) states as follows:

> In representing a client, a lawyer shall not take any action if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, delay or burden a third person.

While the "third person" to whom this rule applies in the context of depositions is often a third-party witness, *see, e.g., Alexander v. Jesuits of Mo. Province*, 175 F.R.D. 556 (D. Kan. 1997) (lawyer's sole purpose in scheduling deposition of nonparty witness at 8 a.m. in city more than sixty miles from her home was harassment), courts have also construed the rule as applying with equal force to party opponents, *see, e.g., Miss. Bar v. Robb*, 684 So. 2d 615 (Miss. 1996) (lawyer for wife attempting to collect overdue maintenance from out-of-state ex-husband lured husband into jurisdiction, purportedly for deposition, and then had him arrested for contempt), and to deponent's counsel, *see In re Williams*, 414 N.W.2d 394 (Minn. 1987) (using anti-Semitic epithets aimed at opposing counsel at deposition).

Rule 3.3

Rule 3.3, which deals with "candor toward the tribunal" and is one of the most important rules applicable to litigators, also applies in the context of depositions. In pertinent part, it states as follows:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (or)
>
> . . . .
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know if its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Even though Rule 3.3 typically applies to courtroom proceedings before a judge or jury, it is not limited to this context. The American Bar Association comments to the rule clarify that an attorney's obligations under Rule 3.3 extend to situations that arise in discovery, and depositions, since they are ancillary proceedings conducted pursuant to the tribunal's adjudicative authority. N.H. R. Prof. C. 3.3 ABA cmt. 1. Thus, for example, paragraph (a)(3) of the rule requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false. N.H. R. Prof. C. 3.3 ABA cmt. 1.

The extension of Rule 3.3 to depositions is logical, since deposition testimony is given under oath and, in some circumstances, is used in lieu of live testimony at trial. And since a client's adversary may rely on the false deposition testimony, the justice process as a whole has the potential to be tainted if false deposition testimony is allowed to stand. *See* ABA Formal Op. No. 93-376 (1993) (determining that Rule 3.3 applies to depositions and noting that reliance on a deposition's content could be "outcome determinative, resulting in an inevitable deception of the other side and subversion of the truthfinding process which the adversary system is designed to implement").

The values of honesty and integrity that are at the core of Rule 3.3 are also reflected in Rule 1.2(d), which prohibits a lawyer from "counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is criminal or fraudulent"; and Rule 4.1(b), which bars a lawyer from "knowingly . . . fail(ing) to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

When false testimony is given in a deposition or during courtroom proceedings, however, the obligations imposed by Rule 3.3 trump even the duty of client confidentiality found in Rule 1.6. *See* N.H. R. Prof. C. 3.3(d) ("The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."). Stated alternatively, if an attorney's client has given false testimony in a deposition, he or she must rectify the fraud even if, as a last resort, this requires disclosure of a client confidence otherwise protected under Rule 1.6.

While counsel's obligations to ensure the integrity of the adjudication process under Rule 3.3 are broad, they are triggered only when the lawyer "knows" that the client's testimony is false. N.H. R. Prof. C. 3.3(a)(3); *see also* N.H. R. Prof. C. 1.0(f) (defining "knows" as "actual knowledge of the fact in question," but also providing that "[a] person's knowledge may be inferred from circumstances"). Where the lawyer is unsure about the falsity of the testimony, he or she should consider all information available in determining his or her obligations

under Rule 3.3. If, after careful consideration, the lawyer does not "know" that the evidence is false, the lawyer must preserve the client's secrets. *See* N.H. R. Prof. C. 1.6(a), 3.3. Given the severity of sanctions typically imposed by disciplinary authorities for violations of Rule 3.3, the potential need to remedy false client deposition testimony can confront a lawyer with one of the hardest decisions under the disciplinary rules.