ITINERARY FOR THE SEPTEMBER 19, 2012 MEETING OF THE GEORGE MASON AMERICAN INNS OF COURT

Program Title: **Top 10 Issues In Depositions**

PROCEEDINGS BEFORE THE HONORABLE JAN L. BRODIE

BEFORE THE DEPOSITION (20 minutes)

1. **Preparing the Deponent.**

2. **Presence of Third Parties At The Deposition.**

3. **Exploring The Deponent's Deposition Preparation.**

DURING THE DEPOSITION (20 minutes)

4. **Making An Unofficial Video.**

5. **Objections And Instructions Not To Answer.**

6. **Talking With The Witness Or Others.**

7. **Errata Sheets.**

30(b)(6) (VA. RULE 4(5)(B)(6)) DEPOSITIONS (20 minutes)

8. **The Notice.**

9. **Preparing The Deponent.**

10. **Taking The Deposition.**

I. BEFORE THE DEPOSITION

1. **Preparing the Deponent.**

2. **Presence of Third Parties At The Deposition.**

3. **Exploring The Deponent's Deposition Preparation.**

Presented by:

Petula Metzler
Mikhael Charnoff
Adrien Pickard

DEPOSITION SKIT #1: PREPARING THE DEPONENT

"A Delicate Dance"

Patty Prevaricator, a professional dancer, is divorcing her husband of ten years, Dudley Doright. Each party alleges that the other committed adultery and both deny these allegations. They have no children. They own a house and two vehicles. They have a joint savings account containing $116K, a joint checking account containing $6K, and credit card debt of $10K. Patty wants the house. The master bedroom closet was custom designed to accommodate her costumes and wig collection. She also wants her car, a red Mustang with the vanity plate, HOTBOD1. Also, of considerable importance to Patty is the ability to keep her stage name, Peaches. Patty, a fan of Tina Turner, has seen *What's Love Got To Do With It* several times so she knows that when Tina divorced Ike all she asked the judge for was the ability to keep her stage name. Despite repeated assurances from her attorneys that this is a non-issue in the case, Patty insists that her career and her brand be protected, just like Tina's. Dudley also wants the house and he insists that there is no way Patty will get to keep a car that he bought. Dudley's attorneys have noticed a deposition of Patty. Patty, who has never been deposed before, meets with her attorneys, Abacus Finch and Donny Cochran, to prepare for her deposition.

GUIDELINES FOR YOUR DEPOSITION[1]

1. **ALWAYS TELL THE TRUTH**

2. **LISTEN TO THE QUESTION.**
   - Do not answer any question unless you hear it completely.
   - If you did not hear the question asked, ask the attorney to repeat it.

3. **UNDERSTAND THE QUESTION BEFORE ANSWERING.**
   - Do not hesitate to ask the other attorney to repeat or rephrase the question until you understand it.

4. **PAUSE AFTER EACH QUESTION.**
   - This gives you an opportunity to think and make an appropriate response.
   - It also permits your attorney to formulate an objection to the question if one is appropriate.

5. **DO NOT GUESS** at any answer.
   - If you do not know the answer to a question, even though you feel you would appear ignorant or evasive saying that you do not know, you should nevertheless do so.

6. **DO NOT VOLUNTEER INFORMATION.**
   - Answer the question that is asked of you and then stop.

7. **BE VERBAL.**
   - Speak loudly enough so everyone can hear you.
   - Do not nod or make gestures; these cannot be recorded by the court reporter.

8. **REMAIN CALM AND POLITE.**
   - Do not lose your temper no matter how hard you are pressed. If you lose your temper, you may be playing into the other side's hands.
   - Do not argue with the other attorney.
   - Give him the information in the same tone of voice and manner that you do in answer to your own attorney's questions.
   - The lawyer has the right to ask questions, and your own attorney will object to any inappropriate questions or actions by the other lawyer.

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[1] Adapted from Leonard M. Roth, *Guidelines For Giving Your Deposition*, at http://corporate.findlaw.com/litigation-disputes/guidelines-for-giving-your-deposition.html (last visited Sept. 14, 2012).

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9. **BE AWARE** of questions involving distances and time.
   - If at any time you estimate distances or time in any of your answers, state that it is an estimate.

10. **NEVER SAY NEVER.**
   - Eliminate adjectives and superlatives such as "never" and "always" from your vocabulary.

11. **MISTAKES.**
   - If at any time during the deposition you realize you have given an erroneous answer or you have misspoken, correct your answer as soon as you recognize your error.
   - Tell either the opposing lawyer that you misspoke, or tell your own attorney at the first available opportunity.

12. **LISTEN.**
   - Do not let the opponent put words in your mouth.
   - If necessary restate or rephrase in your own words the attorney's question.
   - Pay particular attention to introductory clauses preceding the question.
   - Do not accept the other attorney's summary of your testimony unless it is completely accurate.

13. **RELAX.**
   - You are not expected to know by memory all details of what was said when, by whom and where over a long period of time.
   - Do not offer an answer requiring you to consult records not available at the deposition or requiring you to consult your friends and associates for the answer.

14. **DON'T BE EMBARRASSED** about admitting that you have met and consulted with your attorney prior to giving your deposition.
   - If asked what you talked about, simply say your attorney merely instructed you to be truthful and honest.
   - What else you and your attorney discuss is confidential and should not be revealed to the other side.

15. **BEWARE** of questions by the other attorney beginning with words similar to "is that all?"
   - THE OTHER SIDE IS ATTEMPTING TO FREEZE YOUR TESTIMONY.
   - A good answer to such a question would include phrases such as "To the best of my recollection at the present time."

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16. **NO JOKES.**

- Never joke in a deposition.
- Avoid wisecracks and obscenities.
- The humor would not be apparent on the cold transcript and may look crude or untruthful.

17. **DO NOT SPECULATE.**

- Do not try to figure out before you answer whether a truthful answer will help or hinder your case.
- Answer truthfully.
- Your attorney can deal with the truth effectively, but is handicapped when you answer any other way.

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Posted On: **March 13, 2008** by Paul Mark Sandler

Deposition Preparation: Why Depose a Witness

Aren't depositions fun? Hour after hour of barbed questioning can make for a rather treacherous afternoon for the hapless witness. That's not to mention the challenges to his professional integrity, expertise and character he may well have to endure.

No matter how unpleasant a deposition promises to be, a lawyer can take steps to prepare both himself and her witness. Though a deposition hasn't the pomp and circumstance of a trial, an unwary deponent and attorney can lose their case if they fail to ready themselves.

Each deposition considered must be analyzed in terms of purpose. Is this deposition for purposes of summary judgment? Do I want to lock the witness into a particular position? Am I simply seeking to discover what knowledge the witness possesses about important events in the case? You may simply be curious about the substance of what the witness' testimony would be if s/he were to be called to testify at trial. If the witness is an expert, you will want to learn not only the expert's opinion about relevant issues, but also the basis of this opinion, and the qualifications to render it.

Other motivations for deposing a witness include:

• The need to assess a witness' demeanor, character and credibility;
• "Freeze" the testimony. A deponent's testimony under oath is pinned down with certainty, and if she changes her testimony during the trial, her recollection can be refreshed with the deposition transcript, or she can be impeached.
• Perpetuate testimony. If, on the day of trial, a subpoenaed witness fails to appear, counsel can read the deposition to the judge or jury or show a

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video recording. Sometimes counsel will ask an associate to take the witness stand, then read the deposition questions and have the associate read the answers.

• Neutralize a potential harmful witness by eliciting testimony that would compromise his/her eventual trial testimony.

• Obtain information from a friendly witness that supports you client's case. "Officer, it is true that my client was courteous and cooperative at all times?"

Your objective will, or should, predetermine what questions you ask and how you ask them. If you merely want to assess the witness' demeanor, the deposition may be brief and cordial. If you want to neutralize an adverse witness, your line of questioning will likely be aggressive. Keep your motivation in mind when you sit down to prepare.

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RULES OF SUPREME COURT OF VIRGINIA
PART FOUR
PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL

Rule 4:2. Depositions Before Action or Pending Appeal.

(a) *Before Action.*

(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this Commonwealth may file a verified petition in the circuit court in the county or city of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (A) that the petitioner expects to be a party to an action cognizable in a court of this Commonwealth but is presently unable to bring it or cause it to be brought; (B) the subject matter of the expected action and his interest therein; (C) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; (D) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and (E) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 21 days before the date of hearing the notice shall be served either within the Commonwealth in the manner provided for service of a complaint or without the Commonwealth in the manner provided by Code § 8.01-320; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not so served, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a person under a disability, a guardian ad litem shall be appointed to attend on his behalf.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these Rules. The attendance of witnesses may be compelled by subpoena, and the court may make orders of the character provided for by Rules 4:9 and 4:10. For the purpose of applying these Rules to depositions

for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Cost. The cost of such depositions shall be paid by the petitioner, except that the other parties in interest who produce witnesses on their behalf or who make use of witnesses produced by others shall pay their proportionate part of the cost of the transcribed testimony and evidence taken or given on behalf of each of such parties.

(5) Filing. The depositions shall be certified as prescribed in Rule 4:5 and then returned to and filed by the clerk of the court which ordered its taking.

(6) Use of Deposition. If a deposition to perpetuate testimony is taken under these Rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a court of this Commonwealth in accordance with the provisions of Rule 4:1.

(b) *Pending Appeal.* If an appeal has been taken from a judgment of a court of record or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in that court. In such case the party who desires to perpetuate the testimony may make a motion in the court in which the judgment was rendered for leave to take the depositions, upon the same notice and service thereof as if the action was pending therein. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; and (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make orders of the character provided for by Rules 4:9 and 4:10, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these Rules for depositions taken in pending actions.

(c) *Perpetuation of Testimony.* This Rule provides the exclusive procedure to perpetuate testimony.

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Rule 4:3. Persons Before Whom Depositions May Be Taken.

(a) *Within this Commonwealth.* Within this Commonwealth depositions may be taken before any person authorized by law to administer oaths, and if certified by his hand may be received without proof of the signature to such certificate.

(b) *Within the United States.* In any other State of the United States or within any territory or insular possession subject to the dominion of the United States, depositions may be taken before any officer authorized to take depositions in the jurisdiction wherein the witness may be, or before any commissioner appointed by the Governor of this Commonwealth.

(c) *No Commission Necessary.* No commission by the Governor of this Commonwealth shall be necessary to take a deposition whether within or without this Commonwealth.

(d) *In Foreign Countries.* In a foreign state or country depositions shall be taken (1) before any American minister plenipotentiary, charge d'affaires, secretary of embassy or legation, consul general, consul, vice-consul, or commercial agent of the United States in a foreign country, or any other representative of the United States therein, including commissioned officers of the armed services of the United States, or (2) before the mayor, or other magistrate of any city, town or corporation in such country, or any notary therein.

(e) *Certificate When Deposition Taken Outside Commonwealth.* Any person before whom a deposition is taken outside this Commonwealth shall certify the same with his official seal annexed; and, if he have none, the genuineness of his signature shall be authenticated by some officer of the same state or country, under his official seal, except that no seal shall be required of a commissioned officer of the armed services of the United States, but his signature shall be authenticated by the commanding officer of the military installation or ship to which he is assigned.

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Rule 4:4. Stipulations Regarding Discovery.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions and (2) modify the procedures provided by these Rules for other methods of discovery, including discovery of electronically stored information. Stipulations may include agreements with non-party witnesses, consistent with Code § 8.01-420.4. Such stipulations shall be filed with the deposition or other discovery completed pursuant thereto.

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Rule 4:5. Depositions Upon Oral Examination.

(a) *When Depositions May Be Taken.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition before the expiration of the period within which a defendant may file a responsive pleading under Rule 3:8, except that leave is not required (1) if a defendant has served a notice of taking deposition, or (2) if special notice is given as provided in subdivision (b)(2) of this Rule. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(a1) *Taking of Depositions.*

(i) Party Depositions. A deposition of a party, or any witness designated under Rule 4:5(b)(6) to testify on behalf of a party, shall be taken in the county or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court in such suit may, for good cause, designate. Good cause may include the expense or inconvenience of a non-resident party defendant appearing in one of the locations specified in this subsection. The restrictions as to parties set forth in this subdivision (a1)(i) shall not apply where no responsive pleading has been filed or an appearance otherwise made.

(ii) Non-party Witness Depositions. Unless otherwise provided by the law of the jurisdiction where a non-party witness resides, a deposition of a non-party witness shall be taken in the county or city where the non-party witness resides, is employed, or has a principal place of business; at a place upon which the witness and the parties to the litigation agree; or at a place that the court may, for good cause, designate.

(iii) Taking Depositions Outside the State. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or, where applicable, the law of the United States, or (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued upon application and notice and on terms that are just and appropriate. It is not

requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A commission or letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Witnesses may be compelled to appear and testify at depositions taken outside this state by process issued and served in accordance with the law of the jurisdiction where the deposition is taken or, where applicable, the law of the United States. Upon motion, the courts of this State shall issue a commission or letter rogatory requesting the assistance of the courts or authorities of the foreign jurisdiction.

(iv) Uniform Interstate Depositions and Discovery Act. Depositions and related documentary production sought in Virginia pursuant to a subpoena issued under the authority of a foreign jurisdiction shall be subject to the provisions of the Uniform Interstate Depositions and Discovery Act, Virginia Code §§ 8.01-412.8 through 8.01-412.15.

(b) *Notice of Examination: General Requirements; Special Notice; Production of Documents and Things; Deposition of Organization.*

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the Commonwealth, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the period for filing a responsive pleading under Rule 3:8, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) [Deleted.]

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 4:9 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 4:9 shall apply to the request.

(6) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these Rules.

(7) Unless the court orders otherwise, a deposition may be taken by telephone, video conferencing, or teleconferencing. A deposition taken by telephone, video conferencing, or teleconferencing shall be taken before an appropriate officer in the locality where the deponent is present to answer questions propounded to him.

(c) *Examination and Cross-Examination; Record of Examination; Oath; Objections.* Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. If requested by one of the parties, the testimony shall be transcribed.

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Motion to Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county or city where the deposition is being taken may order the officer

conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 4:1(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Submission to Witness; Changes; Signing.* When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 21 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 4:7(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.*

(1) The officer shall prepare an electronic or digitally imaged copy of the deposition transcript, including signatures and any changes as provided in subsection (e) of this Rule, and shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. In a divorce or annulment case, the officer shall then promptly file the electronic or digitally imaged deposition in the office of the clerk, notifying all other parties of such action. In all other cases, the officer shall then lodge the deposition with the attorney for the party who initiated the taking of the deposition, notifying the clerk and all parties of such action. Depositions taken pursuant to this Rule or Rule 4:6 (except depositions taken in divorce and annulment cases) shall not be filed with the clerk until the court so directs, either on its own initiative or upon the request of any party prior to or during the trial. Any such filing shall be made electronically unless otherwise ordered by the judge.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give

each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) *Failure to Attend or to Serve Subpoena; Expenses.*

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

Last amended by Order dated March 1, 2011; effective May 2, 2011.

RULES OF SUPREME COURT OF VIRGINIA
PART FOUR
PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL

Rule 4:6. Depositions Upon Written Questions.

(a) *Serving Questions; Notice.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take the deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 4:5(b)(6).

Within 21 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Officer to Take Responses and Prepare Record.* A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 4:5(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file the electronic or digitally imaged deposition or lodge the deposition with the attorney for the party who initiated the taking of the deposition, attaching thereto the copy of the notice and the questions received.

(c) *Notice of Filing.* When the deposition is filed, the party taking it shall promptly give notice thereof to all other parties.

Last amended by Order dated March 1, 2011; effective May 2, 2011.

RULES OF SUPREME COURT OF VIRGINIA
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Rule 4:6A. Number of Depositions.

There shall be no limit on the number of witnesses whose depositions may be taken by a party except by order of the court for good cause shown.

RULES OF SUPREME COURT OF VIRGINIA
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PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL

Rule 4:7. Use of Depositions in Court Proceedings.

(a) *Use of Depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition taken in a civil action may be used for any purpose in supporting or opposing an equitable claim; provided, however, that such a deposition may be used on an issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E) or a hearing ore tenus only as provided by subdivision (a)(4) of this Rule.

(2) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(3) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose in any action upon a claim arising at law, issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E), or hearing ore tenus upon an equitable claim if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a judge, or is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is a physician, surgeon, dentist, chiropractor, or registered nurse who, in the regular course of his profession, treated or examined any party to the proceeding, or is in any public office or service the duties of which prevent his attending court provided, however, that if the deponent is subject to the jurisdiction of the court, the court may, upon a showing of good cause or sua sponte, order him to attend and to testify ore tenus; or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the

interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(5) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(6) No deposition shall be read in any action against a person under a disability unless it be taken in the presence of the guardian ad litem appointed or attorney serving pursuant to § 8.01-9, or upon questions agreed on by the guardian or attorney before the taking.

(7) In any action, the fact that a deposition has not been offered in evidence prior to an interlocutory decree or order shall not prevent its thereafter being so offered except as to matters ruled upon in such interlocutory decree or order; provided, however, that such deposition may be read as to matters ruled upon in such an interlocutory decree or order if the principles applicable to after-discovered evidence would permit its introduction.

Substitution of parties does not affect the right to use depositions previously taken; and when there are pending in the same court several actions or suits between the same parties, depending upon the same facts, or involving the same matter of controversy, in whole or in part, a deposition taken in one of such actions or suits, upon notice to the same party or parties, may be read in all, so far as it is applicable and relevant to the issue; and, when an action in any court of the United States or of this or any other state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the one action may be used in the other as if originally taken therefor.

(b) *Form of Presentation; Objections to Admissibility.* A party may offer deposition testimony pursuant to this Rule in stenographic or nonstenographic form. Except as otherwise directed by the court, if all or part of a deposition is offered, the offering party shall provide the court with a transcript of the portions so offered in either form or in electronic or digitally imaged form. Except as provided in Rule 1:18 and subject to the provisions of subdivision (d)(3) of this Rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Effect of Taking or Using Depositions.* A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under

subdivision (a)(3) of this Rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Effect of Errors and Irregularities in Depositions.*

(1) As to Notice. – All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. – Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition. –

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 4:6 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. – Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the officer under Rules 4:5 and 4:6 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(e) *Limitation on Use of Depositions.* No motion for summary judgment in any action at law or to strike the evidence shall be sustained when based in whole or in part upon any depositions under Rule 4:5, unless such depositions are received in evidence under Rule 4:7(a)(4) or all parties to the suit or action shall agree that such deposition may be so used.

(f) *Record.* Depositions shall become a part of the record only to the extent that they are offered in evidence.

Last amended by Order dated March 1, 2011; effective May 2, 2011.

RULES OF SUPREME COURT OF VIRGINIA
PART FOUR
PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL

Rule 4:7A. Audio-Visual Depositions.

(a) *When Depositions May Be Taken by Audio-Visual Means.* Any depositions permitted under these Rules may be taken by audio-visual means including, but not limited to, videoconferencing and teleconferencing, as authorized by and when taken in compliance with law.

(b) *Procedure.*

(1) The deposition must begin with an oral or written statement on camera which includes (i) each operator's name and business address or, if applicable, the identity of the video conferencing or teleconferencing proprietor and locations participating in the video conference or teleconference; (ii) the name and business address of the operator's employer; (iii) the date, time and place of the deposition; (iv) the caption of the case; (v) the name of the witness; (vi) the party on whose behalf the deposition is being taken; (vii) with respect to video conferencing or teleconferencing, the identities of persons present at the deposition and the location of each such person; and (viii) any stipulations by the parties; and

(2) In addition, all counsel present on behalf of any party or witness shall identify themselves on camera. The oath for witnesses shall be administered on camera. If the length of a deposition requires the use of more than one recording unit, the end of each unit and the beginning of each succeeding unit shall be announced on camera. At the conclusion of a deposition, a statement shall be made on camera that the deposition is concluded. A statement may be made on camera setting forth any stipulations made by counsel concerning the custody of the audio-visual recording and exhibits or other pertinent matters; and

(3) All objections must be made as in the case of stenographic depositions.

(c) *Editing.* No audio-visual deposition shall be edited except pursuant to a stipulation of the parties or pursuant to order of the court and only as and to the extent directed in such stipulation and/oor order. In any case where the parties stipulate or the court orders the audio-visual recording to be edited prior to its use, the original recording shall not be altered and the editing shall be done on a copy or copies.

(d) *Recording and Transcription.*

(1) Any deposition may be recorded by audio-visual means without a stenographic record. The audio-visual recording is an official record of the deposition. A transcript prepared by a court reporter shall also be deemed an official record of the deposition. Any party may make, at its own expense, a

simultaneous stenographic or audio record of the deposition. Upon request and at his own expense, any party is entitled to an audio or audio-visual copy of the audio-visual recording.

(2) If an appeal is taken in the case, the appellant must cause to be prepared and filed with the clerk a written transcript of that portion of an audio-visual deposition made a part of the record in the trial court to the extent germane to an issue on appeal. The appellee may designate additional portions to be so prepared by the appellant and filed.

(e) *Use.* An audio-visual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used.

(f) *Submission to the Witness; Changes; Signing.* The provisions of Rule 4:5(e) shall not apply to an audio-visual deposition. The other provisions of Rule 4:5 shall be applicable to the extent practicable.

(g) *Filing.* Unless otherwise stipulated by the parties or ordered by the court, the original audio-visual recording of a deposition, any copy edited pursuant to stipulation or an order of the court, and exhibits shall be filed only in accord with Rule 4:5(f)(1).

Can Third Parties Attend Depositions in Virginia?

Parties are permitted to attend depositions in their own cases in both state and federal courts in Virginia. Who else can attend? This may seem like an abstract concern, but what if at your next deposition the opposing attorney mentions that the plaintiff's wife is present and plans to sit through the deposition? Perhaps a consulting expert or even a designated expert is present at the deposition. Or a local reporter has learned of the case and shows up to watch a crucial deposition. You and opposing counsel cannot agree on whether the third party should be excluded or not. What do you do?

As a general proposition, depositions are not ordinarily considered proceedings open to the public. Depositions are usually held in the private law offices of counsel of record, they are scheduled privately in accordance with the calendars of the parties and their lawyers, and notices of deposition generally are not filed publicly.

> [P]retrial depositions and interrogatories are not public components of a civil trial. n19. Such proceedings were not open to the public at common law, Gannett Co. v. DePasquale, 443 U.S. 368, 389 (1979), and, in general, they are conducted in private as a matter of modern practice. See id., at 396 (BURGER, C. J., concurring); Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1 (1983).

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (U.S. 1984). Therefore it would be rather unusual for a newspaper reporter, a nosy neighbor, or an overly interested witness to simply show up at a deposition. In the case of the truly unannounced third party, there would likely be no cause to have sought guidance from the Court prior to deposition. Yet shouldn't it be obvious that all non-parties are excluded?

Virginia practitioners may first think of Code of Virginia §8.01-375, which is the authority for the "rule on witnesses" frequently invoked as trial commences. However, a review of the statute shows that it only applies to a Court trying a civil case. While this rule applies to hearings and trials, it appears to have no express application to a deposition. Moreover, it only applies to witnesses. What about a newspaper reporter or a nosy neighbor?

The next obvious place to look is Supreme Court of Virginia Rule 4:5 "Depositions Upon Oral Examination." But an examination of this lengthy rule also seems silent as to the presence of third parties.

One answer may be found in Rule 30 of the Federal Rules of Civil Procedure, governing depositions. FRCP 30(c)(1) states "The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615." Rule 103 is Rulings on Evidence, and Rule 615 is Excluding Witnesses (the analogue to Code of Virginia §8.01-375). And so the "rule on witnesses" appears to be expressly excluded from automatically applying to the taking of depositions in federal practice. This language was added in the 1993 amendment, and cases before then saw a split of authority. The Advisory Committee helpfully discusses this very issue:

> In addition, the revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

A party can seek a protective order "designating the persons who may be present while the discovery is conducted" under what is currently FRCP 26(c)(1)(E). So the general answer in federal court is that there is no exclusion of third parties without first seeking out a protective order, and showing good cause as you would be required to for any other protective order. There does not appear to be any germane case law from federal district courts in Virginia, nor the Fourth Circuit, but at least a few useful decisions exist elsewhere. The Court in EEOC v. Original Honeybaked Ham Co. of Ga., 2012 U.S. Dist. LEXIS 114206 denied the motion by a corporate defendant and a third party seeking to allow the third party to attend the depositions of allegedly aggrieved individuals:

> Finally, the Court believes that good cause exists to protect the aggrieved individuals from Mr. Jackman's presence at their depositions in this case. As is demonstrated by the deposition transcript attached to the present motion, Ms. Cabrera was "visibly upset" and "extremely distressed" that Mr. Jackman, the person she and the other complainants accuse of sexual harassment in this case, suddenly appeared at her deposition. See Deposition of Wendy Cabrera, April 24, 2012, at 181: 7-18. Considering Mr. Jackman's former managerial role over the aggrieved individuals and the fact that he no longer is employed at the company, the Court can perceive the deponents' feelings of intimidation and embarrassment caused by Mr. Jackman's presence at an otherwise private discovery proceeding.
>
> According to the movants, Mr. Jackman "simply wants to observe, first hand, the questioning of key witnesses regarding issues that may significantly impact [his] reputation and standing in the community." Motion, docket #143 at 2. Further, Defendant contends that "were [Mr. Jackman] allowed to attend future depositions of the Aggrieved Individuals — then [Defendant] would be able to consult with him to better frame its case and to be more efficient at additional depositions in the future." Id. at 4. However, as the Court observed during a telephone call with the parties this morning, there is nothing preventing the sharing of information gleaned from the aggrieved individuals' depositions with Mr. Jackman. The movants fail to persuade the Court to disregard its finding of good cause for exclusion and to permit Mr. Jackman to attend in person.

In another 2012 case arising in Georgia, the Court found that the movant failed to establish good cause to bar a likely witness from attending the deposition of another witness:

> The Court held a telephone conference at the parties' request on May 9, 2012 to address a discovery dispute related to plaintiff's impending deposition (scheduled for tomorrow). Defendant's counsel intends to have defendant's Director of Human Resources attend that deposition. Plaintiff objects to that person's presence and prefers that defendant's CEO attend instead. Defendant's HR director is referenced in the complaint, doc. 1 at ¶ 20, and both parties agree that she may be a witness in the case.
>
> "Witness sequestration 'is not available as a matter of right in pretrial depositions.'" Equal Employment Opportunity Commission v. JBS USA, LLC, 2012 U.S. Dist. LEXIS 37095, 2012 WL 934205 at *2 (D. Colo. March 20, 2012). However, a court may "for good cause" issue an order protecting a party "from annoyance, embarrassment, oppression, or undue burden or expense [by] . . . designating the persons who may be present" during a deposition. Fed. R. Civ. P. 26(c)(1)(E). Here, plaintiff offered two reasons for the exclusion of defendant's HR director from the deposition: (1) the fear that she may shape her own testimony based on facts or information she learns during plaintiff's deposition, and (2) the fear that plaintiff may somehow be intimidated or bullied by the mere presence of this person.
>
> "The decision to issue a protective order rests within the sound discretion of the trial court." JBS USA, LLC, 2012 U.S. Dist. LEXIS 37095, 2012 WL 934205 at *2. After hearing counsel out on this matter, the Court has determined that plaintiff has not made a showing of good cause under Rule 26(c)(1)(E). Accordingly, defendant's Human Resources director may attend plaintiff's deposition.

Usry v. Liberty Reg'l Med. Ctr., 2012 U.S. Dist. LEXIS 65334, 1-2 (S.D. Ga. May 9, 2012).

Other recent federal cases where motions to exclude were denied for failing to show good cause include Morris v. Legend Senior Living, LLC, 2012 U.S. Dist. LEXIS 34238 (W.D. Okla. Mar. 14, 2012) (defendants did not provide any particular or specific demonstration of fact that would lead the Court to find special circumstances present that require sequestration of the witness); Ross v. Latraille, 2011 U.S. Dist. LEXIS 120420 (E.D. Cal. Oct. 17, 2011) (a state prisoner plaintiff pursuing a §1983 civil rights action, and who was to be deposed by videotape, moved for a protective order prohibiting non-parties from being in the same room as him); In re Air Crash at Lexington, 2008 U.S. Dist. LEXIS 3865 (E.D. Ky. Jan. 17, 2008) (plaintiffs argued that the extensive preparation of witnesses suggests that they were preparing their own testimony in conformity with previous depositions, but the Court found that this was speculation and did not warrant a protective order).

Federal cases where motions to exclude were granted appear to have met a fairly high burden. Where a plaintiff was hospitalized from stress and depression connected to his treatment by the very non-parties the defendants sought to bring to deposition, and where their presence would intimidate plaintiff, interfere with the accuracy of his testimony, and negatively affect his health, the Court granted the motion. Monroe v. Sisters of St. Francis Health Servs., 2010 U.S. Dist. LEXIS 124488 (N.D. Ind. Nov. 23, 2010).

The Court in Stone v. City of Grand Junction, 2010 U.S. Dist. LEXIS 122699 (W.D. Tenn. Nov. 4, 2010) found that the movant had satisfied the burden of showing good cause for sequestering non-party witnesses during the depositions:

> (1) In cases such as this one, where the Plaintiff alleges conspiracy among the Defendants, there is good cause for preventing non-party witnesses from attending other depositions, reading other depositions, or otherwise learning the details of other depositions until after the non-party witness has been deposed;
>
> (2) The close relationships between the parties and potential witnesses also supports sequestration in this matter; and
>
> (3) This is a case in which there are not multiple objective witnesses, but witnesses from a small town in which two families are pitted against each other with allegations that law enforcement has taken sides.

The Court in Tolbert-Smith v. Bodman, 253 F.R.D. 2, 4 (D.D.C. 2008) granted a motion to exclude where plaintiff's psychiatrist had testified that plaintiff's "reaction to stress has been catastrophic and included suicidal ideation. Thus the 'clearly defined and serious injury' that will result from this deposition going forward is severe depressive stress possibly resulting in suicide," satisfied the good cause standard.

What is the rule in state court? Supreme Court of Virginia Rule 4:5 "Depositions Upon Oral Examination" is similar to FRCP 30(c)(1) to the extent it states that "Examination and cross-examination of witnesses may proceed as permitted at the trial." Importantly, however, there is no express exclusion of the "rule on witnesses." This would seem to allow the practitioner to make an argument that the interplay of Supreme Court of Virginia Rule 4:5 and Code of Virginia §8.01-375 dictates that, at least with respect to persons who may be witnesses at trial, parties have the right to exclude them from deposition. However, this does not address other third parties, such as consulting experts, or a supportive friend, or an insurance adjuster.

Remarkably, there does not appear to be any published cases illuminating this entire topic from the Supreme Court of Virginia, the Court of Appeals of Virginia, nor any of the Circuit Courts of Virginia. The best option, when possible, is to file a timely motion for a protective order. Where the third party is a likely trial witness, an argument relying on the interplay of the Rule and the Code is promising. When dealing with other third parties, marshal your best evidence to show good cause and refer to persuasive federal authority as instructive.

* *

QUESTIONS:

Q: What if an insurance adjuster shows up at the deposition of the plaintiff in a personal injury case? Plaintiff's counsel objects, and refuses to allow defense counsel to begin deposing plaintiff. Should the insurance adjuster be excluded?

A: Ideally defense counsel would have placed plaintiff's counsel on written notice some time prior to the deposition that the insurance adjuster was planning on attending. If plaintiff's counsel will not consent, he or she at least then had the opportunity to file a motion for a protective order ahead of time, and allow the Court to consider the concerns and make a ruling. The insurance adjuster seems to be a sure bet not to be a witness in the case, and is likely to be an experienced professional who would not interfere with nor distract from the deposition. The Court would likely deny a motion to exclude an insurance adjuster from a deposition. Moreover, in Cavuoto v. Smith, 108 Misc. 2d 221, 222 (N.Y. Sup. Ct. 1981) defendant's counsel in an auto accident case invited two representatives of the insurance carrier to plaintiff's deposition, and the Court denied plaintiff's motion to exclude the representatives, reasoning that the carrier was a real party in interest.

Q: What if a fellow passenger in a car accident case shows up at the deposition of the plaintiff, his friend and neighbor? Defendant's counsel objects, points out that the fellow passenger is a witness who may well testify at trial, and demands exclusion of the witness before deposing plaintiff. Should the witness be excluded?

A: Ideally plaintiff's counsel would have placed defense counsel on written notice prior to the deposition that the fellow passenger was planning on attending, if actually expected. If defense counsel will not consent, he or she at least then had the opportunity to file a motion for a protective order ahead of time, and allow the Court to consider the concerns and make a ruling. The fellow passenger is a likely witness, and would surely be excluded at trial, and deposition should proceed like trial. Defense counsel can further generally argue that failing to exclude this witness from plaintiff's deposition could contaminate the testimony of the fellow passenger, provide an unfair advantage prior to the deposition of the fellow passenger, and even risk interfering with the deposition of the plaintiff.

Q: Plaintiff's counsel notices the deposition of the defendant in a medical malpractice case, and advises defense counsel in writing that a consulting expert for plaintiff will be present. Defendant's counsel objects and demands exclusion of the witness before permitting the defendant to be deposed. Should plaintiff's consulting expert be excluded?

A: A motion could be heard in advance where the request was made in writing in advance. Plaintiff's counsel could argue that the complexity of the case made it important to have the consulting expert present to assist in conducting a useful deposition. Plaintiff's counsel could also argue that any expert who ultimately was designated to testify on behalf of plaintiff would be reading the deposition transcript of the defendant anyway, and that it would not interfere in the normal conduct of the deposition.

How far can you go to explore the witness' preparation?

It is not a matter of dispute that a witness' preparation, alone and without any guidance from counsel, is freely a matter of discovery. There are no privileges which would apply to such preparatory behaviors.

However, a more interesting question arises when a witness is instructed by her counsel to review a discreet set of documents prior to a deposition in preparation for that examination. Under the common law, an adverse party had a right to examine material used to refresh a witness' recollection, but not those documents used to refresh memory prior to testifying. *McGann v. Commonwealth*, 15 Va. App. 448, 451-452, 424 S.E.2d 706 (1992). Therefore, those materials reviewed by a witness prior to her deposition at the direction of her counsel were not discoverable.

Indeed, the Richmond Circuit Court in 1995 explicitly discussed the distinction between the Federal Rule and the Virginia Rule, noting Virginia's persistent reliance on the common law in the absence of any rules of evidence in derogation of that common law. In *Mills v. MCC Behavioral Care, Inc.*, the court stated:

> Identifying documents that a deponent reviewed with counsel in preparation for a deposition is attorney work product. By revealing the identity of particular documents out of the array of all documents pertaining to the case the thought processes of counsel in selecting those documents for use with the witnesses in preparing for the testimony would also be revealed. This would reveal the mental impressions, conclusions and opinions of counsel.

37 Va. Cir. 225, 226 (Va. Cir. Ct. 1995) citing Va. Sup. Ct. R. 4:1(b)(3).

However, on September 12, 2011 (almost a year ago to the day), the Supreme Court of Virginia promulgated new Rules of Evidence. Among those rules adopted by the Supreme Court was Rule 2:613, which substantially mirrors Federal R. of Evidence 612. Federal Rule of Evidence 612 permits parties in Federal proceedings to discover materials used to refresh a witness' recollection (even at the direction of counsel) if that material was used to refresh the witness' recollection (1) while testifying or (2) before testifying. *See James v. Julian, Inc., v. Raytheon Co.*, 93 F.R. D. 138 (D. Del. 1982) (holding in reliance on Federal R. 612, that, where a witness reviews a small selection of documents with a lawyer in preparation for a deposition, the attorney work product is waived with regard to those documents).

Yet, Virginia's Rule 2:613 differs from the Federal Rule in a critical aspect. It does ***not*** include language permitting the discovery or requiring the disclosure of documents used to refresh recollection ***prior*** to testifying. Its only commandment of waiver stems from a witness' use of a document ***while testifying***. Therefore, (as confirmed in Rule 2:102 of the Rules of Evidence), the Rules of Evidence remain consistent with the case law rendered prior to the adoption of the Rules.

Therefore, in Virginia, an examiner is not permitted under the common law to discover what documents a witness has reviewed ***prior*** to the deposition, if that preparation was done at the direction of counsel. This is a departure from Federal practice.

QUESTIONS:

Q: What if a non-party, in consultation with an attorney for one of the parties, is instructed by that attorney to review a discreet set of documents in advance of a deposition? Are these documents discoverable at the deposition?

A: It likely depends on whether the witness is engaged for the limited purpose of the deposition or not. Otherwise, the attorney risks a waiver of the attorney-client and work product privileges by waiver to a non-party under a traditional waiver analysis.

Q: What if a party, on his own, and not at the direction of his counsel, reviews a legal memorandum prepared by his counsel that otherwise constitutes the lawyer's privileged work product prior to the deposition? Is this document discoverable at the deposition?

A: No. The legal memorandum is still cloaked with the work product doctrine protection from disclosure. The client's review of that material, no matter whether she does it on her own or at the behest of her lawyer, prior to the deposition as a means to refresh her recollection, does not serve as a waiver of the privilege.

Comment – this is sort of the flip of the first question. The documents are cloaked with the attorney's work product because it is a legal memo in this example. In other examples, where the lawyer selects a discreet set of "hot docs" from a larger pile, this selection constitutes an act of work product. His act of sharing this work product with his client as a part of deposition prep is protected under the Virginia Rules.

II. DURING THE DEPOSITION

4. Making An Unofficial Video.

5. Objections And Instructions Not To Answer.

6. Talking With The Witness Or Others.

7. Errata Sheets.

Presented by:

Mary Ann Kelly
Heather Bardot
Alyssa DiGiacinto
Raymond Battocchi

Angry Andy has been employed by Hustler, Inc., as Executive Assistant to Larry Flynt, for six months. Mr. Andy's duties include answering calls, keeping Mr. Flynt's calendars and other admin tasks as assigned by Mr. Flynt.

On December 23, Mr. Flynt overhead Mr. Andy on the phone say in an intimate tone, "I am so glad to have you in my life. You are a sweet, sweet man." Mr. Flynt then charged into Mr. Andy's office and, with a hyperfeminized inflection, inquired who he had been speaking with. Mr. Andy responded that he had been speaking with his roommate. Mr. Flynt grinned and inquired what he meant by ***room*mate.** Without waiting for an answer, Mr. Flynt laughed and walked out of Mr. Andy's office with a swagger, holding both wrists up to show Mr. Andy that they had gone limp.

When Mr. Andy arrived at work on December 24, he was shocked to see Mr. Flynt sitting in his chair in Santa Claus outfit which left key parts uncovered. In a very provocative voice, Mr. Flynt asked Mr. Andy if he wanted to sit on Santa's lap. He said that a little time with Santa would surely persuade Angry that Christmas was a holiday worth celebrating, adding that he had even donned *GAY* apparel for the occasion. Mr. Flynt grabbed Mr. Andy's crotch and said: "What's wrong, Angry, don't you have the balls for a little fun?" After Mr. Andy gasped, Mr. Flynt laughed robustly as he watched Mr. Andy flee.

When Mr. Flynt returned from vacation he marched into Mr. Andy's office and locked him in. He told Mr. Andy that he could not stop thinking about him over the holiday break. At that point, Mr. Flynt, quite aroused, rubbed up against Mr. Andy, and asked Mr. Andy and his roommate enjoyed "gaiety" over the holiday. Mr. Andy tried to leave, but Mr. Flynt bent him over the desk and held his arms while rubbing his genitals against Mr. Andy's buttocks. Mr. Andy finally freed himself and again fled.

Mr. Andy brought a sexual harassment case under Title VII with pendant state claims of assault and battery, styled *Angry Andy v. Hustler, Inc.* Hustler's defense is that Mr. Andy is partly lying and partly exaggerating, and that Mr. Flynt was just playing around with Mr. Andy in good fun like men to do with each other.

The deposition of Mr. Andy is scheduled to be taken by defense lawyer, Why-ya Wineen. Her associate is Holly Hardnose. It will be defended by True Believer.

4. MAKING AN UNOFFICIAL VIDEO

The parties, the deponent, and the official court reporter appear at the start of the deposition. Along with her notice of deposition sent out 2 weeks in advance, WW sent out a written notice that she intends to make an informal video of the deposition and will provide a copy of that video to opposing counsel at her expense.

WW and her associate, HH, begin to plug in and set up their camcorder. A heated dispute between the parties then ensues, resulting in a call to the Judge. The parties then call the Judge. Each attorney explains her position, the Judge asks some questions, and then the Judge is prepared to rule:

Before the Judge announces her ruling, invite audience comment on:

A. Is this dispute important enough to justify a call to the Judge?

B. How should the judge rule? Invite audience comments and views.

C. What is the Judge's ruling?

The Court may rule that the informal video will be permitted, for these reasons.

F.R.Civ.P. 30(b)(3) provides (emphasis added):

(3) *Method of Recording.*

> *(A) Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.
>
> *(B) Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

F.R.Civ.P. 30(b)(3)(A) makes explicit that (absent a protective order) a party may notice and take a videotaped deposition before an **official** court reporter. Rule 30(b)(3)(B) provides support for the argument that, with adequate notice and provided that a court

reporter makes an official recording of the deposition, counsel for a party may make an unofficial camcorder recording of the deposition for his or her own use.

Case law supports this proposition. In Maranville v. Utah Valley Univ., 2012 U.S. Dist. LEXIS 59617 (D. Utah Apr. 27, 2012), the Court addressed these Rules and ruled that counsel for a party could make an unofficial video of a deposition, when it was being recorded by an official reporter.

In Hearn v. Wilkins Twp., 2007 U.S. Dist. LEXIS 53911 (W.D. Pa. July 25, 2007), the Court stated that a plaintiff's employee may be permitted to operate recording equipment at a deposition while it is being simultaneously recorded by stenographic means by an officer authorized pursuant to Rule 28, and stated that the non-official recording could be admitted in evidence. See Moore's Federal Practice, 3d ed., § 28.32.

In Pioneer's Drive, LLC v. Nissan Diesel Am., Inc., 262 F.R.D. 552, 554-55 (D. Mont. 2009), the Court ruled that, when the deposition was being taken by an official stenographer, a party's counsel can make an unofficial video of the deposition.

F.R.Civ.P. 28(cd) states that a deposition "must not be taken before any person who is a party's relative, employee, or attorney. . . ." This prohibits an attorney from making an official recording of a deposition. But it does not address whether an attorney may make an unofficial video of a deposition in a federal case. The Court in Pioneer's Drive, in addition to ruling that an attorney could make an unofficial video of a deposition, went on to suggest that, because a videotape is mechanical and involves no interpretation by a human court reporter, a party's counsel might possibly be able to take a video which would be the only official record of the deposition. Id. At 555, n. 3. However, Perales v. Town of Cicero, 2012 U.S. Dist. LEXIS 30426 (N.D. Ill. 2012), ruled that Rule 28(d) means what it says, and that an employee of a law firm representing a party cannot make an official video of a deposition.

D. This case was in federal court. Would a Virginia Court rule the same way?

Probably so. The case for an informal video may be stronger in state court than federal court. Va. Rule 4:7A is addressed exclusively to "Audio Visual Depositions." Rule 4:7A(d)(1) expressly provides that, in addition to official written transcripts or audio-visual recordings:

> "Any party may make, at its own expense, a simultaneous stenographic or audio record of the deposition. Upon request and at his own expense, any party is entitled to an audio or audio-visual copy of the recording."

There is no similar provision in the Federal Rules. One Circuit Court judge has addressed this provision of Rule 4:7A, and held that, separate from the official recording of the deposition, a party's employee may make at its own expense an unofficial videotape of the deposition. Tramel v. Skewes, 2001 Va. Cir. Lexis 143 (Roanoke 2001).

5. **OBJECTIONS AND INSTRUCTIONS NOT TO ANSWER.**
6. **TALKING WITH THE WITNESS OR OTHERS.**

Following the Judge's ruling, the attorneys begin to conduct the deposition in the presence of an official court reporter. Needless to say, numerous contentious disputes arise. The following authorities provide some guidance as to how they may be resolved.

LEGAL AUTHORITIES

Va. Sup. Ct. R. 4:7 pertinently provides:

(3) As to Taking of Deposition. --

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

F.R.Civ.P. 30 pertinently provides:

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

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

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

F.R.Civ.P 32 pertinently provides:

(d) Waiver of Objections.

(3) To the Taking of the Deposition.
(A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.
(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:
(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
(ii) it is not timely made during the deposition.

Ralston Purina Co. v. McFarland, 550 F.2d 967, 973 (4th Cir. N.C. 1977):

The questions put to Wagnon were germane to the subject matter of the pending action and therefore properly within the scope of discovery. They should have been answered and, in any event, the action of plaintiff's counsel in directing the deponent not to answer was "highly improper."

Aetna Cas. & Sur. Co. v. Corroon & Black of Ohio, Inc., 10 Va. Cir. 207, 208 (Va. Cir. Ct. 1987):

Such instructions are proper in order to protect privileged information or trade secrets; otherwise the proper course of action is to state one's objection for the record and allow the question to be answered. See, e.g., Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, U. A., 657 F.2d 890 (7th Cir.

1981); Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977); American Hangar, Inc. v. Basic Line, Inc., 105 F.R.D. 173 (D. Mass. 1985). To the extent that objections are not based on the protection of privileged information or trade secrets, including objections to categories of questions, counsel should refrain from further instructing witnesses not to answer

Cuesta v. Shapiro, 65 Va. Cir. 79, 83 (Fairfax 2004)

It is improper to advise deponent not to answer questions except to preserve a privilege, enforce a court ordered limitation or present a motion pursuant to Rule 30(d)(4). See FED. R. CIV. P. 30(d)(4). The Court also ruled that defendant physician not testifying as his own expert still must answer questions seeking standard of care and expert opinions. The proper procedure is to either adjourn the proceedings to obtain a ruling from the court on the question, or let the witness answer and deal with the objection later.

Kerr Contracting Corp. v. Rector & Visitors of George Mason Univ., 25 Va. Cir. 403 (Fairfax 1991)

Any objection to the question propounded should be stated on the record. The question should be answered at that time unless the question involves privilege, work product, a trade secret, or matters that are the subject of a protective order (See Taking and Defending Depositions).

Estate of Smith, 65 Va. Cir. 267 (Fairfax 2004)

Where the objection is based on the deponent's need for additional time to prepare precise and accurate answers, the defending attorney is not permitted to suspend the inquiry or prohibit the witness from responding (See Taking and Defending Depositions).

Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993)

It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.

In short, depositions are to be limited to what they were and are intended to be:

question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit. When a deposition becomes something other than that because of the strategic interruptions, suggestions, statements, and arguments of counsel, it not only becomes unnecessarily long, but it ceases to serve the purpose of the Federal Rules of Civil Procedure: to find and fix the truth.

Armstrong v. Hussmann Corp., 1995 U.S. Dist. LEXIS 20551, 16-18 (E.D. Mo. 1995)

"IT IS FURTHER ORDERED that the following guidelines for depositions are hereby imposed:

A. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition.

B. All objections, except those which would be waived if not made at the deposition under Federal Rules of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion pursuant to Federal Rules of Civil Procedure 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of the deposition.

C. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court.

D. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsels' statements when making objections should be succinct, stating the basis of the objection and nothing more.

E. Counsel and their witnesses and clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege; [**18] and, any off-the-record conference is a proper subject for inquiry by deposing counsel to ascertain whether it was done in violation of this Order.

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

Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995)

As officers of the court, counsel are expected to conduct themselves in a professional manner during a deposition. A deposition is intended to permit discovery of information in the possession of the deponent or perpetuate the testimony of the deponent. In either case, it is to be conducted in a manner that simulates the dignified and serious atmosphere of the courtroom. Thus, the witness is placed under oath and a court reporter is present. Conduct that is not permissible in the courtroom during the questioning of a witness is ordinarily not permissible at a deposition. Thus, accusations of wrongdoing against witnesses and attorneys have no place in a deposition. Attempts to interrogate opposing counsel during the course of a deposition are improper. Because a judge is not present to rule on legal disputes, arguing legal matters during a deposition serves no purpose. HN2A deposition is not to be used as a device to intimidate a witness or opposing counsel so as to make that person fear the trial as an experience that will be equally unpleasant, thereby motivating him to either dismiss or settle the complaint. Mazzei v. Morton Thiokol, Inc., C-1-88-753 (S.D. Ohio Apr. 21, 1989) (Steinberg, M.J.); Fed. R. Civ. P. 30.

Where irrelevant or repetitious questioning by interrogating counsel occurs, the appropriate course for opposing counsel is to enter an objection. The witness may then answer the question. If the answer is offered at trial, opposing counsel may then renew the objection and the trial judge will rule on it. If authorized by law (for example, where a valid claim of privilege exists), opposing counsel may instruct the witness not to answer the question. Where the objection is to irrelevant or repetitious questions, and interrogating counsel persists in such questioning after objection, opposing counsel's remedy lies in applying to the court for a protective order or sanctions; counsel does not have the right to unilaterally decide such issues by instructing the witness not to answer. Id.

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Ecker v. Wisconsin Central, Ltd., 2008 WL 1777222 (E.D. Wisconsin)

Although counsel for the defendant discussed with the witnesses what he intended to ask them, there is no rule against such conduct which would warrant the sanctions requested. Nor is there any evidence that counsel "coached" the witnesses in the sense that he instructed them how to answer his questions. Concludes that the matter is best handled by allowing ultimate fact-finder to consider the circumstances of the break itself and counsel's conversation with the witnesses in assessing the witnesses' credibility.

In re Asbestos Litigation, 492 A.2d 256, 259-260 (Del. Super. Ct. 1985)

Ordering that counsel could not discuss with the deponent his testimony either during scheduled or unscheduled breaks, and barring such communications until the testimony was finished.

The Court also ruled that if any such conference occurred, counsel could question the deponent about "coaching" which may have occurred.

GMAC BANK v. HTFC CORP, 248 F.R.D. 182 (E.D. Pa. 2008)

Both the client and his counsel were sanctioned for outrageous behavior. Case makes entertaining reading.

7. ERRATA SHEETS

Rule 4:5(e) of the Supreme Court of Virginia allows a deponent to make ***substantive*** changes to his deposition testimony via an errata sheet. Either party may demand that the deponent review his transcript, make any necessary changes, and sign the transcript. The pertinent part of the Rule reads:

> (e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 21 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 4:7(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

In the event that a deponent does not comply with a demand that he read and sign his transcript, a party may invoke Rule 4:7(d)(4) in an effort to limit or preclude the use of the deposition transcript in later proceedings. The Rule states:

> (4) As to Completion and Return of Deposition. - Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the officer under Rules 4:5 and 4:6 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

There are no reported cases in Virginia which address errata sheets. There are, however, many federal court cases in Virginia which discuss proper use of errata sheets and the effect of making substantive changes.

In the case of *E.I. duPont de Nemours & Co. V. Kolon* Indus., 277 F,R,D, 286 (E.D. Va. 2011), errata sheets were the focus of the court's review. The court explained that:

Rule 30(e) (1) sets forth when and how a deponent may alter his deposition testimony. It provides that:

> 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.

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

To effectuate Rule 30's policy of accuracy, courts generally insist on strict adherence to the technical requirements of this provision. *See, e.g., Holland v. Cedar Creek Min., Inc.*, 198 F.R.D. 651, 652-53 (S.D.W. Va. 2001) ("this court, like most courts, will insist on strict adherence to the technical requirements of Rule 30(e)"); see also *EBC, Inc. v. Clark Bldg. Sys.*, 618 F.3d 253, 265 (3d Cir.2010) ("procedural requirements of Rule 30(e) are clear and mandatory").

The first relevant procedural requirement is found in Rule 30(e)(1)(B) which requires the deponent to, "sign a statement listing the changes and reasons for making them." If the deponent does not provide any reasons for a change, then the rule is violated and that procedural defect renders the errata sheet improper. *See E.I. duPont de Nemours & Co. V. Kolon Indus.*, 277 F,R,D, 286 (E.D. Va. 2011), *citing Wyeth v. Lupin Ltd.*, 252 F.R.D. 295, 296 (D. Md. 2008).

But, the mere statement of some reason does not alone satisfy the rule. That is because courts require that each proffered change be accompanied by a specific reason that explains the nature of, and the need to make, the change. *See E.I. duPont de Nemours & Co. V. Kolon Indus.*, 277 F,R,D, 286 (E.D. Va. 2011), *citing Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981) ("after each change, the deponent must state the specific reason for that particular change").

Corrections to previous errata submissions must fall within the allotted thirty day window. A deponent cannot submit a defective errata sheet initially to satisfy the time requirement and then submit a corrected sheet after the thirty day time

limit. *See See E.I. duPont de Nemours & Co. V. Kolon Indus.*, 277 F,R,D, 286, 296 (E.D. Va. 2011), *citing Calloway v. Marvel Entertainment Group*, 110 F.R.D 45, 52 (S.D.N.Y. 1986) ("the delay should be deemed a waiver of the right to object to alleged errors").

It is generally accepted that one purpose of Rule 30(e) is to "permit . . . transcription corrections,"i.e. the reporter recorded the answer: "yes" but [the deponent] actually said "no." That, of course, is a substantive change, and changes of that sort are permitted by the plain text of the rule. The crucial question, however, is whether there are any limits to the types of substantive changes that a deponent may make to a transcript. Courts are divided respecting the leeway to be given to deponents under Rule 30(e) to alter the substance of prior testimony. There is no controlling authority on point in the Fourth Circuit. There are two basic approaches reflected in the cases.

First, there is a line of authority that interprets Rule 30(e) broadly to allow the deponent to make any changes as long as the changes strictly conform to the procedural requirements of the rule. Under this approach, if the procedural requirements of the rule are met, any substantive change will be deemed permissible, even those that create inconsistencies or that directly contradict prior testimony. Under this approach, changes are not limited to transcription errors. However, both versions of the testimony must remain in evidence. Many courts also order that the deposition be reopened to allow further examination about the altered testimony. *See Podell v Citicorp Diners Club*, 112 F.3d 98, 103 (2d Cir. 1997); *Lugtig*, 89 F.R.D. at 641; *see also Foutz v. Town of Vinton, Virginia*, 211 F.R.D. 293, 295 (W.D. Va. 2002) (requiring the amending party to "admit into evidence both the original and correction answers" and to reopen the deposition).

Second, there is a line of authority that interprets Rule 30(e) strictly, allowing only the correction of demonstrated errors made by the court reporter, whether in form or in substance. *See Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 (10th Cir. 2002); *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992). The decision in *Greenway* is noted for this oft cited quotation:

> 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.

Greenway, 144 F.R.D. at 325.

Two district courts in the Fourth Circuit also have concluded that transcriptional or typographical errors are the only types of corrections permitted under Rule 30(e). *See Wyeth v. Lupin Ltd.*, 252 F.R.D. 295, 296-97 (D. Md. 2008); *see also, Lee v. Zom Clarendon, L.P.*,689 F. Supp. 2d 814, 819 (E.D. Va. 2010). This line of authority forecloses substantive changes in what was said at a deposition unless they are shown to be necessary to correct a court reporter's error in reporting what was said.

In Touchcom, Inc. v. Bereskin & Parr, 790 F. Supp. 2d 435, 2011 U.S. Dist. LEXIS 72905 *9 (E.D. Va. July 7, 2011), the court found the proposed changes on an errata sheet, "a bit too convenient." *Id.* The court stated:

> '[T]he purpose of an errata sheet is to correct alleged inaccuracies in what the deponent *said* at his deposition, not to modify what he wishes that he *had said*.' *Crowe v. Marchand*, No. 05-98T, 2006 U.S. Dist. LEXIS 98142, 2006 WL 5230014, *1 (D.R.I. 2006) (emphasis in original). Rule 30(e) (allowing the submission of errata sheets), '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.' *Burns v. Bd. of County Com'rs of Jackson Cnty.*, 330 F.3d 1275, 1282 (10th Cir. 2003) (citations ommited).

Id.

This approach to the use of errata sheets serves to allow the correction of demonstrated court reporter errors while preserving the fundamental concept that a deponent must give honest and complete answers at the deposition. It makes no sense to allow a deponent to change sworn testimony merely because after the deposition he wishes that he had said something other than what was said.

Nor can the errata process permitted by Rule 30(e) be used to allow post-deposition revision of testimony to conform a witness' testimony to enhance a party's case. That too would undermine the purpose for which depositions are allowed under the federal rule.

The purpose of a deposition is to memorialize testimony or to obtain information that can be used at trial or that eliminates the pursuit of issues or that inform decisions as to the future course of the litigation. One of the main purposes of the discovery rules, and the deposition rules in particular, is to elicit the facts before the trial and to memorialize witness testimony before the recollection of

events fade or "it has been altered by . . . helpful suggestions of lawyers." *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993). Those purposes are disserved by allowing deponents to "answer questions [at a deposition] with no thought at all" and later to craft answers that better serve the deponent's cause. Indeed, to allow such conduct makes a mockery of the serious and important role that depositions play in the litigation process.

Moreover, allowing the "make any changes you want" approach would lead to substantial additional litigation expenses by making it necessary to reopen the deposition to explore the altered testimony. And, the approach inevitably will lead to longer trials as counsel pursue the reasons for the changes on cross-examination. The result would be to inject significant confusion and delay into the trial itself. That also would cause trials to be longer and more costly. The rules may not be interpreted to that end. Indeed, Fed. R. Civ. P. 1 directs that the rules are to be "construed and administered to secure the just, speedy and inexpensive determination in every action. ..." Taking the more restrictive approach to applying Rule 30(e) serves that directive.

Errata sheets were also the topic of the court's opinion in *Campbell v. Verizon Virginia, Inc.*, 812 F.Supp. 2d 748 (E.D.Va. 2011). There, the court stated:

> However, the questionable nature of the Plaintiff's newly-formulated testimony vis-a-vis an errata sheet gives the Court pause. There presently exists a split of authority as to how a court should reconcile such conflicting testimony, and disagreement even persists among federal courts sitting in the Court's own state of Virginia. *Compare Touchcom, Inc. v. Bereskin & Parr*, No. 1:07cv114, 790 F. Supp. 2d 435, 2011 U.S. Dist. LEXIS 72905, at *10 (E.D. Va. July 7, 2011) (permitting correction of inaccuracies, but not tactical adjustments) with *Foutz v. Town of Vinton*, 211 F.R.D. 293, 295 (W.D. Va. 2002) (permitting broad substantive changes to deposition testimony).

One series of cases suggests that the scope of changes permitted pursuant to Rule 30(e) is essentially boundless. *See, e.g., Holland v. Cedar Creek Mining, Inc.*, 198 F.R.D. 651, 653 (S.D. W. Va. 2001). Where such an approach is followed, the opposing party may nevertheless impeach a witness with any contradictory statements. *See Usiak v. New York Tank Barge Company, Inc.*, 299 F.2d 808, 810 (2d Cir. 1962) (finding error in the trial court's refusal to permit the use of pre-errata sheet testimony to impeach a witness). That is to say, the conflicting statement is not replaced, and the deponent is instead left with both the original testimony and the errata sheet. The other approach taken by some courts is to simply strike any changes attempting to alter the substance of the deponent's testimony. *See, e.g.,*

Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992) ("[Rule 30(e)] cannot be interpreted to allow one to alter what was said under oath"). Each approach is intended to ensure that the deponent does "not stand in any better case" as a result of his substantive revisions to his own testimony. *Foutz*, 211 F.R.D. at 295 .

Under certain circumstances, the substantive use of an errata sheet to change deposition answers is analogous to a "sham" declaration designed solely to defeat summary judgment, especially where such material is submitted after briefing and oral argument on the related motion. *See Francisco v. Verizon South, Inc.*, 756 F. Supp. 2d 705, 714 (E.D. Va. 2010). "[I]t is well established that a genuine issue of fact is not created where the only issue of fact is to determine which of the two conflicting versions of a party's testimony is correct." *Grace v. Family Dollar Stores, Inc. (In re Family Dollar FLSA Litigation)*, 637 F.3d 508, 512 (4th Cir. 2011). The Court will take no position on the present state of disagreement among the courts on the issue because, as this Court perceives it, neither approach would permit the use of a "sham" errata sheet whose sole apparent purpose is to create a genuine issue of material fact intended to preclude the granting of dispositive relief. Stated another way, pursuant to either rule, the Plaintiff cannot create a genuine issue of material fact where the sole issue is to "determine which of the two conflicting versions . . . is correct."

Finally, when a deponent makes substantive changes to his deposition via an errata sheet, the original answers to the deposition questions may be fully considered by the trier of fact. *See Creech v. Nguyen*, 1998 U.S. App. LEXIS 18306 (4th Cir. Va. Aug. 7, 1998), *citing Podell v. Citicorp Diners Club, Inc.*, 112 F. 3d 98, 103 (2d Cir. 1997).

III. 30(b)(6) (VA. RULE 4(5)(B)(6)) DEPOSITIONS

8. The Notice.

9. Preparing The Deponent.

10. Taking The Deposition.

Presented by:

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III. FRCP 30(b)(6) and Virginia Rule 4:5(b)(6) DEPOSITIONS – CORPORATE DESIGNEES.

In civil litigation cases involving corporations, it can be difficult for an attorney to identify the specific person to depose. In a larger corporation, the information sought may be dispersed among a number of persons. An attorney would traditionally wrangle with numerous deponents in an effort to discover "who knew what" in the case. For an attorney to depose "all" of the persons who may have "any" knowledge related to the case can easily become unmanageable and exceed the federal court's presumptive permitted amount of ten depositions. [1] Such a process can also cause problems for the corporation if it were to be subjected to endless depositions.

In 1970, Federal Rule of Civil Procedure 30(b)(6) was enacted to "reduce the difficulties encountered in determining prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." The rule also intended to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization." [2]

FRCP 30(b)(6) and Va. Rule 4:5(b)(6)[3] provide the mechanism for attorneys to depose a corporation that is a party to the litigation and to have the responses made at depositions bind the corporation at trial.

Under the federal and state rules, a party is allowed to depose the corporation, without knowing which individual has the sought after information. By properly noticing the corporation

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[1] Per FRCP 30(a)(2)(A)(1), leave of the court is required if more than ten depositions are noticed. Virginia rules do not limit the number of depositions; however, this is subject to a general reasonableness standard.

[2] Id.

[3] As Judge Annunziata held in Kerr Contracting Corp. v. Mason University, 25 Va. Circ 403, 1991 WL 835275 (1991), "The purpose of Rule 4:5(b)(6) is to produce testimony by deposition that will bind the corporation. Thus, the designee must have authority to speak on behalf of the corporation in order to meet the requirements of the rule."

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and providing a list of topics, it becomes the corporation's obligation to designate the person to be deposed and have that person's testimony bind the corporation. This prevents or decreases the corporation's ability to "hide" information by secreting the persons with the knowledge. The benefit to the corporation is that they are not subjected to endless and unnecessary depositions of countless employees who the deposing party "thinks" has the sought after information.

Using the rules to depose a corporate designee can be more efficient where information relevant to the litigation may not be limited to a single or a couple of employees. With proper topic designation, the obligation falls upon the corporation to produce as many designees as necessary to respond to the topics designated in the notice. The rules require the corporation to prepare the witness/es so that lack of personal knowledge is not a proper basis for an "I don't know" response. The corporate designee is testifying as to the knowledge of the corporation. This places the onus on the corporation to make the information, e.g., documents, files, interviews of employees, etc., known to the designee.

Another benefit of using corporate designee depositions is that regardless of the number of witnesses deposed in response to the notice, the federal rules count this as one deposition as a whole. Under Virginia Rules this limitation is a non-issue as there is no pre-set limit on the number of times or length of time you can depose a company.

A. The Notice.

1. Preparing the notice.

When preparing a corporate designee deposition notice ensure that it complies with the rules. Minimally, the notice must be directed to the corporation, state a date and time, identify a location, list of topics with reasonable particularity, and served upon all parties to the litigation.

a. Date and Time: Under the federal rules, the taking of depositions is not permitted until after the discovery conference is conducted under FRCP 26(f). Under Virginia Rules does not permit the taking of depositions until after the 21 days for responsive pleadings has passed.[4]

b. Deposition Location: Although the federal rules presume that the depositions will take place at the deponent's principal place of business, it is not uncommon for the

[4] Leave of court is not required (1) if a defendant has served a notice of taking depositions, or (2) if special notice is given as provided in subsection (b)(2) of Rule 4:5.

court to direct that they be held within the jurisdiction where the action is pending. However, under Va. Rule 4:5, party depositions "shall" be taken in the county where the suit is pending, in an adjacent county, at a mutually agreed upon location, or as the court dictates. For non-parties, the depositions are to be taken at the location where the organization is situated.

c. List of Topics: The rule requires that the notice state the topics on which the witness will be deposed be listed with "reasonable particularity." The rule requires that the deponent be on sufficient notice of what discoverable matters will be examined. Without "reasonable particularity", the corporation may have a legitimate basis for objecting to the notice. Proper notice of topics provides the corporation with an idea on the subjects to be examined and permits the corporation to meet its obligation of producing the witness/es who can speak on the topics identified. The list of topics must be formally designated in the Notice. The deposing party may not rely on informal exchanges, i.e., conversations or letters, between counsel.[5]

d. Notice of Depositions to all parties: Notice to all of the parties is required so that they can attend and examine the deponent. Also, a deposition cannot be used against a party, e.g., in co- or multi-defendant cases, who was not present, represented, or given reasonable notice of the deposition. This has been upheld in cases even where the adverse party had *actual notice* of the deposition.

2. Responding to the notice.

When served with a corporate designee notice, counsel needs to review the notice for compliance with the rule. If there are defects in the notice, i.e., it designates a specific person to be deposed, fails to identify the topics for deposition with "reasonable particularity", fails to state a time and permissible place, counsel must file written objections to the notice and move for a protective order or motion to quash the notice, or the court may deem the objections waived.

Upon proper identification of the topics, the corporation can designate anyone who "consents" to testify on behalf of the corporation. Said individual can be an officer, director, current or past employee, or even an unrelated person hired to serve as a corporate designee witness.

[5] Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135 (S.D.N.Y. 1997)

Regardless of whom the corporation designates, it is the responsibility of the corporation to prepare the witness on the noticed topics. Said preparation may include giving the designee access to documents, interviews, and information that he did not previously have knowledge of or access to prior to the designation. Unlike corporate designee depositions, an individual does not have the same obligation as the corporation to "learn or discover" the information requested. An individual can answer "I don't know" as to his personal knowledge; however, a corporate designee can't answer "I don't know" solely based on his lack of personal knowledge. The corporation's knowledge (actual or reasonably available to the corporation) is imputed to the corporate designee. If the designee answers "I don't know," the corporation may be prohibited from introducing contradicting evidence at trial. When a witness is designated as the corporate designee and is unprepared to speak on behalf of the corporation on the listed topics, the deposing counsel may demand additional designees and/or move for sanctions, e.g., costs related to the deposition, ruling limiting the corporation from introducing evidence not provided in the depositions.[6]

Corporate counsel has to decide whether to designate one or more witnesses for the deposition. In federal court, for each witness designated by the corporation, the deposing party can use one seven-hour day. Thus, using one witness who can address all of the noticed topics can be an effective tool for the corporation to limit the extent of the questioning.

B. Preparing the deponent.

1. What must you do?

FRCP 30(b)(6) and Va. Rule 4:5(b)(6) require the corporation to prepare a witness on the noticed topics by collecting all of the information that is known or reasonably available to the corporation. As corporate designee testimony is intended to bind the corporation, counsel should dedicate ample time to review with the witness the designated deposition topics, review the relevant documents, and provide information on the corporation's positions, beliefs and perception of the facts of the case. Failure to properly prepare a witness who can answer questions to the noticed topics may result in sanctions.

[6] Under Va. Rule 4:12, producing an unprepared witness is tantamount to a failure to appear and may be sanctionable.

2. What should you also do?

In addition to preparing the 30(b)(6) witness on the noticed topics, counsel should anticipate questions that exceed the scope of the notice. Counsel should advise the witness that if a question falls outside the scope, and the witness does not know the answer, the witness can answer "I don't know." Counsel should be prepared to state on the record the objection that such questioning is outside the scope AND the response is not binding on the corporation. If the witness answers questions that are beyond the scope of the noticed topics, counsel should state his objections on the record and make clear that the responses are those of the individual witness and not that of the corporation. [7] Counsel should not direct the witness to not answer the question. It is permissible for deposing counsel to ask questions as broadly as any other deponent even in a 30(b)(6) deposition. [8]

The use of mock depositions is a tool that will guide counsel on defending the deposition. It permits the attorney to see the demeanor of the witness, his ability to withstand the examination, his ability to answer in line with interests of the corporation, and his ability to distinguish his responses from the individual and that of the corporation.

See **ATTORNEY POINTERS FOR A CLIENT'S DEPOSITION** and **PREPARING FOR THE DEPOSITION--TIPS FOR WITNESSES** handouts for general preparation pointers.

C. Taking the deposition – – setting realistic goals and achieving them.

The use of corporate designee depositions can be done at the beginning of the discovery period to "discover" information that can be used to prepare written discovery requests, identify witnesses, identify relevant documents, and to learn about the company's policies and procedures. Using these depositions early in the litigation can be supplemented by using them later in the litigation to lock in the corporation's testimony, obtain information that was unknown earlier in the process and to obtain additional documentation.

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[7] A witness' response to questions beyond the scope of 30(b)(6) topics will be treated as the witness' individual answers and not bind the corporation. Flachenberg v. New York State Department of Education, 567 F. Supp. 2d 513, 521 (S.D. N.Y. 2008

[8] King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1996)

Corporate Designee Depositions vs. Individual Depositions

Topic	Corporate Designee	Individual
Identity of Deponent	The notice cannot identify the specific person.	Individual must be named.
Topics of Deposition	Must be identified with reasonable particularity in Notice of Deposition.	Not included in Notice of Deposition.
Scope of Deposition	To bind the corporation it is limited to the topics identified in the notice.	Personal knowledge about information related to the pending action.
Obligation to Respond	Corporation must provide a witness with knowledge of the listed topics. Obligation to educate the witness on listed topics to the degree that they can testify as to matters known or reasonably available to the corporation.	Individual may testify about personal knowledge and is not required to look for information or educate themselves about any potential topic.
Number of Witnesses	Corporate Designee Deposition can consist of several deponents, yet it is considered one deposition under the Federal Rules.	One witness.

ATTORNEY POINTERS FOR A CLIENT'S DEPOSITION

(adopted from the Civil Discovery in Virginia, 3rd Edition – Virginia Lawyers Practice Handbook)

1. *Prepare your client in advance, and more than once.* Do not save your client's preparation for the day of the deposition.

a) *Notify.* When a deposition date is set, notify your client in writing of the date, time, and place of the deposition. Include with your letter a copy of your client's *Answers to Interrogatories*, and any other document the client has attested to under oath. Ask your client to review the documents. Set up an appointment with your client as soon as practicable (in the event more than one preparation/review meeting is needed).

b) *Remind.* When you receive the Notice of Deposition, send it to your client with a reminder to review the enclosures from the prior correspondence. Ask your client to contact your office to schedule at least one in-person appointment with you – the last one should not be more than two weeks before the deposition date. Highlight in your correspondence any documents that the Notice requests your client to bring to the deposition.

2. *Explain the basic mechanics of a deposition.* For a witness to provide the most effective testimony and to remain alert at a deposition, the lawyer must allay fears and provide the witness a level of comfort that is independent of the pending case. Well in advance of the deposition, the lawyer should provide the client with the following information:

a) Where the deposition will be held;

b) Anticipated length of testimony and the order of witnesses;

c) The names, roles, and anticipated demeanor of the lawyers who will be present;

d) The role of the court reporter and the type of equipment the reporter will use. It is surprising how many deponents focus on these mundane features to the detriment of their testimony;

e) The role and level of intrusiveness of a video camera, if applicable;

f) If an insurance/corporate representative is expected to be present, who will be there and why;

g) What the deponent should do if the opponent is expected to attend the deposition. Many times, the presence of one's opponent causes anxiety, anger, or fear. Present your

client a strategy for handling the situation, including procurement of the most favorable seating arrangements;

h) The nature and extent of a lawyer's right to make objections, what an objection means, the client's right to take a break, and, if necessary, the right to seek court intervention in a difficult deposition or to terminate it and seek a protective order under Rule 4:1(c) or 4:5(d). The client's understanding that the lawyer retains a degree of control over the mechanics of the deposition helps to instill confidence and comfort;

i) The deponent's right to read, make written modifications to, and sign the deposition or to waive reading and signature; and

j) The cost of obtaining a copy of the deposition.

3. *Explain the general purposes of a deposition.* At every meeting or discussion with the client regarding the deposition, it is important to stress its nature and role.

a) The deposition is a proceeding under oath. It is essential to tell the truth.

b) The deposition is used by the opponent as a discovery tool, a theory testing tool, and a personality evaluation. It is the opponent's primary opportunity to limit your claims, create certainty, and lock in essential facts.

c) The transcript may be used at the trial to impeach the witness or to attack or mitigate the witness's testimony.

d) The transcript is used by opposing counsel as a guide for trial questioning, but *you* also may use it to predict how the opponent will present his or her case to the trier of fact.

e) The settlement value of a case is often increased or decreased on the basis of a witness's knowledge, credibility, and performance at a deposition.

4. *Explain the binding effect of the testimony.* The client should be informed that when he or she admits to the truth of certain statements of fact in a deposition, the admission cannot be disavowed later at trial.

5. *Review the "Tips for Witnesses" (Appendix 5-3) and any documents prepared under oath.* Remind your client that his or her appearance, performance, credibility, honesty, and knowledge have a direct impact on the case. Use the preparation time to:

a) Allay fears;

b) Reduce nervousness;

c) Teach a verbose client to listen to questions; or

d) Teach a reluctant or shy witness to articulate his or her claims or defenses.

6. *Select other review materials carefully.* Consider carefully what documents you ask your client to review in preparation for the deposition. Opposing counsel may ask what materials were reviewed, which in turn may yield more information or provide more avenues for questioning than you intended. Reviewing certain documents may also waive a privilege attached to those documents. Consider whether your purposes can be equally well served by simply allowing your client to review the documents at the deposition itself.

7. *Explain the opponent's theory of the case.* Educate your client on the opponent's theory, claims, and defense of the case. Providing an alternative analytical framework to a case or an understanding of the case's larger context can help your client to see the facts in a fresh and constructive manner and may help to avoid pitfalls. However, do not over-emphasize the opponent's theory or rehearse the Q&A to the point where your client's testimony loses its freshness and its own point of view. Memorized or facile answers can damage your case and undermine the witness's credibility.

8. *Prepare your client for uncomfortable questions.* Discuss with your client anticipated areas of questioning even if they are uncomfortable or seemingly irrelevant. Use the preparation phase to help your client face the tough questions so that he or she is not surprised by them at the deposition. For example, if your client had an accident or an adulterous affair 20 years ago--no matter how irrelevant you think it may be to the case--discuss it with your client so that he or she will be prepared to address it if the matter arises at the deposition.

9. *Encourage courtesy.* Remind your client, and yourself, to be courteous at all times throughout the deposition.

10. *Review crucial areas of testimony.* Prepare yourself for the last pre-deposition meeting with your client by reviewing the jury instructions and statutes applicable to your case. This will help you to discuss with your client specific questions, elements, or areas of questioning that the opposing counsel will need to ask in order to prove or defend the opponent's case. Take the opportunity afforded by preparing for the deposition to know your case better than you expect your opponent to know it.

11. *Review any problematic or weak areas of the case.* Preparing for the deposition with your client provides a good opportunity to evaluate, and perhaps jettison, claims that detract from or devalue your case. A pre-deposition review of claims also can help to develop a stronger case by uncovering further corroborating evidence of a claim.

12. *Meet with your client on the day of the deposition.* Arrive early and set aside 30 minutes to talk with your client--not to further prepare the client but to help reduce anxiety and discuss any last-minute developments.

PREPARING FOR THE DEPOSITION--TIPS FOR WITNESSES

(adopted from the Civil Discovery in Virginia, 3rd Edition – Virginia Lawyers Practice Handbook)

1. **Tell the truth.** Not just because it is the right thing to do, but also because it's the smart thing to do.

2. **Don't be too nervous, but don't be too relaxed.** A little anxiety is to be expected and is probably a good sign that your adrenaline is flowing and keeping you alert. There is no need, however, to be overly nervous. You are simply answering questions concerning your knowledge and information about the matter in dispute. At the same time, do not get too relaxed. A deposition has the appearance of a normal conversation, but it is *not*. It is a formal procedure with potentially serious consequences.

3. **Think before you speak.** Make sure the questioner has finished the question and pause briefly before answering. This allows counsel to formulate objections and further allows you to reflect on what your answer will be.

4. **Answer the question.** The examiner is entitled to an answer to the question asked and only to that question.

5. **Do not volunteer information.** Hear the questions. Understand the question. And, answer the question. You are not there to educate the examiner. If the examiner appears totally confused about your business and its technical aspects, resist the urge to educate the examiner.

6. **Do not answer a question you do not understand.**

7. **Talk in complete sentences.** Beware of questions with double negatives.

8. **Do not guess.** If you do not know or cannot recall something, say so. There is nothing wrong with a truthful statement that you do not know or do not remember. You may be asked if a statement or document refreshes your recollection. If it does, say so. If it does not, the answer remains that you do not remember. Do not underestimate the "powers" of defense counsel through subpoenas, interviews, and surveillance to corroborate or impeach your testimony.

9. **Do not be put in a position contrary to your true recollection.** If you are asked when something occurred and you remember that it occurred, for example, on January 15, state "on January 15." If you cannot recall the exact date, state the approximate date.

10. Do not be defensive. Answer the questions directly and forthrightly. Resist the temptation to explain or justify answers.

11. If you are finished with an answer and the answer is complete and truthful, remain quiet and do not expand upon it. If the examiner asks you if that is all you recollect, say yes if that is the case. Do not feel the need to fill silences.

12. Never characterize your own testimony. Do not use "in all candor," "honestly," "I am doing the best I can," or similar phrases.

13. Avoid adjectives and superlatives. "I never" or "I always" can have a way of coming back to haunt you. The only exception to that rule is with time lapse estimates. If you do not know precisely how long something took to occur, do not guess but state "very short," "very long," etc.

14. Do not testify as to what other people know unless you are asked specifically for such a statement.

15. Numerous documents are typically marked as exhibits at deposition. Before testifying about a document, read it. Do not make any comments whatsoever about the document except to answer a question.

16. If the requested information is in a document which is an exhibit, ask to see the document. Do not always assume that if it's written down that it is true, accurate, or demonstrates that your recollection is incorrect.

17. If the information is in a document that is not an exhibit to the deposition, answer the question if you can recall the answer. Do not tip off the examiner as to the existence of documents he or she does not know about.

18. Do not let the examiner put words in your mouth. Do not accept the examiner's characterization of time, distances, personalities, events, and the like. Rephrase the question into a sentence of your own using your own words. Do not always assume that if it's written down that it is true, accurate, or demonstrates that your recollection is incorrect.

19. Pay particular attention to the introductory clauses preceding the guts of the question. Leading questions are often preceded by statements that are either half true or contain facts that you do not know to be true. Do not have the examiner put you in the position of adopting these half truths, unknown facts, or his or her "spin" on the facts. Be aware that if you adopt those characterizations, he or she will then base further questioning on them.

20. **If you are interrupted, let the lawyer finish the interruption and then firmly but courteously state that you were interrupted and that you had not yet finished your answer to the previous question, and then answer that question.**

21. **If you are caught in an inconsistency, do not collapse.** What will happen next will depend upon what questions are asked of you. State, if asked, your present recollection. State the reason for the inconsistency only if you are asked. Your counsel will be responsible for rehabilitation either when it is your counsel's turn to ask questions or at trial.

22. **Do not expect to testify without the other side "scoring some points."** If the other side appears to be asking some questions which call for answers that do not help your case, accept the fact that every lawsuit has two sides. Avoid the temptation to guess or expand on your answer where expansion is not called for or to be equivocal in your response.

23. **Every witness makes mistakes at a deposition.** Do not become upset if you find you have made one. If you realize you have made a mistake, correct it as soon as it is realized.

24. **Never express anger or argue with the examiner.** If a deposition becomes unpleasant, your counsel will deal with the situation. Do not allow the other attorney to learn how to "press your buttons," because it can come back to haunt you at trial. As difficult as it may be, try to keep the emotion, anger, and frustration out of your testimony.

25. **Avoid any attempt at levity or sarcasm as those nuances are not captured in the depositions and can be interpreted to be literal.**

26. **Avoid even the mildest obscenity and absolutely avoid any ethnic slurs or references that could be considered as derogatory.**

27. **There is no such thing as "off the record."** If you have a conversation with anybody in the deposition room, be prepared for questions about the conversation.

28. **If you are hit with a flash of insight or recollection while testifying that has not been previously discussed with your counsel, keep the matter to yourself, if possible, until you have had an opportunity to go over it with counsel.**

29. **Dress and act conservatively at the deposition.** In this instance, first impressions are important impressions.

30. **Keep your counsel informed.** Please remember that it is easier to stay out of trouble than to stop trouble once it has begun. Please keep your counsel informed and please disclose to your counsel anything that may have any impact on the case. Your counsel cannot minimize their impact if the facts and opinions that may be recorded in those records are unknown to your counsel.

Inns of Court Skit

Summary of Skit

The skit will comprise of two short vignettes discussing the various aspects of corporate designee depositions. During and after each segment the presenter will question the audience on the proper course of action. The audience will be requested with a show of hands to advise the group on how they proceed. A brief discussion by the presenters will follow the questions.

Text of Skit

Background

Jr. Attorney and Lead Attorney represent Corporation ABC and several related individual defendants in litigation brought by the Plaintiff in the local circuit court. The initial dispositive motions have been resolved and the parties are engaged in the discovery process.

First Scenario (Notice Issues)

Jr. Attorney: We received an interesting notice of deposition from counsel for the plaintiff today.

Lead Attorney: Why is it interesting?

Jr.: Plaintiff seeks to depose Joe Smith as the corporate designee of our client, ABC Corporation. The notice requires testimony on several topics that he has little knowledge of. It gets worse, it lists numerous topics that have nothing to do with our litigation and they are extremely expansive in scope.

Lead: Although Joe is most knowledgeable on these topics, we don't want Joe to testify because he will make a terrible witness. Can we prevent Joe from being deposed? How do you propose we respond to the notice?

Jr.: We could appear with our own witness, Betty who is a much better witness. We will take up the issue with Plaintiff's counsel at the deposition. Betty is knowledgeable about some of these topics and can do well in a deposition.

Lead: What about the topics she is not knowledgeable about, particularly the overbroad and unrelated topics?

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Jr.: Betty is really sharp and can fend for her own. If she doesn't know the answers we can object to these categories at the time of the deposition. If pressed she can say "I don't know."

Lead: Instead of using Betty, can't we just hire someone to serve as the corporate designee?

Jr.: No, we can't. Betty is our best option.

Lead: But Betty only has information about the facts surrounding most of these topics, is it a problem that she cannot provide any opinions on behalf of the corporation?

Jr.: It should not be a problem.

Discussion Points:

Can Depo Notice require a specific person to appear?

(No)

Does the Corporation have to produce the most knowledge person?

(No – but required to produce an individual or individuals who have knowledge known to or reasonably available to the corporation)

Are you required to object to the topics in writing beforehand?

(Most preferred response is yes. To ensure preservation of the objections and to avoid sanctions for producing a witness who is deemed unprepared.)

Federal Court – Case law says yes. Moore's Federal Practice suggests that the onus is on the moving party to file for protective order

State Court – Recommends you do so the same after attempting to resolve issues with opposing counsel.

Potential to waive objections if not done in writing.

Can you prevent depositions of other employees or agents of the corporation by producing a corporate designee?

No.

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Can the Plaintiff still depose Joe?

(Yes. Joe can still be deposed even if his testimony would have been covered in the topics listed in the deposition notice.)

Can you hire someone to serve as your designee?

(yes – but consider the downsides/ costs / credibility issues.)

Is it necessary for a corporate designee to possess information regarding a corporation's opinions or beliefs?

(Yes – Case QBE Insurance v. Jorda Enterprises. Must provide a person who has knowledge of Corporation's position, beliefs and opinions, as well as interpretation of documents and events.

Second Scenario (Issues at Deposition)

(Parties have resolved their differences regarding the topics, etc. and they are now proceeding with the deposition)

Lead: We are ready to proceed with the deposition, we have brought with us our 15 witnesses to testify today.

Opposing Counsel: Well, given that information I anticipate that the depositions will take several days to finish.

Lead: The witnesses are available today and today only.

Discussion Points:

How long can the deposition last? What happens at the end of Day One?

State Court – No limits. But Defendant should have taken measures beforehand and now exposes Corporation ABC to a motion to compel if deposition is not completed.

Federal Court 7 Hrs. per witness – If you designate more than one person, Deposing attorney can spend 7 hrs with each witness.

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(Later on in the deposition)

Opposing: Can you tell me if ABC Corporation has a policy on document retention?

Witness: We retain files.

Opposing: Pursuant to a policy?

Witness: I don't know if we have a policy, but we retain them.

Discussion Points:

Is "I don't know" an acceptable answer at a corporate designee deposition?

(probably not – Obligation to educate witnesses on the listed topics. If the Corporation does not have an answer, then perhaps it is an acceptable response.)

The deposition notice lists the document production as part a topic for discussion, does not list document retention. Does ABC Corporation have to provide a witness on document production?

Probably not. Both rules require the notice to state with "reasonable particularity the matters for examination."