Deposition Protocol for Federal Court

UNITED STATES DISTRICT COURT

DISTRICT OF _____

Case No.: _____

[PLAINTIFFS],

v.

[DEFENDANTS].

A. MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DEPOSITION PROTOCOL

FACTS

[INSERT FACTS OF CASE]

B. PROCEDURAL POSTURE

[INSERT PROCEDURAL POSTURE]

All phases of a civil deposition are subject to court control. The court has discretion to issue orders designed to prevent abusive tactics during depositions. To prevent any misunderstanding between counsel, to avoid potentially unnecessary motions before this Court, and to protect the testimony in this case, Plaintiff respectfully moves the Court, pursuant to the equitable powers of the Court and Fed.R.Civ.P.30(d)(1) and 37 for an order establishing the protocol to govern all depositions in this litigation.

C. DEPOSITION PROTOCOL

(1) Depositions shall be conducted in compliance with the Federal Rules of Civil Procedure.

(2) During all depositions, Counsel shall adhere strictly to Rules 30(d)(1) and (3). No objections may be made, except those which would be waived if not made under Fed.R.Civ.P. 32(d)(3)(B) (errors and irregularities) and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a Fed.R.Civ.P. 30(d) motion (to terminate bad-faith deposition). Objections to form shall be stated, "objection as to form." Any further explanation is inappropriate and prohibited. There shall be no speaking objections. An objection made by one party preserves the objection for all other parties.

(3) Neither a deponent nor counsel for a deponent may interrupt a deposition when a question is pending or a document is being reviewed except as permitted in Rule 30(d)(1).

(4) A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3) [of Rule 30(d)]. Whenever counsel instructs a witness not to answer a question, he or she shall state on the record the specific reason for such an instruction, the specific question, part of a question, or manner of asking the question, upon which counsel is basing the instruction to answer the question.

(5) Any depositions may be videotaped, in addition to being recorded stenographically.

D. OBSTRUCTIVE DEPOSITION TACTICS ARE PROHIBITED

In the landmark case of *Hall v. Clifton Precision,*[1] the court evaluated and listed what was to be considered appropriate deposition conduct. The court explained:

> The purpose of a deposition is to find out what a witness saw, heard or did—what the witness thinks. A deposition is meant to be a question and answer conversation between the deposing

[1] *Hall v. Clifton Precision,* 150 F.R.D.

> lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness formulate the answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness.

The Court went on to explain that:

> . . . 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 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.[2]

[2] *Hall,* 150 F.R.D. at 527.

The "Hall Standards" have been recognized by courts throughout the country.[3]

In sum, they provide:

(1) A witness may only seek clarification, definition, or explanation of words, questions, or documents from deposing counsel, not from counsel for the witness.

(2) No objections may be made, except those which would be waived if not made under Fed.R.Civ.P. 32(d)(3)(B) (errors and irregularities) and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a Fed.R.Civ.P. 30(d) motion (to terminate bad-faith deposition);

(3) The only permissible instructions not to answer a question are to preserve a privilege; and, to comply with limitation on evidence directed by the court;

(4) Counsel and their witness-clients shall not engage in private, off-the- record conferences during depositions or during breaks or recesses, except to decide whether to assert a privilege;

(5) Witness-counsel conferences are a proper subject for inquiry by deposing counsel who may inquire whether there has been any witness coaching and, if so, what;

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[3] *Armstrong v. Hussmann Corp.,* 163 F.R.D. 299, 301-05 (E.D. Mo. 1995); ML- Lee Acquisition Fund II, L.P. Litigation, 848 F.Supp. 527, 567 (D. Del. 1994); *Bucher v. Richardson Hosp. Authority,* 160 F.R.D. 88, 94 (N.D. Tex. 1994); *Holland v. Fisher,* 1994 WL 878780 (Mass. Super. Ct.); *Van Pilsum v. Iowa State University of Science and Tech.,* 152 F.R.D. 179, 180-81 (S.D. Iowa 1993); *Johnson v. Wayne Manor Apartments,* 152 F.R.D. 56, 58-59 (E.D. Pa. 1993); *Deutschman v. Beneficial Corp.,* 132 F.R.D. 359 (D. Del. 1990); *In Re: Amezaga,* 195 B.R. 221 (Bankr. D.P.R. 1996); *Damaj v. Farmers Ins. Co.,* 164 F.R.D. 559 (N.D. Okla. 1995); Bucher v. Richardson Hosp., 160 F.R.D. 88 (N.D. Tex. 1994); *Odone v. Croda Int'l,* 170 F.R.D. 66 (D.D.C. 1997); *Acri v. Golden Triangle Management Acceptance Co.,* 142 Pitt. Legal J. 225 (Pa. Ct. 1994); *Paramount Communications Inc. v. QVC Network, Inc.,* 637 A.2d 34,55 (Del.Supr. 1994); *Dominick v. Troscoso,* WL 408769 (Mass.Super. 1996): *Burrows v. Redbud Community Hosp. Dist.,* 187 F.R.D. 606 (N.D. Cal 1998); *Quantachrome Corp. v. Micromeritics Instrument Corp.,* 189 F.R.D. 697(S.D.Fla. 1999); *Collins v. International Dairy Queen, Inc.,* WL 293314 (M.D.Ga. 1998): *Chapsky v. Baxter V. Mueller Div.,* Baxter Healthcare Corp., WL 327348 (N.D. Ill 1994); *Sinclair v. Kmart Corp.,* WL 748038 (D.Kan. 1996); *Boyd v.University of Maryland Medical Systems,* 173 F.R.D. 143 (D. Md. 1997); *Metayer v. PFL Life Ins. Co.,* WL 33117063 (D.Me. 1999).*Phinney v Paulshock,* 181 F.R.D. 185 (D.N.H. 1998); *Mruz v. Caring, Inc.,* 107 F.Supp.2d 596 (D.N.J. 2000); *Prudential Ins. Co. of American v. Nelson,* 11 F.Supp. 572 (D.N.L 1998); and *Teletel, Inc., v. Tel-Tel Us Corp.,* WL 1335872 (S.D.N.Y 2000); *Plaisted v. Geisinger Medical Center,* 210 F.R.D. 527, 54 Fed.R.Serv.3d 191 (M.D. Pa. 2002) ("We believe that Hall has established clear, workable guidelines.").

(6) Counsel who confers with their client must disclose that fact on the record, and disclose the purpose and outcome of the conference;

(7) Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition, and may do so either before the deposition begins or contemporaneously with the showing of each document; and

(8) The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.

E. OBJECTIONS

(1) What Objections are Appropriate

The Federal rules describe under what circumstances it is appropriate for an attorney to object during a deposition.

> 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.[4]

It is only necessary to object at a deposition where the 'form' of the question (not the nature of the question) is objectionable and a 'seasonable' objection would provide an opportunity to correct the form.[5] Substantive objections are preserved by Rule 32(d)(3)(a) and are therefore unnecessary. Objections that are not required to be asserted at the deposition are

[4]Fed.R.Civ.P. 32(d)(3)(A).
[5]William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, *Federal Civil Procedure Before Trial,* §11:493 at 11-99.

inappropriate.[6] The purpose of allowing most objections to be raised later is to permit the preliminary examination to proceed without constant interruptions.[7]

It is difficult to conceive of the likelihood that a question which calls for irrelevant information can be "cured" by restating the question, unless the question is changed to ask for relevant (i.e., different) information. Accordingly, it would be rare that an irrelevant question could be cured. Thus, the objecting party may wait until trial (or just prior to trial) to make the objection when and if the deposition testimony is offered into evidence.[8] To the extent that objections are made, deposition objections are treated differently than trial objections—the testimony continues subject to the objections, and the objections are preserved for trial.[9]

(2) Type and Manner of Objection

Rule 30(d)(1) provides for the type and manner in which objections during a deposition may be made. Objections are to be non-argumentative and non-suggestive.[10] The Advisory committee notes following Rule 30 offers insight into the purpose of this rule:

> Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond . . . [o]bjections . . . should be limited to those that under Rule 32(d)(3) might be waived if not made at that time . . . [o]ther objections can . . . be raised for the first time at trial and therefore should be kept at a minimum during a deposition. "Directions to a deponent not to

[6]Herr & Haydock, *Civil Rules Annotated* (3rd Ed.), §30.22 at 107 (1998).
[7]*Id.*
[8]*In Re: Stratosphere Corp. Securities Litigation,* 182 F.R.D., 614, (D. Nev. 1998).
[9]Fed.R.Civ.P. 30(c); and *W.R. Grace & Co. v. Pullman Inc.,* 74 F.R.D.80 (D.C. Okl. 1977); *Drew v. International hd. Of Sulphite and Paperworks,* 37 F.R.D. 446 (D.D.C. 1965).
[10]Fed.R.Civ.P. 30(d)(1).

> answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated . . . In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of objections may itself constitute sanctionable conduct."[11]

(3) Speaking Objections

Speaking objections occur when the defending attorney actually engages in coaching the witness, attempting in the course of articulating the objection to direct the witness' attention to what the "right" or "correct answer should be."[12] Such objections are prohibited. "Objection to form" should be sufficient explanation to notify the interrogator of the grounds for the objection, and thereby allow revision of question.[13] Any further explanation is inappropriate.

(4) Numerous "Proper" Objections

A party may object to an irrelevant line of questions, but once the objection is noted the testimony should proceed. Protection can become a cover for obstruction.[14] Therefore, counsel should avoid the prohibited practice of engaging in so-called Rambo tactics where counsel attacks or objects to every question posed, thus interfering with, or preventing, the elicitation of any meaningful testimony and disrupting the orderly flow of the deposition.[15] The advisory

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[11]Fed.R.Civ. P.30(d), Advisory Committee Note.
[12]*Applied Telematics, Inc., v. Sprint Corp.,* WL 79237 (E.D. Pa, 1995) citing the Federal Bar Council Committee on Second Circuit Courts, "A Report on the Conduct of Depositions" 131 F.R.D. 613, 617 (1990), quoted by Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action,* 67 Temple L. Rev. 179, 218n. 182 (1994).
[13]See 8A Wright, Miller, & Marcus, *Federal Practice and Procedure Civil* 2d., § 2156 at 206 (1994).
[14]William Fortune, et al., *Modern Litigation and Professional Responsibility handbook: The Limits of Zealous Advocacy,* n. 267, section 6.7.4 at 264 (1996).
[15]*American Directory Service Agency Inc. v. Beam,* 131 F.R.D. 15, 18-19 (D.C. D.C. 1990).

committee notes for Rule 30(d) explain that " the making of an excessive number of unnecessary objections may itself constitute sanctionable conduct."[16]

F. LACK OF UNDERSTANDING

(1) Deponent's Lack of Understanding

If the deponent does not understand the question, or the meaning of a word or phrase, or even if the deponent has a question about a document, the deponent should ask the questioning attorney. If the deponent lacks knowledge or understanding, then the deponent should say so, not seek understanding or direction about how to answer the question from his or her attorney. The interrogating counsel has the right to the deponent's answers, not an attorney's answers.[17]

(2) Lawyer's Lack of Understanding

A lawyer's purported lack of understanding is not a proper reason to disrupt the deposition.[18] It does not matter if an attorney does not understand the question. It is only the witness's understanding of the question which is of significance.

(3) Clarifications

Interruptions and "clarifications" of questions by counsel for the witness are improper.[19] It is the witness who must ask for clarification if the witness does not understand the question.

G. INSTRUCTIONS NOT TO ANSWER

A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation of evidence directed by the court, or to present a motion under

[16]Fed.R.Civ. P. 30(d)(1), Advisory Committee notes on the 1993 amendment.
[17]*In Re: Stratosphere Corp. Securities Litigation,* 182 F.R.D. 614 (D.Nev. 1998).
[18]*Applied Telematics, Inc. v. Sprint Corp.,* WL 79237 (E.D. Pa, 1995).
[19]*Unique Concepts, Inc. v. Brown,* 115 F.R.D. 292 (S.D. NY 1987).

Rule 30(d)(4)for protective order.[20] Instructing a witness not to answer a question for any other reason such calling for inadmissible facts is sanctionable.[21]

H. CONFERRING WITH WITNESSES DURING DEPOSITION

Depositions are to proceed in the same manner as the examination and cross-examination of witnesses at trial.[22] During a civil trial, a witness' attorney does not sit beside him in the witness stand telling him what to say or refrain from saying. Simply because the fact finder is not present in the deposition room does open the door to such behavior.[23] Therefore, just as in court, the testimony to be elicited should be that of the witness, not his or her counsel. The candid answers of the witness, for better or for worse, are what the questioner is entitled to, not merely a repetition of the words opposing counsel places in the witness's ear.[24]

Although an attorney has a legal and ethical duty to prepare a client before the deposition, preparation, by definition, occurs before—not during—the event. Once the deposition begins, the preparation period is over and the witness is on his or her own.[25] If the attorney did not adequately prepare the client before the deposition, then the attorney and client must suffer the consequences.[26]

When there is a question pending, neither the deponent nor his or her counsel may initiate the interruption of the proceeding to confer about the question, the answer, or about any

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[20]Fed. R. Civ. P. 30(d)(1).
[21]*Boyd v. University of Maryland Medical Systems,* 173 F.R.D. 143 (D.Md. 1977); *International Union of Elec., Radio & Mach. Workers AFL-CIO v. Westinghouse Elev. Corp.,* 91 F.R.D. (277, D.C. dc 1981); *Preyer v. US Lines Inc.,* 64 F.R.D. 430 (E.D. Pa. 1973).
[22]Fed. R. Civ. P. 30(c).
[23]*See, Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D. Pa. 1993).
[24]Baer & Meade: *The Conduct and Misconduct of the Deposition* 64 APR N.Y. st. B.J. 16 (1992); Helmers, *Depositions: Objections, Instructions & Sanctions,* 33 S.D.L. Rev. 272 (1987/1988).
[25]*Alexander Grant & Co., Litigation,* 110 F.R.D. 545, 547 (S.D.Fla. 1986); *Nutmeg Ins. Co. v. Atwell, Vogel & Sterling,* 120 F.R.D. 504 (D.C.La. 1988); *Smith v. The Logan Sport Community School Corp.,* 139 F.R.D. 647 (1991); *Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D. Pa. 1993).
[26]Dickerson, *The Law and Ethics of Civil Depositions,* 57 Md.L.Rev. 273, 286 (1998); and *Eggleston v. Chicago Journey Plumbers Local Union No. 30,* 657 F2d 890, 902 (7th Cir. 1981).

document that is being examined, except to assert a claim of privilege, conform to a court order, or seek a protective order.[27]

H. ATTORNEYS FEES AND EXPENSES

Federal Rule of Civil Procedure 37(a)(4) mandates an award of expenses and sanctions against the party or party's attorney whose conduct necessitates the motion to compel discovery, including the apportionment of expenses to achieve justice. Rule 37(a)(4)(A) provides:

> If the motion is granted, or if the requested discovery is provided after the motion was filed, the court *shall*, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good-faith effort to obtain the discovery without court action, or that the opposing party's non-disclosure, response or objection was substantially justified or that other circumstances make an award of expenses unjust.

Pursuant to Fed.R.Civ.P. 37(a)(2)(A), plaintiff's counsel has made a good-faith effort to resolve this discovery dispute in an effort to avoid the need for this motion. Plaintiffs, as the moving party, need only show a failure to answer or object as required by the particular rule; the

[27]*In Re: Stratosphere Corp. Securities Litigation,* 182 F.R.D. 614, 619 (D. Nev. 1998); *Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D. Pa. 1993).

recalcitrant party's intent or motive for the failure is not controlling. Federal Rule 37(a) was amended to eliminate willfulness as a requisite to imposition of sanctions.[28]

The rule prescribes that expenses should be awarded to the prevailing party, unless the losing party's position is substantially justified. Thus, the rule is designed to encourage courts to make more frequent use of its provisions for awarding expenses.

The Advisory Committee Note to Fed.R. Civ.P.37(a) states:

> At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified.

The change provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. The expenses to be awarded include all those incurred in obtaining the order, including attorneys' fees incurred in drafting moving papers, affidavits, briefs, legal research, traveling to the place of hearing, argument at hearing, and drafting orders.

I. CONCLUSION

The effectiveness of a deposition is undermined through the obstructive tactics of opposing counsel. Obstructive conduct impairs the development of relevant, material evidence, which is prohibited under federal common law, as well as the Federal Rules of Civil Procedure.

[28]Fed.R.Civ.P. 37 Advisory Committee note (1970).