DEPOSITION PRACTICE UNDER THE NEW RULES

Civil Discovery Under the New Rules

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I. INTRODUCTION AND SCOPE

An examining attorney recently described the deposition process to a witness I was defending as follows:

> She's trying to protect you and I'm trying to get as much out of you as I can. That's what it boils down to. But this is not an adversarial situation at all. We don't want it to be.

This dichotomy is what the drafters of the discovery revisions have attempted to address. They have placed limits on both sides of the equation. The new rules contain time limits on depositions, which will limit the examining attorney who is "trying to get as much out of [the witness] as [he] can." On the other hand, the revisions also address the "protection" of a witness by explicitly limiting private conferences between the witness and his or her attorney and by

limiting speaking objections and instructions not to answer. The goal, as expressed by Justice Nathan Hecht in the December 1998 issue of the Texas Bar Journal, is to "streamline the discovery process, remove many of its pitfalls, and reduce costs and delays." Whether these laudable goals will be met remains to be seen. However, the new rules have the potential to make depositions a more effective discovery tool.

This article will discuss the significant changes to the conduct of depositions and attempt to give some practical advice on coping with the changes.

II. SIGNIFICANT RULE CHANGES.

A. Time Limits on Depositions.

1. Total Hours.

Rule 190 establishes three standard discovery plans, depending on the size and complexity of the case. Two of the discovery levels include limits on the total number of deposition hours.

a. In Level 1 cases (involving $50,000 or less) each party is allowed six hours to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand the limit up to ten hours in total, but not more except by court order. The rule further provides that the court may modify the deposition hours so that no party is given unfair advantage.

b. In Level 2 cases (those cases involving more than $50,000, which do not require a tailored discovery plan) each party is allowed 50 hours to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

c. Level 3 cases are those in which the parties and/or the court have determined that a specific discovery control plan, tailored to the circumstances of the specific suit, is needed. In a Level 3 case, the court may change any limitation on the time for discovery and the amount of discovery.

2. Individual Depositions.

Rule 199.5 provides that no "side" may examine or cross-examine an individual witness for more than six hours, not counting breaks. This six-hour limit applies to all three discovery levels.

B. Conduct During Depositions.

1. Elimination of Conferences.

Rule 199.5 (d) provides as follows regarding the deposition conduct of parties and their attorneys:

> The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.

2. Elimination of Objections.

Rule 199.5 (e) drastically limits the ability of an attorney to make speaking objections, providing, in pertinent part, as follows:

> Objections to questions during the oral deposition are limited to "Objections, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, nonresponsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions.

3. Instructions Not to Answer.

Rule 199.5 (f) also limits the situations in which an attorney may instruct a witness not to answer, as follows:

> An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested by the party who asked the question.

4. Suspending the Deposition.

Rule 199.5 (g) provides that a party or witness may suspend the oral deposition for the time necessary to obtain a ruling if the time limitations for the deposition have expired or if the deposition is being conducted or defended in violation of these rules.

5. Good Faith Required.

Finally, Rule 199.5 (h) admonishes attorneys not to object to a question, instruct the witness not to answer or suspend the deposition without a good faith factual and legal basis for doing so.

C. Video Depositions.

The rules regarding videotaped depositions have been revised to clarify the appropriate procedures for taking and using such depositions. A party wishing to record the deposition by non-stenographic means is not required to also have a stenographic recording of the deposition. However, the court may require a written transcription of such a deposition for use at trial.

1. Notice of Videotaped Depositions

Rule 199.1 (c) provides that any party may "cause a deposition upon oral examination to be recorded by other than stenographic means including videotape recording" but requires that party to obtain "a person authorized by law to administer the oath and for assuring that the recording will be intelligible accurate, and trustworthy." The second requirement is new and apparently means that a certified court reporter is not required to be present. Furthermore, the party must serve notice at least five days prior to the deposition that the deposition will be recorded non-stenographically. The notice must state the method of non-stenographic recording and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.

2. Use of Videotaped Depositions.

Rule 203.6 provides that a non-stenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. The court may, for good cause, require that the party seeking to use a nonstenographic recording first obtain a complete transcript of the deposition recording from a certified court reporter.

D. Deposition Notice Directed to Organizations.

Rule 199.2 contains a revision to the procedure for noticing the deposition of an organization, formerly contained in Rule 201(4). The rule still requires that the party noticing the deposition, "describe with reasonable particularity the matters on which examination is requested." The only change to this procedure is that the organization must respond to the notice within a "reasonable time before the deposition," designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify."

III. ADAPTING TO THE CHANGES.

A. When Do The Rules Become Effective.

The revisions to the discovery rules go into effet on January 1, 1999. Rule 190 (discovery levels) applies to all cases filed on or after that date, but a court may adopt an appropriate discovery control plan in previously filed cases. Otherwise, Rule 199 will presumably apply to depositions conducted in cases filed before January 1, 1999. The Supreme Court has admonished that the application of the revised rules in pending cases, "must be consistent with the purpose of the revised rules to streamline discovery procedures and to reduce costs and delays associated with discovery practice and must be without undue prejudice to any person on account of the transition from the prior rules."

B. Time Limits.

One of the revisions to the discovery rules, aimed at streamlining the discovery process, is the time limit on depositions. There is an overall time limit (six hours in Level 1 cases and 50 hours in Level 2 cases), as well as a time limit on each deposition (six hours in all cases). These time limits are especially bad news for attorneys who are disorganized. However, the limitations are daunting for even the most methodical attorneys. Old attorneys will have to learn new tricks. It may be some comfort to know that other jurisdictions have enacted more drastic reforms. Illinois, for example, limits all depositions to three hours, unless the parties agree otherwise. Arizona only allows litigants to depose parties and their expert witnesses and limits those depositions to four hours.

1. How Many Sides Are There.

The comments to the Rules indicate that the concept of "sides" is borrowed from Rule 233, which governs the allocation of peremptory strikes, and from Fed.R.Civ.P. 30 (a)(2). In most cases there are only two sides-plaintiffs and defendants. In cases involving third parties or cross-claims between defendants, however there will be more sides and more deposition hours. The commentators provide the following example:

> If P1 and P2 sue D1, D2 and D3, and D1 sues D2 and D3, Ps would together be entitled to depose Ds and others permitted by the rule (i.e. Ds' experts and persons subject to Ds' control) for 50 hours, and Ds would together be entitled to depose Ps and others for 50 hours. D1 would also be entitled to depose D2 and D3 and others for 50 hours on matters in controversy among them, and D2 and D3 would together be entitled to depose D1 and others for 50 hours.

The parties on the same "side" of the lawsuit will obviously need to confer and coordinate regarding scheduling depositions. As with jury selection and the allocation of peremptory strikes, we can expect some disputes between defendants who have not formally cross-claimed against each other, but who are antagonistic toward each other. Defendants have been held to be antagonistic with each other when they contend the other is solely responsible for the plaintiff's injuries. *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 918 (Tex. 1979).

2. Getting All Depositions Taken in Six (or Even 50) Hours.

The trick to adapting to this overall time limit is obvious. Learn your case early in the discovery process through disclosure, other forms of written discovery, and informal factual investigation. Depose only the most crucial witnesses and budget a specific amount of time for each deposition. Learn as much as you can about each witness before you go into the deposition.

3. The Six Hour Deposition.

This change is good news for those of us who have little patience for long-winded, meandering explorations of every minute detail of the witness's life. The six-hour time limit is bad news, however, for attorneys who are disorganized and unprepared. We have all defended depositions taken by attorneys who are clearly learning the case as they go along. Every document, even those produced months before, is a new experience for the disorganized attorney. I knew I was in for a long haul recently when I had to remind the examining attorney who his client was. Finally, the six hour limit will be a shield against those attorneys who use depositions to wear down the witness. Still, even for the organized and prepared attorney, the six hour deposition will require careful planning and a change from our natural desire to thoroughly examine every detail and exhaust every lead in depositions.

a. Prioritize. Focus on the most important aspects of the case. Of course, that means you have to know your case. Develop your theory and know what you have to prove before you go into the deposition so you can focus your questioning.

b. Organize. Many attorneys are used to starting with the date of birth of a witness, then plodding through his or her educational and employment history and arriving at the relevant time period an hour or two into the deposition. This is a waste of time and can be excruciatingly boring, even for those of us who are paid by the hour. The

information gleaned from such questioning is marginally useful, at best, and can often be obtained through written discovery. Resist the urge to go in chronological order. Divide your deposition outline into a number of topic groups. Ask about the most important groups first. You can still be detailed and methodical within a given grouping. Budget a certain amount of time for each subject area. You still have to be flexible. You may learn new facts in the deposition that change your priorities and your budget. If you know your case well, you will be able to recognize and adapt to these situations.

c. Do not duplicate. If you have received certain evidence, such as a needed admission or names and addresses of witnesses, through disclosure or through written discovery requests, do not go over that information again in a deposition. New Rule 193.7, which provides that a party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial, could be helpful in this regard. There may not be a need to spend time having the witness authenticate such documents at his or her deposition.

d. Do not argue with the witness. Many attorneys spend a lot of time going back and forth with a witness in an attempt to get the precise answer they want in the exact words they want. Of course, it is important to have a clear record. However, you may need to be satisfied with a good, but not the best answer.

e. Do not argue with opposing counsel. One way to quickly exhaust the six hour time limit would be to engage in lengthy arguments or discussions with opposing counsel. The rule prohibiting speaking objections should deter lengthy sidebars by opposing counsel. However, disputes will inevitably arise. Attempt to have such discussions off the record, making sure that the court reporter notes the time you went off the record and the time you went back on the record. If the problem cannot be resolved off the record, then each attorney should agree to state his or her objection for the record and move forward, agreeing to resolve the problem later. If these tactics do not work, make a good record of the time used by counsel's tactics and then apply to the court for additional time (and perhaps sanctions against your long-winded adversary).

4. Coordinate With Other Parties on Your Side.

All of your careful planning and organization will be wasted if your co-defendant passes the witness with only a few minutes left in the six hour deposition. Coordinate with the other parties on your side prior to the deposition, in order to allocate the time fairly.

5. Getting More Time.

Despite your careful organization and planning, it may be impossible to complete your questioning in the time allotted. It may be that the case is especially complex or the witness's knowledge particularly exhaustive. It could be that the witness is long-winded, slow to answer or evasive. The new rules allow the parties some leeway to agree to expand the time limits. Rule 190.2 provides that, in Level 1 cases, the parties may agree to expand the six hour limit to ten hours, but no more except by court order. Rule 190.3, which governs Level 2 cases contains no such provision, but allows the court

to modify the deposition hours. Of course, if the parties agree from the outset that their case needs its own discovery rules, they can request that their case be treated as a Level 3 case, pursuant to Rule 190.4, with a discovery control plan tailored to the circumstances of the specific suit.

In any case, it would behoove the parties to be agreeable regarding reasonable requests for extensions of time. Parties can expect the courts, particularly in the initial implementation of the new rules, to be fairly lenient in granting such requests and to be impatient with parties who quibble over a few deposition hours. However, when the parties cannot agree, such as when the expansion of time is made necessary by the other side's improper tactics, it is important to make a good record of the reason more time is needed. Rule 203.2(e) requires the deposition officer to record and certify the amount of time used by each party at the deposition. It is not clear whether this certification includes time spent on examination or also on speeches made by counsel. If the court reporter is not willing to record the time spent "speechifying," then state the times for the record. Rule 199.5(g) does allow a party to suspend the deposition for the time necessary to request additional time from the court.

C. Limits on Defense Counsel.

On the side of allowing access to information and discouraging colloquy between counsel, the new rules limit the ability of the defending attorney to get between the examining attorney and the witness. The intent of the revisions against speaking objections is understandable and laudable. The purpose of the deposition is to get the true story from the horse's mouth, not a lawyer's shading of that story. However, the new rules make it more difficult to protect an unsophisticated witness from purposefully misleading questions and creates a danger of turning defense counsel into a "potted plant."

1. Elimination of Private Conferences.

Rule 199.5 (d) eliminates conferences between the witness and the attorney during the taking of the deposition, except for the purpose of determining whether a privilege should be asserted. As with deposition time limits, Texas' rules are more lenient than those adopted by some other jurisdictions, which prohibit <u>any</u> private conferences, even during recesses and provide that, "any such conferences are fair ground for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what." *See Hall v. Clifton Precision,* 150 F.R.D. 525, 528-29 & n.7. (E.D. Fa.1993) Unlike these other jurisdictions, the new Texas rules do allow private conference during agreed recesses and adjournments. The reasoning behind the rule is clear. The goal is to prevent attorneys from subverting the discovery process by suggesting answers and coaching the witness. It is designed to avoid circumstances like the following example:

Q. Why did you want a letter regarding the date the benefits began?

A. Oh, I don't remember.

ATTORNEY: Off the record just a minute.

(Off the record.)

THE WITNESS: Yes. Okay. In answer to the question of why did I write the letter or request the letter of when the bennies began, that was just -- I was trying to get the confusion straight as to when benefits ended and when they were ending and when they started and everything else to get it straight with the Social Security Board.

However, the potential problems with the rule are also clear. The no consultation rule has the potential of infringing on the attorney-client relationship. Furthermore, the rule makes it difficult for an attorney to consult with a client when an apparent error, whether inadvertent or not, appears in client testimony. The rule also works to put the deponent at the mercy of any abusive questioner and prevents the attorney from protecting the witness from insulting, abusive, repetitive or irrelevant questions.

The fact that the Texas rules recognize and allow private conferences during agreed recesses and adjournments means that Texas judges are not likely to sanction witnesses and attorneys who confer privately. However, the rule also provides that if lawyers and witnesses do not comply with the rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the deposition that reflect upon the credibility of the witness or the testimony. An overuse of private conferences, or frequent requests for recesses, could prompt a request that the court take the above measures. Defense counsel should rarely use such conferences. If a conference is used to determine whether a privilege should be asserted, counsel should state the purpose of the conference on the record.

As the examining attorney, if you have reason to believe that a consultation while a question is pending is inappropriate, you should try to prevent it from occurring. Force the defender to articulate the basis for any belief that a privilege has been implicated by your question. For example, when breaks are requested by opposing counsel during a potentially damaging line of questions, make sure the record reflects that the witness and counsel conferred, particularly if the witness then seeks to “clarify” her last answer. Don’t be timid about finishing your line of inquiry before a break. If you anticipate that a particular line of questions will be difficult for the witness, you may want to ask those questions immediately following a break. It will then be awkward for the witness to use the pretext of a break as an opportunity to get help from her lawyer. If the witness and her counsel confer off the record, ask the reporter to note for the record the starting and ending time of the consultation.

2. No More Speaking Objections.

The lawyer defending a deposition is limited to “Objection, form,” which encompasses objections that the question calls for speculation, calls for a narrative answer, is vague, is confusing, or is ambiguous. The rule simply codifies the longstanding practical admonition that a deposition objector should state his or her objection concisely so that the examination can proceed without interruption. Lawyers who continue to rely on speaking objections risk waiving their objections altogether. Perhaps this risk will deter the improper but widespread use of speaking objections to

suggest the “correct” answer to the witness. The following examples are probably quite familiar:

Example 1:

Q. Have you ever spoken with him?

ATTORNEY: If you recall. If you don’t know or if you don’t remember the answer to a question, that’s an appropriate answer.

THE WITNESS: Yeah. I don’t know.

Example 2:

Q. Do you know about any other drugs that your brother might have had a problem with?

A. No, ma’am.

Q. What about Valium?

ATTORNEY: How do you mean “problem”?

THE WITNESS: Yeah. That’s what I was think, you know. When you’re saying that, I don’t ---

BY MS. HANNA:

Q. You don’t understand my question?

A. Right.

Example 3:

Q. Okay. Did you have any problems with any particular neighbors?

A. Sure.

Q. Who did you have problems with?

A. --------- next door, and across the street, the people that moved in the house across the street.

Q. Okay. Did you have problems with --------- in 1996?

ATTORNEY: Objection to the word “problems.” Identify the problem. It’s vague.

Q. (By. MS. HANNA) Do you understand what I mean when I say “Did you have problems with him?”

A. What type of problems are you saying?

However, because witnesses are suggestible, and often unsophisticated, they can be misled by attorneys who base their questions on false or misleading assumptions, as follows:

A. However, when she submitted her possessions for the fire, she had, I believe, forty-five thousand dollars worth of possessions and her disposable income during that time was almost negligible.

Q. Forty-five thousand dollars, are you sure about that?

A. I said approximately, sir, didn't I?

Q. I think it was probably around thirty-seven thousand.

A. Okay, sir, thirty-seven thousand.

The commentators to the 1999 change recognize that objections to the form of the question may be inadequate if a question incorporates unfair assumptions or is worded so that any answer would necessarily be misleading. "A witness should not be required to answer whether he has yet ceased conduct he denies ever doing, subject to an objection to form...because any answer would necessarily be misleading."

e.g.: Q. "Have you stopped beating your wife?"

In such a situation, the rules allow the defending lawyer to instruct the witness not to answer.

The limitation on speaking objections obviously increases the importance of witness preparation, which is beyond the scope of this article. However, this new rule does not mean that the defender must remain idle while the examiner controls the deposition. The defending attorney needs to continue to be vigilant and object to the form of improper questions. Confidently asserting objections, particularly early in the deposition, and then instructing your own witness that he or she may answer the question is a good way to inject yourself between the examiner and the witness. You may be able to get away with one word explanations of your grounds, such as "vague," "asked and answered," etc. However, be wary of going any further because there is a risk of waiving the objections altogether. In any event, be prepared to state your grounds for the objection should you be asked to do so.

The examining attorney will need to frame her questions more carefully, since she will not be able to rely on "hints" by the objector that the question and answer may not be admissible at trial. The examining attorney should be wary about asking the objector to state grounds for his or her objection, as that will inevitably give the objecting attorney the opportunity to give a speech.

3. Instructions Not to Answer.

Courts have long taken a dim view of the wholesale use of instructions not to answer. *See, e.g., Thomas v. Hoffmann-La Roche, Inc.*, 126 F.R.D. 522 (N.D. Miss. 1989) (imposing sanctions under inherent power). In the words of the Eastern District of

New York's Standing Orders on Effective Discovery in Civil Cases: "Repeated directions to a witness not to answer questions calling for non-privileged answers are symptomatic that the deposition is not proceeding as it should" (Rule 11(a)). See also *First Tennessee Bank v. Federal Deposit Insurance Corp.*, 108 F.R.D. 640 (E.D. Tenn. 1985) (holding that counsel for a non-party deponent had no right to instruct the witness not to answer a deposition question on the ground that the question had been asked and answered earlier in the deposition; counsel should have sought a protective order that if he believed he had grounds to obtain one). Rule 199.5 (f) allows an attorney to instruct a witness not to answer if necessary to preserve a privilege or to protect the witness from an abusive question or one for which any answer would be misleading. This last category could be very large indeed. Good faith is, of course, required and the instructing attorney must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested by the party asking the question. An instruction not to answer might have been appropriate in the following example:

Q. Who did they talk to? Was it you?

A. No, they did not talk to me. It was either Mr. B. or Ms. L.

Q. Ms. L. said they didn't talk to her.

MS. HANNA: Objection, there is no evidence of that.

ATTORNEY: She said that.

MS. HANNA: I don't know that you asked her that question. Do not tell him what other people testified to.

A. I did not talk to the mortgage company.

Q. (By Attorney) She said she didn't and that the mortgage company called, period.

A. I did not talk to the mortgage company.

Q. Were you told that?

A. I was told that?

Q. By Ms. L. or Mr. B?

A. Yes.

Q. Which one?

A. I don't know which one.

Q. Who has done the major investigation on this claim?

A. Initially, it was Ms. L. and Mr. B. took over probably after a week or so.

> Q. He was the one that was gathering the information?
>
> A. Yes.
>
> Q. I would imagine it would be Mr. B. who probably came up with the information somewhere and surely if you had a meeting with Ms. L. and Mr. B., during that meeting Mr. B. or Ms. L. said, "Hey, the mortgage company called" and/or "I called the mortgage company" or whatever and "they are in the position of foreclosing on the house," and that was evidence there, that is absolute motive, isn't it?

In addition, instructions not to answer can be used to protect a witness from abusive questions which include, "questions that inquire into matters clearly beyond the scope of discovery, or that are argumentative, repetitious or harassing." In *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 903 (7th Cir. 1981), a case involving class certification discovery that went badly awry, the Seventh Circuit recognized that refusal to answer irrelevant questions that unnecessarily touch sensitive areas or go beyond reasonable limits may be justified. In *Eggleston*, which involved questions of race discrimination, the court found that questions about what the indisputably black plaintiff's grandmother told him about any Caucasian ancestors he may have had were a "totally unjustified and reprehensible intrusion into personal family history." *Id.* at 898; *see also E.I. DuPond de Nemours & Co. v. Dearing Milliken Research Corp.,* 72 F.R.D. 440, 443 (D.Del. 1976) (instruction not to answer proper where, "it is palpable that the evidence sought can have no possible bearing on the issues.")

Eggleston includes other examples of questions to which instructions not to answer might be appropriate:

> Eggleston was asked if he knew who the defendants in the case were. Plaintiffs' counsel objected that the question had been asked and answered just the day before. Defendants' counsel then responded.'
>
> ATTORNEY: I'm asking Mr. Eggleston if he knows today who the defendants in this case are.

The defending lawyer should rarely use instructions not to answer and always be prepared to state the grounds for the instruction. If the examining attorney persists in asking questions which make such instructions necessary, defense counsel should have an off-the-record discussion with the questioner, perhaps outside the presence of the witness, and try to persuade the examining attorney to correct the problem. If that fails, the defending attorney should consider suspending the deposition pursuant to Rule 199.5 (g) in order to get a ruling from the court.

Similarly, the examining attorney should be careful to ask questions that are not going to result in instructions not to answer. If the examining attorney believes defense counsel is improperly using instructions not to answer, the examining attorney should force defense counsel to articulate the grounds for the instructions, proceed with questioning on other topics, and after getting all the information that he or she can, suspend the deposition pursuant to Rule 199.5 (g) in order to get a ruling from the court.

4. Suspending the Deposition.

a. Make a Good Record. Rule 199.5(g) allows a party or witness to suspend the deposition if it is necessary to obtain a ruling from the court. It is important to make a good record of the reason for the suspension, whether it be the need for more time or obstructive tactics by an attorney or a witness. If you are requesting more time, it is important to show that you have not been disorganized or repetitive. If you have wasted the allotted time, or the other side will certainly highlight that fact for the court. If the witness has been long-winded or evasive or nonresponsive, you should periodically ask the witness to provide a responsive answer. Always create a clear record of the reasons for suspending the deposition before you go off the record.

b. Use Videotape. When you know that a particular attorney or witness will be problematic, you may want to consider videotaping the deposition. This tactic can deter some misbehavior and highlight the misbehavior that does continue, so that you can use the videotape when you request the court for more time or a protective order.

IV. CONCLUSION.

The short-term effect of the new discovery rules is likely to be increase litigation. The long-term effect is harder to predict as parties struggle to learn how to comply, or to get around, the new rules. In any event, compliance with the new rules on depositions can help attorneys on both sides get more use out of this very important, but often poorly used, discovery device.