1984

A Practical Guide to Taking and Defending Depositions

Gary S. Gildin
gsg2@psu.edu

A Practical Guide to Taking and Defending Depositions

Gary S. Gildin*

One of the most important skills of trial advocacy is employed outside the courtroom and well in advance of the inception of the trial. While the effective advocate must be able to present the case to the trier of fact in an understandable and persuasive fashion, it is through pretrial discovery that counsel is afforded the opportunity to learn of, as well as to limit, the actual evidence which credibly may be offered at trial.[1] Because the script for the trial is authored before any witness setsfoot in the courtroom, it is essential that the advocate become a master in the art of discovery. This article explores what is generally accepted as the most valuable, albeit the most expensive, discovery device—the deposition.[2] Strategies and tactics for

* Associate Professor, The Dickinson School of Law. B.A. 1973, University of Wisconsin; J.D. 1976, Stanford Law School. This article is an expanded version of a presentation for the Pennsylvania Bar Institute, the outline of which previously has been published. Gildin & Shrager, *Strategies and Tactics in Deposition Practice*, in HOW TO PREPARE FOR, TAKE & USE DEPOSITIONS (Pennsylvania Bar Institute 1981) [hereinafter cited as Gildin & Shrager]. The author expresses his gratitude to Ann Targonski for her valuable assistance in research for this article.

1. Depositions have the potential to serve many significant purposes beyond discovery. In some jurisdictions, depositions may be taken prior to the commencement of an action to assist in the preparation of pleadings. *See, e.g.*, PA.R.CIV.P. 4001(c). Responses to deposition questions may be submitted in support of motions to dispose of litigation on the merits prior to trial, FED.R.CIV.P. 32, 56(e), as well as offered into evidence at trial. FED.R.CIV.P. 32(a). In fact, depositions may be taken specifically to perpetuate the testimony of witnesses who will be unavailable at trial and thus generate evidence which otherwise could not be presented. FED.R.CIV.P. 27, 32(a)(3). Finally, depositions may influence the means by which a vast majority of civil cases are disposed—settlement. Depositions not only allow the attorney to assess the case on its merits by learning the relevant facts prior to trial, but also enable her to evaluate the opposing party, witnesses and counsel. Similarly, the advocate may affect the opposing party's evaluation of the case by her competence in taking and defending depositions.

2. Although the most useful single discovery tool, depositions are most effective when they complement other methods of discovery. Because the various means of discovery may be used in any order unless the court orders otherwise, FED.R.CIV.P. 26(d), counsel carefully must plan the sequencing of discovery devices and the order in which individual depositions are taken. *See* Sugarman & North, *Introduction to Deposition Strategy*, 1 DEPOSITION STRATEGY, LAW AND FORMS § 1.02[2][f] and [g] (1983) [hereinafter cited as Sugarman & North]; Gildin & Shrager, *supra* note*, at 19-21; Dallas, *Effective Use of Interrogatories and Depositions: Some Practical Pointers*, 45 BROOKLYN L. REV. 297, 304-305 (1979) [hereinafter cited as Dallas].

Notwithstanding the efficacy of depositions, counsel may elect not to depose a particular witness for tactical reasons, *see* A. MORRILL, TRIAL DIPLOMACY, SELECTED TEXT § 12.7 (2d

taking and defending depositions in federal courts are examined in the order in which they may be predicted to arise in the course of a "typical" deposition.[3]

I. Stipulations About the Conduct of the Deposition

The conduct of depositions in federal court cases is governed by the Federal Rules of Civil Procedure[4] and any rules promulgated by the district court and/or individual judge to whom the particular case is assigned.[5] As in any other aspect of pretrial or trial advocacy, one must thoroughly understand the prescribed rules to be effective in taking or defending a deposition. The first tactical decision which is likely to be raised at the deposition, however, is unique to the discovery process—whether to enter into a stipulation to modify the pertinent rules.

Federal Rule of Civil Procedure 29 provides that "[u]nless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken . . . in any manner and when so taken may be used like other depositions . . . ."[6] At the outset of the deposition, opposing counsel, or even the court reporter, may suggest altering the federal rules by "the usual stipulations." Frequently, an inexperienced attorney, fearful of appearing ignorant, responds by stating "of course," even though he is completely unaware of the substance of the proposed stipulations. The appropriate reply to any offer to conduct a deposition under the "usual stipulations" is, "what specific stipulations are you proposing?"[7]

The two most significant stipulations typically sought are waiver of the requirement that the deponent read and sign the transcript of

---

ed. 1979); Sugarman & North, *supra* § 1.02[2][6], or because the rules of procedure do not authorize discovery by deposition. *See, e.g.*, FED.R.CIV.P. 26 (b)(4)(A)(i)(persons whom the adversary expects to call as an expert witness at trial may not be deposed absent court order).

3. This article does not address preparation for depositions. For a discussion of preparing to take and defend depositions, see R. HAYDOCK & D. HERR, DISCOVERY PRACTICE §§ 3.4, 3.7.2 and 3.7.3 (1982)[hereinafter cited as R. HAYDOCK & D. HERR]; Sugarman & North, *supra* note 2, at § 1.02[3]-[6]; Facher, *Taking Depositions*, 4 LITIGATION, Fall 1977 at 27, 28 [hereinafter cited as Facher]; Summit, *Conducting the Oral Deposition*, 1 LITIGATION, Spring 1975 at 22-24 [hereinafter cited as Summit]; Suplee, *Depositions: Strategies, Tactics, Objectives, Mechanics, and Problems*, 2 REV. OF LITIGATION 255, 320-27 (1982)[hereinafter cited as Suplee].

4. Although restricted to analysis of deposition practice in cases filed in federal court, this article identifies tactics which may be considered in any jurisdiction. Of course, the pertinent rules of the particular jurisdiction must be consulted before taking or defending any deposition.

5. Federal Rule of Civil Procedure 83 authorizes each district court to create rules governing practice in the district, so long as those rules are not inconsistent with the Federal Rules of Civil Procedure. FED.R.CIV.P. 83.

6. FED.R.CIV.P. 29.

7. Acceptance of the "usual stipulations" arguably would fail to comply with the requirement that any stipulation regarding discovery be written. FED.R.CIV.P. 29. Each stipulation should be placed unambiguously on the record of the deposition. Porter v. Seas Shipping Co., 20 F.R.D. 108 (S.D. N.Y. 1956).

the deposition[8] and alteration of the rules that dictate which objections are waived if not lodged at the deposition.[9] The strategies involved in the latter stipulation will be analyzed in the course of the discussion of objections.[10]

The witness' general obligation to read and sign the transcript of the deposition is set forth in Federal Rule of Civil Procedure 30(e) as follows:

> 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 30 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 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.[11]

The party taking the deposition may profit by insisting that the deponent read and sign the transcript. By requiring the witness to review the transcript, the deposing counsel is assured of the accuracy of both the testimony and the transcription. Additionally, the deposition may be used more effectively to impeach the deponent if his trial testimony varies from his deposition answers. The witness not only will be forced to concede that he was under oath at the time of the deposition, but further will have to admit that he read the transcript of the deposition and affixed his signature only after finding it to be a true and correct recording of his testimony.

Notwithstanding these advantages, more compelling reasons encourage the deposing party to seek a stipulation waiving the reading and signing of the transcript.[12] The deposition is the sole discovery

---

8. FED.R.CIV.P. 30(e).

9. FED.R.CIV.P. 32(d). Stipulations also may concern purely procedural matters, like waiver of sealing or filing of the deposition. FED.R.CIV.P. 30(f)(1).

10. *See infra* notes 85-91 and accompanying text.

11. FED.R.CIV.P. 30(e).

12. Federal Rule of Civil Procedure 30(e) requires an agreement by the deponent *and* the parties to waive reading of the transcript, whereas waiver of signature may be accomplished by stipulation of the parties without the consent of the witness. FED.R.CIV.P. 30(e).

device capable of eliciting responses that are not initially screened by counsel. This unique opportunity to obtain spontaneous answers may be impaired drastically if the deponent is allowed to alter his deposition testimony in the course of reviewing the transcript. Rule 30(e) does not restrict the deponent to correcting errors in transcription, and the courts have placed virtually no substantive limits on the changes that the witness is entitled to make.[13] Furthermore, the deponent is not prohibited from conferring with counsel concerning revision of his deposition responses.[14] Although the original answers remain on the transcript and are admissible in evidence,[15] their utility will be greatly diminished if the witness promptly disavowed those responses upon his review of the transcript.[16] For these reasons, the attorney noticing the deposition generally should offer, and defending counsel should refuse, a stipulation to waive the reading and signature requirements of Rule 30(e).[17]

---

13. Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981) ("Rule 30(e) of the Federal Rules of Civil Procedure allows deponents to make '[a]ny changes in form or substance which the witness desires . . .,' even if the changes contradict the original answers or even if the deponent's reasons for making the changes are unconvincing."); Allen & Company v. Occidental Petroleum Corp., 49 F.R.D. 337, 340 (S.D. N.Y. 1970)("The cases construing the Rule [30(e)] are clear that the witness may make changes of any nature, no matter how fundamental or substantial."); Colin v. Thompson, 16 F.R.D. 194, 195 (W.D. Mo. 1954) ("Whether his reasons are good or not will not impair his right to make the changes. . . ."); De Seversky v. Republic Aviation Corp., 2 F.R.D. 113, 115 (E.D. N.Y. 1941)("Nor, in my opinion, should the witness be prevented from correcting his answers where he reasonably desires to do so although his reasons given may seem inadequate"). If the changes to the transcript are substantial, the courts may permit the deposition to be re-opened at the expense of the party making the changes. Lugtig v. Thomas, 89 F.R.D. at 642, Erstad v. Curtis Bay Towing Co., 28 F.R.D. 583, 584 (D. Md. 1961); Colin v. Thompson, 16 F.R.D. at 195; De Seversky v. Republic Aviation Corp., 2 F.R.D. at 115. *But cf.* Allen & Company v. Occidental Petroleum Corp., 49 F.R.D. at 341 (changes to deposition do not warrant further examination).

Although courts have not substantively restricted the right to amend deposition answers, they have insisted upon strict compliance with the procedural requirements of Rule 30 (e). Lugtig v. Thomas, 89 F.R.D. at 641 (changes made by witness on correction sheets appended to transcript are inadequate); Sauder Industries, Inc. v. The Carborundum Co., 31 Fed.R.Serv.2d (Callaghan) 437, 441 (N.D. Ohio 1980)(Rule 30 (e) does not permit changes by deponent after unsigned deposition has been certified for filing by court reporter); Architectural League of New York v. Bartos, 404 F. Supp. 304, 311 n.7 (S.D. N.Y. 1975)(changes to deposition made in witness' own hand and without a statement of reasons for the changes are inoperative); Colin v. Thompson, 16 F.R.D. at 195 (deponent may not enter changes on transcript but must appear before the person who took the deposition to make changes in answers and state reasons for changes). *But cf.* Allen & Company v. Occidental Petroleum Corp., 49 F.R.D. at 340-41 ("substantial compliance" with requirement that changes be entered upon the deposition by officer is adequate).

14. Erstad v. Curtis Bay Towing Co., 28 F.R.D. 583, 584 (D. Md. 1961).

15. Usiak v. New York Tank Barge Co., 299 F.2d 808, 810 (2nd Cir. 1962); Lugtig v. Thomas, 89 F.R.D. 639, 641-42 (N.D. Ill. 1981); Sauder Industries, Inc. v. The Carborundum Co., 31 FED.R.SERV.2d (CALLAGHAN) 437, 441 (N.D. Ohio 1980); Allen & Company v. Occidental Petroleum Corp., 49 F.R.D. 337, 341 (S.D. N.Y. 1970).

16. At the request of the adverse party, the court may require the party offering the original answers to introduce the amended answers as well. *See* FED.R.CIV.P. 32(a)(4); FED.R.EVID. 106.

17. Different considerations are present when the deposition is taken to perpetuate the favorable testimony of a witness who will be unavailable at trial. *See* FED.R.CIV.P. 27, 32(a)(3). Counsel taking the deposition may prefer to have the witness review and execute the

II. Examining the Deponent

A. The Introductory Litany

One of the goals in taking a deposition is to create a script from which the witness cannot deviate at trial without being impeached. To achieve this end, each deposition should commence with the following introductory litany:

> Q. Mr. Sorenson, do you understand that you are under oath?
> A. Yes.
> Q. Is there anything which will prevent you from testifying fully and accurately?[18]
> A. No.
> Q. I want you to listen carefully to the questions which I ask you, and answer only those questions which you hear fully. If you do not hear a question, please tell me and I will repeat it. Will you do that?
> A. Yes.
> Q. Mr. Sorenson, I also want you to answer only those questions which you completely understand. If you do not understand a question, please let me know and I will try to rephrase it. Will you promise to do so?
> A. Yes.
> Q. May I assume, then, that if you answer a question, you have both heard and understood the question?
> A. Yes.[19]

These questions guarantee that the deponent may not credibly repudiate his deposition answers at trial by asserting that he did not testify truthfully or accurately or did not hear or understand a question. If the witness attempts to explain an inconsistency between his trial and deposition testimony by such a claim, he will be impeached further by his responses to these prefatory questions.

B. The Substance and Structure of the Examination

The substance, as well as the structure, of the examination of

---

transcript to verify that it is accurate and thus bolster its weight in the eyes of the trier of fact. Assuming the witness is not hostile, there is also little risk that he will substantially change the answers given at the deposition upon reviewing the transcript.

It should be noted that waiver of signature will not entirely preclude a party from amending his deposition responses. *See* FED.R.CIV.P. 26(e), which sets forth circumstances under which a party has a duty to supplement responses to discovery requests.

18. Blumenkopf, *Deposition Strategy and Tactics*, 5 AM.J.TRIAL ADVOC. 231, 242 (1981)[hereinafter cited as Blumenkopf].

19. One commentator suggests that at this point, defending counsel should interject for the record that the witness may believe he comprehends a question when in fact he does not, and therefore the fact that the witness answers is not a guarantee that he understood the question. Suplee, *supra* note 3, at 287. If the defending attorney offers such remarks, the examiner again should obtain assurances from the deponent that he will only answer questions which he is certain that he understands.

the witness largely depends upon the purpose for which the particular deposition is taken. If the principal goal is discovery, counsel obviously should strive to obtain all information which the deponent knows about the subject matter of the cause of action.[20] The deposition not only should elicit all favorable facts, but also should discover every fact which tends to undermine the deposing party's claim or defense. Only by learning the harmful facts in advance of trial can counsel properly prepare to rebut or blunt those facts and to evaluate the case intelligently for purposes of settlement.

The deposing party must not rest content with unearthing the witness' knowledge of the events in issue. The record similarly should reflect those matters about which the deponent does *not* know to ensure that he may not be offered as an adverse witness at trial to testify about these facts. The deponent also should be asked to identify other witnesses and documents which may be relevant to the case.[21]

Finally, questioning should pin the witness to a specific factual position which he must reiterate at trial. While at first blush this appears to be at odds with the aim of comprehensive discovery, both objectives can be achieved through the proper sequencing of questions.[22] Counsel should begin each area of inquiry with broad, general questions designed to generate expansive narrative responses.[23] The examination should continue with more narrowly focused questions geared not only to secure more complete answers, but also to confine the witness' testimony to a very precise set of facts. Counsel

---

20. The permissible scope of discovery is set forth in Federal Rule of Civil Procedure 26(b). Discovery is not limited to information which would be admissible at trial "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." FED.R.CIV.P. 26(b)(1).

21. The deponent should be asked about the location and existence of relevant documents even if documents have been produced in advance of the deposition pursuant to a request for production under Federal Rule of Civil Procedure 34. The witness may identify documents which were not sought by or produced in response to an earlier request. Isom, *A Deposition Primer, Part II: At the Deposition*, 11 COLO. LAW. 1215, 1219 (1982)[hereinafter cited as Isom]. If the witness does identify new documents, the examiner should demand production prior to the final termination of the deposition so that she may interrogate the witness about these documents. Any agreement to produce the documents should be placed on the record of the deposition. R. HAYDOCK & D. HERR, *supra* note 3, at § 3.5.6 (1982).

22. As previously discussed, the introductory litany also binds the witness to his deposition testimony. *See supra* note 18 and accompanying text.

23. The examiner further can encourage the witness to be responsive by adopting a friendly, helpful demeanor, However, counsel at all times must maintain control over the witness by persisting in the examination until she is satisfied that the witness has offered complete answers to her questions. The examiner also must make sure that defending counsel does not interfere with the deposition by repeatedly conferring with the deponent before he answers. All such conferences should be noted for the record, and after each conference, the witness should be asked whether a) his answer differed because of what the attorney said, b) the attorney's advice helped him answer and c) the attorney noted pitfalls in the question. Suplee, *supra* note 3, at 290. Similarly, following each recess, to deter any modification of testimony, the deponent should be asked whether he conferred with counsel. R. HAYDOCK & D. HERR, *supra* note 3, at § 3.5.8.

should conclude the area of inquiry by plainly establishing that the deponent's recollection has been exhausted fully, thus preventing him from successfully departing from his deposition testimony at trial. This sequence is exemplified by the following abbreviated excerpt from the deposition of the plaintiff in a civil action for assault:

> Q. Mr. Byron, please explain what happened on the corner of Michigan and Main around 10:00 on the evening of Friday, October 3. [The sequence begins with an open-ended question calling for an expansive narrative description of the events.]
> A. I was standing on the corner waiting for the bus to take me home from work. Pat Moran came up to me and started shouting and pushing me. We fell to the ground, Moran started punching me and then got up and ran away.
> Q. Mr. Byron, let's focus first on what happened before the pushing began. You stated that Mr. Moran began shouting at you. Can you tell us exactly what he said? [The examiner follows-up to elicit a more detailed and thorough explanation of the events preceding the alleged assault.]
> A. Yes. Moran came up to me and said, "We don't need your kind hanging around here anymore. Why don't you just move on."
> Q. Were those his exact words? [The witness is further pinned to a very specific factual position.]
> A. Yes.
> Q. Is that everything which you recall that Mr. Moran said before he began pushing you? [The inquiry into Moran's statements preceding the alleged assault concludes by clearly establishing that the deponent's recollection is exhausted so that he may not expand upon or deviate from his deposition testimony at trial.][24]
> A. Yes.

Even when the principal purpose of a deposition is discovery, the deposing party must be alert for responses which may prove valuable at trial as admissions or impeachment.[25] The likelihood of procuring such testimony may be increased without a significant sacrifice in discovery if counsel jumps from topic to topic rather than asking the deponent to relate his version of the facts in chronological

---

24. It has been suggested that, to close further any route by which the witness may escape his deposition testimony at trial, the examiner should ask whether there are any documents which could refresh the witness' recollection. If the deponent responds affirmatively, counsel should show him the document or continue the deposition until it is produced and inquire whether it in fact has refreshed his recollection. Summit, *supra* note 3, at 26. Affording the witness a chance to refresh his recollection presents the risk that the witness will recall facts that are damaging to the examiner. Thus the deposing party may prefer to accept the witness' statement that he has no recollection of any other statement prior to the pushing and use this response to impeach the witness if further statements are offered at trial.

25. FED.R.CIV.P. 32(a)(1) and (2).

order.[26] The examiner must be willing to abandon an area of inquiry before exhausting the witness' recollection if the deponent unexpectedly gives an answer which may serve as an important admission or impeachment. This poses perhaps the toughest tactical decision for the deposing attorney, who must weigh the benefits to be derived from further questioning in the area against the risk that the witness will destroy the admission or impeachment through subsequent responses. The advocate must make this choice instantly, for if she unduly delays before asking the next question, the deponent or the opposing counsel may be alerted to the damage and may take steps to qualify or clarify the previous answer and thus assure that it will be utterly useless at trial.

An entirely different approach to the examination is dictated when the deposition is taken to perpetuate the testimony of a witness who will be unavailable at trial.[27] Unlike depositions intended principally for discovery, these depositions require the deposing party to proffer only questions that narrowly elicit favorable facts which she intends to introduce at trial.[28] Because the deposing party intends to offer the deposition into evidence in place of live testimony, the examination must be carefully structured in a logical sequence which will be understandable to the trier of fact. Both the form of the question and the answer must be proper,[29] and counsel meticulously must

---

26. Deviating from a chronological structure in fact may enhance discovery from the witness who has been prepared thoroughly for his deposition, as he will be less able to testify from his rehearsed script.

27. FED.R.CIV.P. 27, 32(a)(3). Federal Rule of Civil Procedure 32(a)(3) deems a witness unavailable for purposes of permitting the use of his testimony as substantive evidence

> 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 the United States, 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) 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.

FED.R.CIV.P. 32(a)(3); *see also* Federal Rule of Evidence 804(a), which defines when a witness is unavailable for purposes of using his deposition under the former testimony exception to the hearsay rule. FED.R.EVID. 804(a),(b)(1).

28. As in discovery depositions, the examiner also may elect to establish the witness' lack of knowledge about certain matters.

29. Federal Rule of Civil Procedure 30(c) provides, in pertinent part, that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." FED.R.CIV.P. 30 (c). The proper use of leading questions at a deposition therefore is prescribed by Federal Rule of Evidence 611(c) as follows:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

establish any requisite foundation for the admissibility of the testimony. As the witness will not be available at trial, there will be no later opportunity to correct deficiencies in the deposition.

Different questioning tactics are utilized when the primary aim of the deposition is to dispose of the litigation prior to trial. For example, a witness may be deposed to generate evidence to support a motion for summary judgment.[30] In such instances, the examination should be limited to establishing only those matters which are necessary to support the motion. Counsel does not want to afford the witness an opportunity to explain his responses nor to elicit unfavorable answers which could be used to demonstrate that material facts are in dispute.[31] Consequently, the questions must be painstakingly formulated to invite only the desired responses. Similarly, depositions may be used to induce termination of the litigation by settlement. Such depositions should emulate an aggressive cross-examination and are substantively limited to exposing the weaknesses in the adversary's case.[32]

Regardless of the purpose of the deposition, the precise questions to be posed are determined by the legal and factual issues of the case. While it is obviously not feasible here to catalogue the questions to be asked in every type of case,[33] there is one important line of inquiry which should be pursued in virtually every deposition. The witness should be asked to describe all steps he took to prepare for the deposition and to identify specifically each file and document that he reviewed.[34] The witness' response not only will enhance the reliability of the deposition testimony if offered at trial, but may lead to the production of evidence which was not and could not be obtained through other means of discovery.

Under Federal Rule of Evidence 612, an adverse party is entitled to production and inspection of documents which the witness

---

FED.R.EVID. 611(c).

30. Federal Rule of Civil Procedure 56(e) specifically authorizes the court to permit depositions to be offered in support of, and in opposition to, motions for summary judgment. FED.R.CIV.P. 56(e).

31.sp2n]Counsel may have to adopt a sterner demeanor to prevent an uncooperative witness from offering responses which are evasive or which go beyond the scope of the question.

32. Some attorneys attempt to maximize the chances of settlement by making the deposition of a party so unpleasant that the witness will not want to repeat the experience at trial. The use of this tactic is limited by Federal Rules of Civil Procedure 26(c) and 30(d) as well as by MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) and 7-102(A)(1) and EC 7-10 and 7-37 (1979). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1, 4.4 (1983).

33. For an analysis of depositions in various substantive areas of law, see DANNER, PATTERN DEPOSITION CHECKLISTS (1973 & Supp. 1983); 2-9 DEPOSITION STRATEGY LAW AND FORMS (A. Sann and S. Bellman ed. 1983); THE ART OF TAKING AND USING DEPOSITIONS; (Pennsylvania Bar Institute ed. 1981).

34. If the deposition is not completed in one day, at the beginning of each subsequent session of the deposition, the witness should be asked to detail the preparation that was done since the most recent adjournment. Summit, *supra* note 3, at 25.

consulted before trial to refresh his memory for the purpose of testifying.[35] Rule 612 has been extended to require production of documents reviewed by a witness in preparation for his deposition.[36] Indeed, some courts have construed the rule even to compel disclosure of privileged documents by reasoning that the privilege is waived once the documents are used to assist in refreshing the deponent's recollection.[37] The operation of Rule 612 plainly instructs the examining counsel routinely to ask the witness to identify and produce all documents reviewed in anticipation of the deposition. In turn, the deponent's lawyer should avoid disclosing documents which are privileged or which have not been requested through previous discovery when preparing the witness for his deposition.[38]

C. *Use of Documents at the Deposition*

The deposition is an indispensable tool for the discovery of documents. Not only may the deponent be asked to divulge the existence, location and identity of relevant writings, but the deposition is the lone means of compelling a nonparty to produce documentary evidence prior to trial.[39] The deposition also may lead to the inspection of records which otherwise would be privileged and, thus,

---

35. FED.R.EVID. 612.

36. FED.R.CIV.P. 30(c); Prucha v. M & N Modern Hydraulic Press Co., 76 F.R.D. 207 (W.D. Wisc. 1977). *See infra* note 36.

37. James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982); Ramsey v. County of Fresno, 7 Fed.Evid.Rep. 950 (E.D. Cal. 1980); Marshall v. United States Postal Service, 88 F.R.D. 348, 350-51 (D.D.C. 1980)(use of privileged document to refresh recollection at the deposition requires disclosure to opposing counsel, but does not constitute anyfurther waiver of privilege); Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8 (N.D. Ill. 1978).

In Cambridge Industrial Products Corp. v. Metal Works, Ltd., 4 Fed.Evid.Rep. 835 (D. Mass. 1979) and Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D. N.Y. 1977), the courts refused to compel production of privileged documents used to refresh a deponent's recollection. Both courts noted that their decisions were premised largely on the fact that there was no clear prior case law that would have apprised the attorneys of the risk of waiving the work-product privilege and cautioned that, in future cases, they would be willing to find the privilege waived when the documents were used to refresh a deponent's recollection.

Contra Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F.Supp. 45 (S.D. N.Y. 1982)(refusing to order disclosure of work product used to refresh deponent's recollection); Al-Rowaishan Establishment v. Beatrice Foods Co., 92 F.R.D. 779 (S.D. N.Y. 1982) (refusing to order disclosure of documents which contain solely the mental impressions of an attorney relating to pending litigation); Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii) Ltd., 85 F.R.D. 118, 120 n.2 (W.D. Mo. 1980)(dictum).

38. Barrer v. Women's National Bank, 96 F.R.D. 202, 204 n.1 (D.D.C. 1982)("Counsel can adequately protect the attorney-client privilege by not making such a document available for perusal by a client to prepare for a forthcoming deposition").

39. Documents may be obtained from a nonparty through service of a subpoena duces tecum commanding the witness to produce specified documents at the deposition. FED.R.CIV.P. 30(a) and (b)(1), 45. While a party also may be required to produce documents at a deposition, *see* FED.R.CIV.P. 30(b)(5), one can compel a party to produce documents without a formal deposition through a request for production of documents under Federal Rule of Civil Procedure 34. FED.R.CIV.P. 34.

shielded from discovery.[40]

Interestingly, while depositions may be instrumental in procuring documents, documents play an integral role in the preparation for and conduct of depositions. Whenever possible, counsel should secure all relevant documents before taking depositions.[41] Review of these papers supplies background facts and suggests topics to be explored at the deposition. The documents themselves are likely to be the subject of many questions,[42] as the deposition often affords the sole opportunity prior to trial to compel a witness to explain or to interpret a writing. Documents also can be used at the deposition to induce forthright responses from a witness who persists in providing evasive answers or who repeatedly claims a failure of recollection.[43] Finally, only by reviewing documents in advance of the deposition is the examiner equipped to recognize when the deponent's testimony is contradicted by documentary evidence. Counsel then must decide whether to confront the witness with the conflicting document in an

---

40. *See supra* notes 34-37 and accompanying text.

41. Documents readily may be acquired from a party in advance of his deposition by filing a request for production of documents pursuant to Federal Rule of Civil Procedure 34, which sets a date for inspection of documents that precedes the time of the deposition set forth in the notice of deposition. FED.R.CIV.P. 34. However, the only means authorized by the federal rules to obtain documents from a nonparty is through a subpoena duces tecum which commands production *at* the deposition. FED.R.CIV.P. 30(a) and (b)(1), 45. Nevertheless, a nonparty may be persuaded to produce documents in advance of the deposition if it is explained that earlier production will spare the witness from waiting at the deposition while counsel reviews the documents. If this appeal to the convenience of the deponent fails, counsel can issue the subpoena duces tecum to the custodian of documents, limit the deposition of the custodian to identification and authentication of the documents produced and subsequently depose witnesses who have personal knowledge of the contents of the documents. Sugarman & North, *supra* note 2, at § 1.02[7]. Of course, this procedure will afford an advance review of documents only if the custodian of documents is not the individual who possesses personal knowledge of the substance of the documents.

42. One commentator recommends that the witness should be asked the following about each document he authored or distributed:

1. Who drafted the document?
2. Identify all persons from whom information contained in the document was received.
3. How many drafts of the document were prepared?
4. Who has custody of the drafts of the document?
5. Who reviewed the document before it was distributed?
6. Identify all persons who received copies of the document.
7. Identify all oral and written responses to the document or copies of the document.

Suplee, *supra* note 3, at 303.

Suplee also suggests that the following questions should be posed for each document received by the witness:

1. What response, written or oral, did you make to the document?
2. If you made no response, why not?
3. To whom did you show the document?
4. Whom did you consult about the contents of the document?
5. What action was taken in response to the document?

Id.

43. The benefit of this use of documents at the deposition is aptly summarized in Dallas, *supra* note 2, at 308: "If the examiner is able to employ this technique to trap the witness on enough occasions, the witness may soon conclude that the examiner has documents to establish every question. At that point, the examiner may be able to ask, even without documentary support, questions that elicit crucial admissions."

effort to prevail upon him to retract the answer or to abandon the line of questioning and spring the impeaching document upon the hopefully unsuspecting witness at trial.

While there are no formal rules prescribing the handling and use of documents at depositions, as a tactical matter, one should adhere to two general precepts. First, every document referred to at the deposition should be marked for identification (for example, Brown Deposition Exhibit A) and annexed to the transcript of the deposition.[44] The deposing party thereby averts any dispute at trial over which document formed the basis of the deposition testimony.[45] Second, the examining counsel should attempt to have the witness establish the proper foundation[46] for the admissibility of each document used at the deposition. While this is not a condition which must be satisfied before questioning the deponent about the document,[47] the deposition presents an important opportunity to learn whether the witness in fact is competent to lay the foundation. If the witness fully testifies to the foundation, the deposing party has discovered a means of offering the exhibit into evidence at trial.[48] Moreover, opposing counsel will be more inclined to stipulate to the admissibility of the document, which will obviate the need to call any witness to sponsor the document. Conversely, if the witness cannot supply the foundation, the examiner is alerted in advance of trial that he must find other ways to meet the evidentiary requisites. Opposing counsel also may neglect to object to the failure to establish a proper foundation and thus preempt any such objection at trial.[49]

III. Objections

A. Rules of Procedure Relating to Objections

To raise or respond to objections competently, one must have an absolute command of the applicable rules. The Federal Rules of

---

44. Federal Rule of Civil Procedure 30(f)(1) expressly authorizes a party to request that documents produced during the examination be marked for identification and annexed to the deposition. Rule 30(f)(1) also details the circumstances under which the person producing the documents may retain the originals. FED.R.CIV.P. 30(f)(1).

45. To eliminate any ambiguity concerning multipage exhibits, the examiner should identify specifically the page of the exhibit to which his question pertains. Dombroff, *Effective Discovery Techniques and Tactics under the Federal Rules of Civil Procedure*, BARRISTER, Winter 1982, at 31, 34.

46. To be admissible at trial, a document must be properly authenticated and identified, FED.R.EVID. 901-903; must be an original or satisfy one of the exceptions to the requirement of an original, FED.R.EVID. 1001-1008; if hearsay, must fall within one of the hearsay exceptions, FED.R.EVID. 801-806; must be relevant, FED.R.EVID. 401-411; and must not be privileged, FED.R.EVID. 501.

47. FED.R.CIV.P. 26 (b)(1), 30(c); *see infra* notes 61-67 and accompanying text.

48. If the deponent is a party or is unavailable at trial, the deposition transcript itself may be offered as the foundation for the admission of the exhibit into evidence. FED.R.CIV.P. 32(a)(2) and (3).

49. *See infra* note 54 and accompanying text.

Civil Procedure lump the available objections into categories organized according to the point in time at which the objection must be raised to avoid waiver.[50] Objections to the conduct of the examination of the deponent[51] are regulated by Federal Rule of Civil Procedure 32(d)(3), which provides in pertinent part as follows:

> (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[52] or answers,[53] 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.[54]

Some counsel mistakenly believe that while objections to form are waived unless raised at the deposition, all objections to relevance are preserved for trial. A close reading of Rule 32(d)(3) plainly indicates that an objection to competency, relevancy and materiality indeed may be waived if the basis for the objection could have been "obviated" if lodged at the deposition. Accordingly, courts have refused to entertain trial objections to the authenticity of exhibits,[55] to the qualification of expert witnesses[56] and to opinion testimony premised on hearsay[57] by finding that such objections are "obviable"

---

50. FED.R.CIV.P. 32(d). These rules may be modified by written stipulation of the parties. FED.R.CIV.P. 29; *see infra* notes 85-91 and accompanying text.

51. The federal rules also specify the time and manner of objecting to the notice of the deposition, FED.R.CIV.P. 32(d)(1); to the alleged disqualification of the officer before whom the deposition is to be taken, FED.R.CIV.P. 32(d)(2); to the completion and return of the deposition, FED.R.CIV.P. 32(d)(4); and to the form of written questions submitted for a deposition upon written questions pursuant to Federal Rule of Civil Procedure 31. FED.R.CIV.P. 32(d)(3)(c).

52. Objections to form may include objections to questions which are improperly leading, Oberlin v. Marlin American Corp., 596 F.2d 1322, 1328 (7th Cir. 1979)(failure to object to leading questions during the examination of the deponent by his own counsel waives the objection); Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 298 F.2d 356, 360 (6th Cir. 1961); Houser v. Snap-on Tools Corp., 202 F. Supp. 181, 187-88 (D. Md. 1962); *see* FED.R.CIV.P. 30(c); FED.R.EVID. 611(c); questions which are argumentative, Bahamas Agriculture Industries, Ltd. v. Riley Stoker Corp., 526 F.2d 1174, 1180-81 (6th Cir. 1975); and questions which are misleading, ambiguous, compound or lacking a proper foundation. Sugarman and North, *supra* note 2, at § 1.04[4][c].

53. The examiner must be alert to object to answers which are nonresponsive, beyond the scope of the question, speculative or otherwise defective in form to avoid waiving an objection to the answers. Kirschner v. Broadhead, 671 F.2d 1034 (7th Cir. 1981).

54. FED.R.CIV.P. 32(d)(3)(A) and (B).

55. Gore v. Maritime Overseas Corp., 256 F. Supp. 104 (E.D. Pa. 1966), *modified*, 378 F.2d 584 (3rd Cir. 1967).

56. Cordle v. Allied Chemical Corp., 309 F.2d 821 (6th Cir. 1962).

57. Bahamas Agricultural Industries, Ltd. v. Riley Stoker Corp., 526 F.2d 1174 (6th Cir. 1975); Cordle v. Allied Chemical Corp., 309 F.2d 821, 825-26 (6th Cir. 1962); Dudding

and therefore waived by counsel's failure to interject at the deposition. Thus, any objection that possibly could be cured, whether it addresses the form or the substance of the question or answer, is waived unless timely presented at the taking of the deposition.[58]

B. Strategies in Raising Objections

As at the trial of the action, the attorney defending the deposition must consider whether an objection is tactically wise as well as legally permissible. Thus, defending counsel may elect to forego a waivable objection if the examiner, by curing the objection, will obtain more comprehensive information from the witness. Indeed, the deposing party may infer that the objection would not have been made unless he was entering a productive area of examination. Consequently, the defending attorney always must balance the need to preserve an objection against the risk that raising the objection will lead to more thorough discovery.[59] Conversely, the defending lawyer may object, even if an objection is not necessary to avoid waiver, to establish on the record a reminder to object at trial, to attempt to prompt settlement by demonstrating evidentiary obstacles to the opponent's case[60] or to induce the examiner to abandon the line of questioning.[61]

In addition to making objections, under limited circumstances the defending attorney may instruct the witness not to answer an objectionable question.[62] Generally, the deponent is required to respond to all questions, even those to which an objection has been raised.[63] Although some courts have sanctioned refusals to answer questions which are unquestionably irrelevant,[64] the majority of ju-

---

v. Thorpe, 47 F.R.D. 565 (W.D. Pa. 1969).

58. Although Federal Rule of Civil Procedure 32(d)(3)(A) provides that an obviable relevance objection is waived unless interposed at the deposition, Kirschner v. Broadhead, 671 F.2d 1034 (7th Cir. 1982), some courts have sustained relevance objections to deposition testimony that are raised for the first time at trial on the ground that Federal Rule of Evidence 402 permits only the admission of relevant evidence. Reeg v. Shaughnessy, 570 F.2d 309 (10th Cir. 1978); Sims Consolidated, Ltd. v. Irrigation and Power Equipment, Inc., 518 F.2d 413, 418 (10th Cir.), *cert. denied*, 423 U.S. 913 (1975).

59. Dallas, *supra* note 2, at 309.

60. Isom, *supra* note 20, at 1218.

61. The propriety of this tactic is limited by the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2), EC 7-4 and 7-25 (1979). *See also* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.1 and comment (1983).

62. If counsel does not represent the witness, he may suggest that the witness refuse to answer a question, but is not entitled to instruct the witness not to respond. Shapiro v. Freeman, 38 F.R.D. 308, 312 (S.D. N.Y. 1965).

63. FED.R.CIV.P. 30 (c).

64. Kamens v. Horizon Corp., 81 F.R.D. 444 (S.D. N.Y. 1979). On occasion, courts have approved refusals to answer questions which are ambiguous, Mortensen v. Honduras Shipping Co., 18 F.R.D. 510, 512 (S.D. N.Y. 1955); questions which are repetitious, misleading and argumentative, *In re* Folding Carton Antitrust Litigation, 83 F.R.D. 132, 134-35 (N.D. Ill. 1979); Keough v. Pearson, 35 F.R.D. 20, 22-23 (D.D.C. 1964); and questions which call for information outside the deponent's personal knowledge, In re Folding Carton Antitrust

risdictions hold that counsel may not instruct a witness to refuse to answer a question on the ground that it is not relevant.[65] However, one may, in fact must, advise his client not to answer a question which invades a privilege.[66] Not only is privileged material outside the scope of discovery,[67] but by responding to the question the witness would waive the privilege.[68]

Even though the right to instruct the witness to refuse to answer is severely constricted, one is not impotent to curtail an improper examination. While the court normally does not rule upon until trial, the defending counsel is entitled to suspend a deposition and move the court to terminate or limit the examination on the ground that it is being conducted "in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party."[69] Motions to terminate have been granted when the examiner sought information which was entirely irrelevant,[70] when there was repeated inquiry into privileged matters[71] and when the deposition in fact was oppressive or embarrassing to the witness.[72] The court has the discretion to terminate the deposition completely or, less dramatically, to limit the scope and manner of conducting the deposition.[73] If the court denies the motion, however, the defending attorney and/or his client may be required to pay the reasonable expenses, including attorney's fees, incurred by the party opposing the motion.[74]

Litigation, 83 F.R.D. 132 (N.D. Ill. 1979). *See* R. HAYDOCK & D. HERR, *supra* note 2, at § 3.7.5.

65. Ralston Purina Co. v. McFarland, 550 F.2d 967, 973-74 (4th Cir. 1977); Preyer v. United States Lines, Inc., 64 F.R.D. 430 (E.D. Pa. 1973), *aff'd*, 546 F.2d 418 (3rd Cir. 1976); United States v. IBM, 79 F.R.D. 378 (S.D. N.Y. 1978); Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518, 520-21 (E.D. Tenn. 1977); W.R. Grace & Co. v. Pullman, Inc., 74 F.R.D. 80, 83-84 (W.D. Okla. 1977); Shapiro v. Freeman, 38 F.R.D. 308, 311-12 (S.D. N.Y. 1965); Drew v. International Bd. of Sulphite & Paper Mill Workers, 37 F.R.D. 446, 449-50 (D.D.C. 1965); Banco Nacional de Credito Ejidal, S.A. v. Bank of America National Trust & Savings Assn., 11 F.R.D. 497 (N.D. Cal. 1951).

66. Preyer v. United States Lines, Inc., 64 F.R.D. 430 (E.D. Pa. 1973), *aff'd*, 546 F.2d 418 (3rd Cir. 1976); W.R. Grace & Co. v. Pullman, Inc., 74 F.R.D. 80, 85 (W.D. Okla. 1977); Lewis v. United Lines Transport Corp., 32 F. Supp. 21 (W.D. Pa. 1940).

67. FED.R.CIV.P. 26 (b)(1).

68. Perrigon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978); Rosenfield v. Unger, 25 F.R.D. 340 (S.D. Iowa 1960).

69. FED.R.CIV.P. 30(d). The motion may be presented either to the court in which the action is pending or to the court in the district where the deposition is being taken. *Id.* Counsel also may petition the court to limit the scope of the deposition in advance of the deposition through a motion for a protective order, FED.R.CIV.P. 26(c), as well as through a motion for a discovery conference, FED.R.CIV.P. 26(f).

70. Pittsburgh Plate Glass Co. v. Allied Chemical Alkali Workers of America, 11 F.R.D. 518 (N.D. Ohio 1951).

71. Ross v. Cities Services Gas Co., 21 F.R.D. 34 (W.D. Mo. 1957); Broadbent v. Moore-McCormack Lines, Inc., 5 F.R.D. 220 (E.D. Pa. 1946); French v. Zelstem-Zalessky, 1 F.R.D. 508 (S.D. N.Y. 1940).

72. De Wagenknecht v. Stinnes, 243 F.2d 413 (D.C. Cir. 1957).

73. FED.R.CIV.P. 30(d). If the court terminates the deposition, the deposition may be resumed only upon the order of the court in which the action is pending. *Id.*

74. FED.R.CIV.P. 30(d), 37(a)(4).

C. *Responding to Objections*

The key to responding to objections lies in the recognition that, except for claims of privilege, an objection does not authorize the deponent to refuse to answer, but merely preserves that objection for trial.[75] Because Federal Rule of Civil Procedure 30(c) provides that objections should not interfere with the taking of evidence at the deposition, the principal tactical decision for the examining counsel is whether to attempt to cure an objection to ensure that the deponent's response may be used at trial.

If the deposing party does not foresee offering the witness' reply to a particular question at trial, her response to any objection is quite simple. She should merely ask the witness to answer. The examiner never should abandon the question, since the objection generally will not support a refusal to answer.[76] Similarly, there is no reason for the examining counsel to argue about the objection when she is indifferent to whether the objection will preclude her from submitting the answer at trial.

In cases in which the party taking the deposition does wish to preserve her option to use the deponent's response at trial, she first must ascertain the basis for the objection. Her reaction then will depend upon whether the objection is one which may be remedied at the deposition. If the objection is curable, the examiner should endeavor to satisfy opposing counsel by rephrasing the question or by taking other steps to correct the grounds for the objection.[77] Conversely, if the objection is not obviable, the witness simply should be asked to answer the question. Again, there usually is no cause to quibble over the objection because it will not be resolved until trial and should not impede the taking of evidence at the deposition. Counsel particularly should avoid responding to relevance objections by describing the purpose of her question.[78] By explaining the relevance of her questions, the deposing party invites continued objections as the defending counsel will realize that, by objecting, he will be rewarded with discovery of the examiner's case.

Different strategies are implicated when the defending attorney not only objects but improperly instructs the witness not to answer.[79]

---

75. *See supra* notes 61-67 and accompanying text.

76. *Id.* The witness is entitled to decline to answer on the ground of privilege. *See supra* notes 65-67 and accompanying text.

77. One author recommends that the examiner should ask the witness to answer the initial question before attempting to cure the objection. Isom, *supra* note 20, at 1218.

78. If the witness refuses to answer and counsel intends to present a motion to compel the answer, she may have to explain the relevance of the question to demonstrate a good-faith effort to resolve the objection. *See* United States District Court for the Middle District of Pennsylvania Rules of Court, Rule 402.6.

79. If the deponent is not a party, the opposing counsel should be advised that he has no right to instruct a witness not to answer unless he represents the witness. Shapiro v. Freeman,

Assuming that counsel cannot be persuaded that the refusal to answer is not authorized, the deposing party has four options:[80]

1. The examiner may proceed with the interrogation and ask the same question, in a slightly different form, later in the deposition. Often the defending attorney will not repeat the objection, either because he does not recognize that it is substantially the same question which he counselled the witness not to answer, or because he no longer cares to object.

2. The examiner may complete the deposition and, prior to its termination, negotiate all the refusals to answer. Once confronted with the number of times he directed the witness not to answer, the defending counsel may be willing to retract some of those instructions to avoid a motion to compel the answers and accompanying sanctions.[81] Moreover, the deposing party obtains immediate responses without the delay or costs attendant to formal court intervention.

3. The examiner may complete the deposition and, following its termination, file a motion to compel the witness to answer.[82]

4. Rather than complete the deposition, the examiner may suspend the deposition and seek a motion to compel the witness to answer.[83] Arguably the most effective means of inducing rescission of an instruction not to answer is to suspend the deposition to seek an *immediate* ruling from the judge. Counsel may present his motion in person or even by telephone to the judge to whom the case is as-

---

38 F.R.D. 308, 312 (S.D. N.Y. 1965). The defending attorney then should be asked pointedly to state for the record whether he represents the deponent. If counsel does not acknowledge that he has been retained to defend the witness, there no longer is any justification for the instruction. On the other hand, if counsel affirms that he represents the deponent, the examiner may use this representation to impeach the credibility of the witness at trial.

The opposing counsel may suggest, rather than instruct, that a nonparty witness not answer a question. If the witness declines to answer, the examiner should apprise the witness that the deposition may need to be reconvened at a subsequent date. The specter of spending more time away from their usual affairs typically induces most disinterested witnesses to respond.

80. In all cases, the examiner should have the court reporter mark the stenographic tape in a manner which will enable the reporter readily to access the refusal to answer before the deposition is transcribed. Counsel thus will be able accurately to apprise the court of the specific refusal to answer without awaiting a transcript of the deposition.

81. FED.R.CIV.P. 37(a)(4) provides that if a motion to compel is granted,

> the court shall, after opportunity for hearing, 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 obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

82. FED.R.CIV.P. 37(a). If the deponent is a party, the motion may be submitted to the court before which the action is pending or to the court in the district in which the deposition is taken. FED.R.CIV.P. 37(a)(1). However, if counsel seeks to compel a nonparty to answer a question, the motion must be made to the court in the district in which the deposition is taken. *Id.*

83. FED.R.CIV.P. 37(a).

signed or to the emergency judge on duty.[84] This tactic not only achieves a prompt resolution of the objection, but also the imminent threat of an adverse ruling commonly impels defending counsel to permit the witness to respond.[85]

D. Stipulations to Modify the Rules Relating to Objections

In addition to comprehending the way in which the federal rules affect the raising of and response to objections at the deposition, both the persons taking and defending the deposition must consider whether to modify those rules by stipulation.[86] As with most aspects of deposition practice, the purpose of the individual deposition influences which stipulations each party should favor.

If the foremost objective of the deposition is discovery rather than generating evidence for trial, the deposing party should strive to limit his adversary's opportunities to interfere with the interrogation. Accordingly, the attorney taking the deposition may offer to stipulate that all objections are preserved for trial, thus precluding any basis for objecting at the deposition. The examiner, however, does have some incentive to require objections to be presented at the deposition.[87] Even if taken principally for discovery, the deposition unexpectedly may beget responses which may be used at trial for impeachment or as substantive evidence.[88] The deposing attorney wants to ensure that these answers will be admissible at trial absent an objection at the deposition.[89] Given these competing considerations, the appropriate stipulation rests upon an assessment of the likelihood of the defending counsel's obstructing discovery through excessive objections versus the probability that the deponent's testimony will be employed at trial.

The attorney defending the deposition must avoid the temptation to accept a stipulation that all objections are preserved for trial. While alluring because it guards against inadvertent waiver of objections, the stipulation also disarms the defending party's most potent

---

84. Braziller v. Lind, 32 F.R.D. 367 (S.D. N.Y. 1963); *see* United States District Court for the Eastern District of Pennsylvania Rule of Civil Procedure 4. If counsel immediately petitions the judge to compel an answer, the judge's ruling should be placed on the deposition record.

85. If it is anticipated that the defending attorney repeatedly will instruct the witness not to answer, the examiner may seek an order barring such future instructions, United States v. IBM, 79 F.R.D. 378 (S.D. N.Y. 1978), or may apply to have a master appointed to preside over the deposition. FED.R.CIV.P. 53; Shapiro v. Freeman, 38 F.R.D. 308, 312 (S.D. N.Y)(fees of the master to be paid by the objecting attorney without reimbursement by his client). The deposing party also may ask the court to rule upon the proper scope of discovery in advance of a deposition through a motion for protective order, FED.R.CIV.P. 26(c), or a motion for a discovery conference, FED.R.CIV.P. 26(f).

86. *See supra* notes 4-10 and accompanying text.

87. *See supra* notes 49-57 and accompanying text.

88. FED.R.CIV.P. 32(a)(1) and (2).

89. Blumenkopf, *supra* note 18, at 240.

weapon for controlling the deposition and protecting the witness. The defending attorney, however, ordinarily should be willing to enter into a stipulation preserving all objections except as to the form of the question to avoid unintentional waiver of relevance objections which the court ultimately deems obviable if raised at the deposition.[90]

Different strategies are needed if the deposition is taken to perpetuate the testimony of a witness who will be unavailable at trial.[91] Because the deposition will be the sole source of the witness' testimony at trial, the deposing counsel wants to be alerted to and to resolve all objections prior to terminating the deposition. Therefore, one should seek a stipulation that all objections not offered at the deposition are waived. Conversely, the defending counsel prefers to preserve objections for trial, knowing that if an objection ultimately is sustained, his adversary can offer no substitute for the deposition testimony. Given that the defending party is unlikely to accede to a stipulation requiring all objections to be presented at the deposition, the attorney taking a deposition to perpetuate testimony should seek a court order in advance of the deposition which provides that any objection not raised at the deposition will be waived.[92]

IV. Examination of the Witness by the Attorney Defending the Deposition

The attorney defending the deposition must determine whether, and to what extent, to exercise his right to examine the deponent.[93] This decision rests largely, although not exclusively, on the nature of his relationship with the deponent.

If the deponent is counsel's client or a friendly or neutral witness who voluntarily will cooperate, as a general rule counsel should not examine at the deposition. When the deposing party has exposed only facts which harm his case, the defending attorney may be tempted to question the witness to elicit favorable facts for the record. Such an examination is entirely unnecessary when the witness is willing to supply this information to the defending counsel outside the deposition chamber. The helpful testimony may be presented fully at trial, unimpaired by the defending counsel's failure to question the witness about these matters at his deposition.[94] By examining the witness at the deposition, defending counsel gratuitously sup-

90. Facher, *supra* note 3, at 29; *see supra* notes 49-57 and accompanying text.

91. FED.R.CIV.P. 27, 32(a)(3).

92. FED.R.CIV.P. 26(c)(2).

93. The form of the questions properly employed by the defending attorney during his examination is determined by Federal Rule of Civil Procedure 30(e). *See supra* note 28.

94. Similarly, the testimony may be offered in support of pretrial motions, like motions for summary judgment, through an affidavit of the witness. *See* FED.R.CIV.P. 56.

plies the discovery which the deposing party neglected to seek. Beyond acquiring the testimony elicited by defending counsel, the deposing attorney most assuredly will probe the new facts brought forth on cross-examination through an extensive redirect examination.

There are, however, two circumstances when a party or friendly witness should be questioned. First, if there is any risk that the deponent will be unavailable[95] at trial, counsel should examine to the extent necessary to adduce favorable testimony for ultimate use at trial. Second, defending counsel should interrogate the witness to resolve ambiguities in the direct testimony if counsel is confident that the ambiguities may prove detrimental at trial *and* that the deponent will clarify in a manner which helps, rather than further hurts, his case. Although the ambiguities could be elucidated at trial, the explanation will be more credible if first presented at the deposition. Federal Rule of Civil Procedure 32(a)(4) specifically prescribes that "[i]f 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. . . ."[96] To invoke this rule of completeness at trial, the defending counsel must unravel the ambiguities during the deposition.

The extent of the defending attorney's examination should differ markedly if the deponent is affiliated with the adversary or for any reason will not voluntarily cooperate. In such cases, the deposition affords the only opportunity to interview the witness before trial. Consequently, the defending counsel should examine as fully as if he had noticed the deposition.[97] The defending attorney is not limited in questioning by the scope of the direct examination,[98] although he may have to bear a share of the costs of the deposition if his interrogation becomes extensive.[99]

V. Conclusion

Virtually all the strategies in deposition practice are products of two factors—the formal rules governing depositions and the purpose or purposes for which the particular deposition is taken. While this article does not pretend to comprehensively survey deposition tactics, counsel should be able to deduce the appropriate techniques to be

95. *See supra* note 26.
96. FED.R.CIV.P. 32(a)(4); *see also* FED.R.EVID. 106.
97. *See supra* notes 19-38 and accompanying text.
98. Spray Products, Inc. v. Strouse, Inc., 31 F.R.D. 211 (E.D. Pa. 1962).
99. Baron v. Leo Feist, Inc., 7 F.R.D. 71, 72 (S.D. N.Y. 1946); R. HAYDOCK & D. HERR, *supra* note 3, at § 3.7.7.

employed in any deposition situation by analyzing the applicable rules and her goals in taking or defending the deposition.