

Advanced Topics in Oral Civil Discovery

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THIS article addresses advanced topics in civil discovery in state and federal courts. It presupposes prior experience in both oral discovery and pretrial procedure. This article focuses on oral civil discovery and is presented

in a Frequently Asked Questions (“FAQ”) format that may be more accessible to seasoned practitioners. Because state court rules are frequently based on the Federal Rules of Civil Procedure (“FRCP”),¹ this article generally

¹ See e.g. *World Mission Soc’y Church of God v. Colon*, 85 Va. Cir. 134, 136 (Va. Cir. Ct. 2012) (applying FRCP 26 to interpret the “good cause” standard under Rule 4:1(c)); *Staples Corp. v. Washington Hall Corp.*, 44 Va. Cir. 372, 374 (Va. Cir. Ct. 1998) (“Where the Virginia Supreme Court has not addressed a particular discovery issue, federal case law interpreting the FRCP may be instructive” (citing *Transilift Equip., Ltd. v. Cunningham*,

relies on federal authority (with occasional references to state court authority).

I. Oral Discovery

A. What to do About Overbroad Corporate Deposition Notices

Corporations are required under FRCP 30(b)(6) to produce a witness (or multiple witnesses) who can testify about specific topics identified in the deposition notice. Sometimes, corporations are served with notices that have 20, 30 or 40 topics. It can be difficult, if not impossible, to prepare a witness for all of those topics. This creates a further risk to corporations, because there is case law that provides that a corporation cannot

offer evidence on a topic that was covered by a 30(b)(6) notice if the witness was not prepared to testify on that topic.

Courts recognize that Rule 30(b)(6) depositions can be a wellspring of discovery abuse. One judge described the issue:

[A] 30(b)(6) deposition, which by its nature can be time-consuming and inefficient, [must] be productive and not simply an excuse to seek information that is already known.²

Courts have held that the deposing party must designate topics for the deposition with “painstaking specificity”:

²³⁴ Va. 84, 90-91 (1987) and *Rakes v. Fulcher*, 210 Va. 542, 545 (1970)).

² *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 126 (D.D.C. 2005); *see also Crocs, Inc. v. Effervescent, Inc.*, No. 06-cv-00605, 2017 U.S. Dist. LEXIS 27082 (D. Colo. 2017) (affirming Magistrate Judge’s ruling narrowing seventeen 30(b)(6) topics to one topic. Magistrate Judge ruled that the notice was not proportional and covered topics better suited to less onerous discovery). *See also Banks v. Office of the Senate Sergeant of Arms*, 222 F.R.D. 7, 19 (D. D.C. 2004) (ordering the parties to find topics that will “insure that the 30(b)(6) depositions are meaningful exercises in ascertaining information that has not been previously discovered” and ordering the party seeking discovery “not [to] ask questions that duplicate questions previously asked of other witness or seek information that he already has by virtue of responses to other discovery devices”).

A deposition under Rule 30(b)(6) differs in significant respects from the normal deposition. To begin with, the notice of deposition must “describe with reasonable particularity the matters for examination.” As several courts and commentators have pointed out, the goal of this requirement “is to enable the responding organization to identify the person who is best situated to answer questions about the matter, or to make sure that the person selected to testify is able to respond regarding that matter.” Accordingly, there is an implicit obligation on the deponent to prepare the witness. **However, the rule implies an equivalent obligation on the deposing party to designate with painstaking specificity, the particular subject areas that are intended to be questioned.**³

Courts have also quashed FRCP 30(b)(6) deposition notices when

the topics listed are open-ended or vague:

The court finds plaintiff’s Rule 30(b)(6) notice to be overbroad. Although plaintiff has specifically listed the areas of inquiry for which a 30(b)(6) designation is sought, she has indicated that the listed areas are not exclusive. **Plaintiff broadens the scope of the designated topics by indicating that the areas of inquiry will “include, but not [be] limited to” the areas specifically enumerated.** An overbroad Rule 30(b)(6) notice **subjects the noticed party to an impossible task.** To avoid liability, the noticed party must designate persons knowledgeable in the areas of inquiry listed in the notice. Where, as here, the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant

³ Int’l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc., No. 11-cv-02007, 2013 U.S. Dist. LEXIS 22986, at *14 – 15 (D.

Colo. Feb. 19, 2013) (emphasis added) (internal citations omitted).

designation is not feasible.⁴

In sum, corporate deposition notices can be a source of discovery abuse, but courts will limit them.

B. What Happens When a Corporate Representative “Does Not Know” about a Topic?

The Federal Rules of Civil Procedure do not allow a party to disclaim knowledge in a Rule 30(b)(6) deposition and then later offer testimony about that topic. Courts have ruled that because a Rule 30(b)(6) designee testifies on behalf of the entity, the entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know.⁵ Federal courts apply this principle to preclude evidence a corporate witness “did not know”:

[D]epending on the nature and extent of the obfuscation, the testimony

given by the non-responsive deponent (e.g. “I don’t know”) may be deemed “binding on the corporation” so as to prohibit it from offering contrary evidence at trial.⁶

Courts impose this proscription because the 30(b)(6) deposition is intended to ease the burden on corporations, and conversely, corporations have an obligation to present well-prepared witnesses:

By commissioning the designee as the voice of the corporation, the Rule obligates a corporate party **“to prepare its designee to be able to give binding answers”** in its behalf. **Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.**⁷

⁴ Reed v. Nellcor Puritan Bennett & Mallinckrodt, 193 F.R.D. 689, 692 (D. Kan. 2000) (emphasis added) (citations omitted).

⁵ 7-30 MOORE’S FEDERAL PRACTICE – CIVIL § 30.25 (2016).

⁶ Wilson v. Lakner, 228 F.R.D. 524, 530 (D. Md. 2005).

⁷ Rainey v. American Forest & Paper Ass’n, 26 F. Supp.2d 82, 94-95 (D.D.C. 1998) quoting Ierardi v. Lorillard, Inc., 1991 U.S. Dist. LEXIS 11320, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991); and United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (emphasis added).

A notice of deposition made pursuant to Rule 30(b)(6) requires the corporation to produce one or more officers to testify with respect to matters set out in the deposition notice or subpoena. A party need only designate, with reasonable particularity, the topics for examination. The corporation, then must not only produce such number of persons as will satisfy the request, *but more importantly, prepare them so that they may give complete knowledgeable and binding answers on behalf of the corporation.*⁸

The Western District of North Carolina has excluded evidence on “the central issue” because the FRCP 30(b)(6) witness was unprepared.

[Movant] could not first take the position that it had no information on that subject and then later, after the close of discovery and the filing of the Defendant’s dispositive

motion, completely reverse itself.⁹

In sum, if a corporate representative is unprepared to offer testimony about a topic, his testimony that he “does not know” about the topic is binding on the corporation; the corporation also “does not know.”

C. Can a Corporate Representative be Forced to Testify About Litigation Contentions?

Many courts reject the use of Rule 30(b)(6) to require an adverse party to “marshal... its factual proof” and then put forward a witness to be cross-examined regarding such proof under oath. For example, *In re Independent Serv. Orgs. Antitrust Litigation*¹⁰ upheld objections to these notices seeking “facts supporting numerous paragraphs of [a party’s] denials and affirmative defenses.” As the court explained, these 30(b)(6) notices improperly required the responding party “to marshal all of its factual proof and then provide it to [the 30(b)(6) designee] so that she could respond to what are essentially... contention interrogatories... [T]his would be highly inefficient and burdensome,

⁸ *Audiotext Communs. Network v. US Telecom*, 1995 U.S. Dist. LEXIS 15416, at *38-39 (D. Kan. Oct. 5, 1995) quoting *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) (emphasis in original).

⁹ *Caraustar Indus. v. N. Ga. Converting, Inc.*, No. 3:04CV187-H, 2006 U.S. Dist. LEXIS 91829, at *21-22 (W.D.N.C. Dec. 19, 2006).

¹⁰ 168 F.R.D. 651, 654 (D. Kan. 1996).

rather than the most direct manner of securing relevant information.”¹¹

If a party seeks to learn his adversary’s legal contentions, that party should serve interrogatories:

The Rules also preclude proponents of discovery from wielding the discovery process as a club by propounding requests compelling the recipient to assume an excessive burden.¹² Consequently, **the recipient of a Rule 30(b)(6) request is not required to have its counsel muster all of its factual evidence to prepare a witness to be able to testify regarding a defense or claim.** This rule holds especially true when the information sought is likely discoverable from other sources. . . . **Defendants could readily have obtained the same information in a more**

efficient manner by propounding “standard” interrogatories upon its opponent. By doing so, Defendants could obtain the same information with infinitely less intrusion upon privilege concerns, in a more workable form, and from the individuals who have actual knowledge of the matters at issue.¹³

District courts in the Fourth Circuit routinely require parties to use written discovery rather than corporate depositions to ferret out an adversary’s legal contentions:

Plaintiffs can obtain the factual support for defendants’ affirmative defenses in other less burdensome ways. Plaintiffs are entitled to know the factual basis for defendants’ affirmative defenses, and defendants should provide through answers to written discovery responses. **A**

¹¹ *Id.* at 645.

¹² See *United States v. District Council of New York City*, 1992 U.S. Dist. LEXIS 12307, 1992 WL 208284 at *15 (S.D.N.Y. Aug. 19, 1992).

¹³ *Smithkline Beecham Corp. v. Apotex Corp.*, 2000 U.S. Dist. LEXIS 667 at *27-28 (N.D. Ill. Jan. 21, 2000) (emphasis added) (citations omitted); see also *McCormick-Morgan, Inc. v. Teledyne Indus. Inc.*, 134 F.R.D. 275, 286 (N.D. Cal. 1991) (“we are concerned that . . . no one human being can be expected to set forth, especially orally in a deposition, a fully reliable and sufficiently complete account of all bases for the contentions made and position taken” by a party in a complex case).

party may seek to discover by interrogatory facts that form the basis of pleaded affirmative defenses.¹⁴

Counsel should promptly object to such Rule 30(b)(6) notices and argue that the 30(b)(6) deposition is intended to identify facts, not poke holes in legal theories.

D. FRCP 30(b)(5) and Overbroad Deposition Document Requests

FRCP 30(b)(6) deposition notices are frequently accompanied by a Rule 30(b)(5) request for documents. Often, discovering parties use these document requests to burden the party to be deposed while the party is trying to prepare for the Rule 30(b)(6) deposition. There is good authority for the proposition that FRCP 30(b)(5) is meant for narrow, focused document discovery related to the pending FRCP 30(b)(6) deposition and is not intended to

substitute for broad document discovery under FRCP 34. Rule 30(b)(5) states in relevant part as follows:

The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.¹⁵

The pertinent portion of the Advisory Committee Notes to this subsection states that:

... [A] provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition... Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under

¹⁴ Proa v. NRT Mid-Atlantic, Inc., No. AMD-05-2157, 2008 U.S. Dist. LEXIS 129572, at *46 (D. Md. June 20, 2008) (emphasis added) (citations omitted); see also Cx Reinsurance Co. v. B&R Mgmt., 2018 U.S. Dist. LEXIS 56386, at *8-9 (D. Md. Apr. 3, 2018) (“I find that [Plaintiff’s] probing of [Defendant’s] affirmative defenses was more suitably explored by way of interrogatories and that [Plaintiff] is, therefore, foreclosed from inquiring into the factual bases of

[Defendant’s] affirmative defenses when deposing [the corporate representative]”); BB & T Corp. v. United States, 233 F.R.D. 447, 448 (M.D.N.C. 2006) (defining “contention discovery” as including “seek[ing] to discover [a party’s] factual and legal bases for its defense” and stating that it “is usually made by serving contention interrogatories which are favored over contention depositions...”).

¹⁵ FED. R. CIV. P. 30(b)(5).

this rule will depend on the nature and volume of the documents or things. Both methods are made available. **When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rule 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone.**¹⁶

Although made in a different context, the court's comments and citation in *Canal Barge Co. v. Commonwealth Edison*,¹⁷ are instructive:

In essence, a document request under Rule 30(b)(5) is a complement to a Rule 30 deposition, not a substitute for a Rule 34 document request...

Thus... requests which fall under the rubric of a Rule 30(b)(5) deposition should be "few and simple" and "closely related to the oral examination" sought. Otherwise, the Court may assume that the document request falls under Rule 34 and, as such, is barred as untimely under the Court's scheduling order.¹⁸

Courts also prohibit parties from using the Rule 30(b)(5) document request as a means of circumventing the written discovery cut-off in a Scheduling Order. The *Carter* court saw through this ruse:

Plaintiff has made little secret of the fact that his deposition notices were directed more at the documents enumerated than the testimony sought... Plaintiff's own admission, one purpose of the depositions was to establish certain negatives with respect to the documents sought, for example, that certain documents did not exist and that certain psychiatric evaluations

¹⁶ FED. R. CIV. P. 30(b)(5) Advisory Committee's Note (emphasis added).

¹⁷ 2001 U.S. Dist. LEXIS 10097 (N.D. Ill. 2001).

¹⁸ *Id.* at *13 (emphasis added) quoting *Carter v. United States*, 164 F.R.D. 131, 133 (D. Mass. 1995).

were not done... In the Court's view, the deposition notices, heavily laden with document requests and divorced from any articulated bases for the oral testimony, were merely alternative means for Plaintiff to avoid the expiration of his right to written discovery. As such, Plaintiff's deposition notices were improper and his motion to compel must be denied.¹⁹

E. Where Is A Corporate Representative Deposed?

Although not specifically stated in Rule 30(b)(6), courts apply a presumption that a defendant's corporate representative will be deposed in the corporation's principal place of business.

Thus, courts have generally recognized the presumption that Rule 30(a)(1) or 30(b)(6)

depositions of a foreign defendant corporation's officers or managing agents should be taken at the corporation's principal place of business.

This presumption is supported by the same sound reason noted above for applying the presumption to individual defendants. Further support for the presumption in the corporate context is the added potential for undue burdens on a corporation owing to the fact that unlike an individual defendant, a corporate defendant is subject to multiple depositions pursuant to Rules 30(a)(1) and 30(b)(6). Accordingly, a foreign corporation's Rule 30(b)(6) and managing agent witnesses should presumptively be deposed in the district of the corporation's principal place of business.²⁰

¹⁹ *Carter*, 164 F.R.D. at 133 (emphasis added).

²⁰ *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 471-472 (E.D. Va. 2010) (emphasis added); see also *Williams v. Microbilt Corp.*, 2019 U.S. Dist. LEXIS 227601 at *75 (E.D. Va. Sep. 23, 2019) ("Moreover, as Plaintiffs point out, depositions of officers and agents of a nonresident corporate defendant presumptively should occur in the district of the corporation's principal place of business."); *Swimways Corp. v. Zuru, Inc.*,

This presumption is not absolute and is subject to the discretion of the trial court: “To be sure, this presumption may be overcome, but only where circumstances exist distinguishing the case from the ordinary run of civil cases.”²¹ The Eastern District of Virginia has cataloged the following “distinguishing factors” that can overcome the presumption that a corporate defendant is deposed in its principal place of business:

- When the deposition is noticed for a location where the defendant regularly conducts business;²²
- When the deposing attorneys would be subject to criminal penalties if the deposition is conducted in the defendant’s principal place of business;²³ and

- When the corporate defendant had disregarded previous orders of the Court.²⁴

The Eastern District concluded by identifying the common theme that rebuts the presumption that a defendant’s corporate representative must be deposed in the corporation’s principal place of business:

[T]hese three examples are merely illustrative, not exhaustive. But taken together, they indicate that the presumption is overcome where the record presents unique or distinctive circumstances demonstrating either (i) that taking the depositions at the corporation’s principal place of business would be unduly burdensome, or (ii) that, by virtue of the corporation’s regular course of activity in the alternative location, the burden of requiring the

2014 U.S. Dist. LEXIS 101713 (E.D. Va. June 6, 2014) (same).

²¹ *In re Outsidewall Tire Litig.*, 267 F.R.D. at 472.

²² *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1365-1366 (7th Cir. 1985).

²³ *Fausto v. Credigy Svcs. Corp.*, 251 F.R.D. 427, 430-431 (N.D. Cal. 2008) (illegal for

American lawyers to take depositions in Brazil).

²⁴ *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994) (requiring officers of Hong Kong corporate defendant to be deposed in San Francisco because corporate defendant “had disregarded the previous deposition order” and further because the defendant had done business and filed suit in the district court located there).

officer or managing agent to be deposed there is minimal and the savings to the deposing party are substantial.²⁵

In sum, federal courts apply a rebuttable presumption that a corporate defendant's 30(b)(6) representative will be deposed in the corporation's principal place of business. The presumption can be rebutted by showing "distinguishing factors" that demonstrate that a deposition taken at an alternative location is as convenient to the corporation or a showing that a deposition at the corporation's principal place of business would be unusually burdensome to the plaintiff.

On a related note, some authorities suggest that it is useful to hold the deposition at the corporate headquarters so the witness can retrieve documents from the corporation during the deposition. This is a bad idea. The defending attorney should never permit the witness to offer to retrieve documents during the deposition. The documents need to be reviewed for responsiveness and privilege, and this is almost impossible during the pendency of the deposition.

F. Can a Deposing Party Demand the Documents Reviewed by the Corporate Witnesses in Preparation for Deposition?

As noted above, FRCP 30(b)(6) requires organizations to provide a witness to offer testimony on topics designated by the deposing party. The witness provided is typically an employee or agent of the organization. The attorney preparing the corporate witness has an attorney-client relationship with the organization, and therefore the witness. Often, an issue arises as to whether the deposing attorney is entitled to review the specific documents used to prepare the corporate witness. There is good case law to refuse to provide this information based on the attorney client privilege and work product doctrine.

In *Sporck v. Peil*,²⁶ the defendant's attorney selected a large group of documents and reviewed them with the defendant's corporate witness in preparation for deposition.²⁷ At the defendant's deposition, plaintiff's counsel asked the corporate witness to identify all documents that were reviewed in preparation for the deposition.²⁸

²⁵ *In re Outsidewall Tire Litig.*, 267 F.R.D. at 473; see also *Swimways*, 2014 U.S. Dist. LEXIS 101713 at *5.

²⁶ 759 F.2d 312 (3d Cir. 1985), cert. denied 474 U.S. 903, 106 S. Ct. 232 (1985).

²⁷ *Id.* at 314.

²⁸ *Id.*

Defendant's counsel refused.²⁹ The defending attorney did allow the deposing attorney to ask specific questions about specific documents. The District Court disagreed with defendant's privilege claim and ordered production of the documents pursuant to Federal Rule of Evidence 612 (a document used to refresh a witness's memory must be shown to opposing counsel). On mandamus, the Third Circuit disagreed.

The Third Circuit concluded that while the documents themselves did not constitute work product, the defendant's counsel's selection and organization of the documents were work product. More importantly, the Third Circuit concluded that the selection of the documents was "opinion" work product and thus afforded almost absolute protection from discovery.³⁰

The Fourth Circuit adopted the *Sporck* court's reasoning in *In re Allen*.³¹ In *In re Allen*, the Attorney General of West Virginia hired outside counsel, who assisted in preparing a witness for a deposition. Outside counsel selected a group of personnel records for a deponent to review in preparation for his deposition.³² Opposing counsel sought discovery of the records that the deponent reviewed for

preparation.³³ When counsel refused, the district court held him in contempt.³⁴ The Fourth Circuit reversed the decision, concluding that while the documents themselves were not work product, outside counsel's selection of documents constituted legal opinions about which documents were relevant to the case.³⁵ As such, the Fourth Circuit held that the documents were subject to almost absolute immunity as opinion work product.³⁶

Finally, we turn to Document no. 20. It contains pages of selected employment records concerning Donna Willis, which Allen requested that Carolyn Stafford and Charlene Vaughn provide to her. We have held that attorney-client privilege does not protect these records. Yet, just as Allen prepared the interview notes and summaries in anticipation of litigation, she also chose and arranged these records in anticipation of litigation. This choice and arrangement constitute opinion work product

²⁹ *Id.* citing FRCP 26(b)(3) and *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 305 (1947).

³⁰ *Id.* at 315 -316.

³¹ 106 F.3d 582 (4th Cir. 1997).

³² *Id.* at 598-599.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 608.

³⁶ *Id.*

because Allen's selection and compilation of these particular documents reveals her thought processes and theories regarding this litigation.³⁷

District courts in the Fourth Circuit also recognize the work product implications raised in *Sporck v. Peil*:

[C]ourts should exercise great care before permitting the deposition of an attorney inasmuch as even seemingly innocent questions, such as the existence or nonexistence of documents or queries concerning which documents counsel has selected in preparing a witness for deposition,

may implicate opinion work product.³⁸

There is also contrary law, but it is scattered in district courts and does not address the work product doctrine as well as *Sporck* and *Allen*.

G. Can You Consult With Your Witness During a Deposition?

There are few issues more fraught with controversy than the issue as to whether a defending attorney can consult with his witness during a deposition break. The significance of depositions and the manner in which they are conducted was aptly summarized by Judge Gawthorp of the United States District Court for the Eastern District of Pennsylvania:

Depositions are the factual battleground where the vast majority of litigation actually takes place. It may

³⁷ *Id.* citing *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986) ("In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more crucial than legal research... We believe [counsel's] selective review of [her clients'] numerous documents were based on her professional judgment of the issues and defenses involved in this case."); *Sporck*, 759 F.2d at 316 ("We believe that the selection and compilation of documents in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product."). *See also* James

Julian v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982) ("In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case."). *See also* *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402-403 (4th Cir. 1999) (holding that work product doctrine precluded discovery of research memorandum prepared in connection with collection of a construction loan).

³⁸ *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85-86 (M.D.N.C. 1987); *see also Shelton*, 805 F.2d at 1327; *Sporck*, 759 F.2d at 312.

safely be said that Rule 30 has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial – assuming there is a trial, which there usually is not. **The pretrial tail now wags the trial dog.**³⁹

There are generally two schools of thought on the issue in the federal courts. The two schools can be fairly called the “Hall” school and the “Stratosphere” school for *Hall* and *In re Stratosphere Corp. Securities Litigation*,⁴⁰ respectively.

1. The *Hall* Standard

In *Hall*, plaintiff’s counsel was defending the deposition of his client, Mr. Hall.⁴¹ At the beginning of the deposition, deposing counsel for the defendant advised plaintiff that, if he did not understand a question, he should advise defense counsel and defense counsel would seek to clarify the question. Plaintiff’s

counsel then added that if plaintiff was uncertain about a question, he could ask plaintiff’s counsel and plaintiff’s counsel would clarify the question. Shortly after the deposition started, plaintiff asked for a break so that he could obtain clarification of a question with his counsel.⁴² After the break, plaintiff asked defense counsel to clarify his question.⁴³ After a few more minutes, defendant’s counsel presented plaintiff with a document.⁴⁴ Plaintiff’s counsel took the document and said that he needed to review the document with his client.⁴⁵ At that point, defense counsel contacted the court and the deposition was adjourned so that the court could resolve the deposition issues.

Before the federal district court, plaintiff’s counsel argued that plaintiff had a right to consult with his counsel during deposition.⁴⁶ Plaintiff’s counsel provided no citation to authority for his argument.⁴⁷ Defense counsel, on the other hand, argued that it was improper for a witness or a client to consult with counsel during a deposition.⁴⁸ Defense counsel presented several standing orders from other courts which precluded

³⁹ *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993) (emphasis added).

⁴⁰ 182 F.R.D. 614 (D. Nev. 1998).

⁴¹ *Hall*, 150 F.R.D. at 526.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 527.

⁴⁷ *Id.*

⁴⁸ *Id.*

conferences between the witness and defending counsel, with the exception of those conversations necessary to determine whether to assert privilege.⁴⁹

The *Hall* court ruled that the interests of preventing improper deposition coaching outweighed any concerns about a client's right to consult with counsel.

The underlying purpose of a deposition is to find out what a witness saw, heard, or did -- what the witness thinks. **A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.** The witness comes to the deposition to testify, **not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record.** It is the witness – not the

lawyer – who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop.⁵⁰

The district court was unimpressed with the claim that a client has a right to consult with counsel:

Concern has been expressed as to the client's right to counsel and to due process. A lawyer, of course, has the right, if not the duty, to prepare a client for a deposition. **But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth.** Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. During a civil trial, a witness and his or her lawyer are not permitted to confer at their

⁴⁹ *Id.*

⁵⁰ *Id.* (emphasis added).

pleasure during the witness's testimony. **Once a witness has been prepared and has taken the stand, that witness is on his or her own.** The same is true at a deposition. The fact that there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur. **The underlying reason for preventing private conferences is still present: they tend, at the very least, to give the appearance of obstructing the truth.**⁵¹

The *Hall* court adopted a strict "no consultation" rule that applied to the entire deposition:

To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask his or her lawyer for the answer, and then parrot the lawyer's response. Again, this is not what depositions are all about – or, at least, it is not what they are supposed to be all about. If the witness does not understand the question, or needs some

language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer. There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur.

These rules also apply during recesses. Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. Otherwise, the same problems would persist. A clever lawyer or

⁵¹ *Id.* (emphasis added).

witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences. **Therefore, I hold that conferences between witness and lawyer are prohibited both during the deposition and during recesses.**

The same reasoning applies to conferences about documents show to the witness during the deposition. When the deposing attorney presents a document to a witness at a deposition, that attorney is entitled to have the witness, and the witness alone, answer questions about the document. **The witness's lawyer should be given a copy of the document for his or her own inspection, but there is no valid reason why the lawyer and the witness should have to confer about the document before the witness answers questions about it.** If the

witness does not recall having seen the document before or does not understand the document, the witness may ask the deposing lawyer for some additional information, or the witness may simply testify to the lack of knowledge or understanding. **But there need not be an off-the-record conference between witness and lawyer in order to ascertain whether the witness understands the document or a pending question about the document.**⁵²

The *Hall* court allowed a narrow exception to the “no consultation” rule:

[A] private conference between witness and attorney is permissible if the purpose of the conference is to decide whether to assert a privilege. With this exception I agree. Since the assertion of a privilege is a proper, and very important, objection during a deposition, it makes sense to allow the witness the opportunity to consult with counsel about

⁵² *Id.* at 528-529 (emphasis added).

whether to assert a privilege. Further, privileges are violated not only by the admission of privileged evidence at trial, but by the very disclosures themselves. Thus, it is important that the witness be fully informed of his or her rights before making a statement which might reveal privileged information. **However, when such a conference occurs, the conferring attorney should place on the record the fact that the conference occurred, the subject of the conference, and the decision reached as to whether to assert a privilege.**⁵³

In sum, the *Hall* standard precludes any discussions between a witness and the defending attorney except to determine whether to assert a privilege. Within this narrow exception, the defending attorney must state (on the record) that a conference took place about a potential privilege and must advise as to whether a privilege will be asserted.

2. The *Stratosphere* Standard

The *Stratosphere* standard, established by *In re Stratosphere*,⁵⁴ was crafted in response to the *Hall* standard. In *Stratosphere*, a class action plaintiff moved the court for an order governing deposition protocol.⁵⁵ The proposed protocol addressed a number of mundane matters, including deposition scheduling and videotaping.⁵⁶ Plaintiff also proposed strict compliance to the *Hall* standard; prohibiting all conferences during the deposition except to determine if a privilege exists and those conferences were subject to questioning by the deposing attorney.⁵⁷ Plaintiff cited *Hall* as his source of authority.⁵⁸ The *Stratosphere* court considered the *Hall* opinion but concluded that it went too far:

This Court agrees with the underlying concern and essential purpose of the *Hall* court's ruling. However, this Court is of the opinion that the *Hall* decision goes too far and its strict adherence could

⁵³ *Id.* at 529–530 (emphasis added).

⁵⁴ 182 F.R.D. 614 (D. Nev. 1998).

⁵⁵ *Id.* at 616.

⁵⁶ *Id.*

⁵⁷ *Id.* at 619.

⁵⁸ *Id.*

violate the right to counsel.⁵⁹

The *Stratosphere* court found that a party had a right to consult with counsel, even in a civil case, as part of the Fifth Amendment requirement for due process.

It is this Court's experience, at the bar and on the bench, that attorney's and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid-morning or mid-afternoon, the lunch recess, are the evening recess. **The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial).** What this Court, and the Federal Rules of Procedure seek to prevent is coaching the witness by telling the witness what to say or how to answer a specific question. **We all want the witness's answers, but not at the sacrifice of his or her right to the assistance of counsel.**⁶⁰

Additionally, the *Stratosphere* court agreed that the witness or counsel could not *initiate* a conference but refused to preclude conferences during regular breaks:

While this Court agrees with the *Hall* court's goals, it declines to adopt its strict requirements. This Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness. **So long as attorneys do not demand a break in the questions, or demand a conference between question and answers, the Court is confident that the search for truth will adequately prevail.**⁶¹

In the Fourth Circuit, *Hall* is cited favorably, on occasion, but mostly for the proposition that a defending attorney cannot act as an

⁵⁹ *Id.* at 620.

⁶⁰ *Id.* at 621 (emphasis added).

⁶¹ *Id.* (emphasis added).

intermediary and thus forming the witness's response to questions.⁶²

The most substantive analysis of the *Hall/Stratosphere* dichotomy was in *Callahan v. Toys "R" Us-Delaware, Inc.*⁶³ The case involved the deposition of an expert, not a client. Defending counsel did not allow deposing counsel to inquire as to the substance of conversations that took place during deposition breaks.⁶⁴ The *Callahan* court summarized the divergent views between *Hall* and *Stratosphere* as follows:

In prohibiting attorney/deponent communications in *Hall*, the court emphasized the importance of avoiding witness coaching, so that the deponent, and the deponent alone, answers questions, which furthers the truth-seeking purpose of the deposition. By contrast, in declining to impose an outright ban on attorney/client communications, the court in *Stratosphere* reasoned that the goals identified by the *Hall* court would not be

frustrated by allowing attorneys to communicate with their clients to ensure that they understood questions and were adequately prepared.⁶⁵

The *Callahan* court seemed to agree with the *Stratosphere* court's conclusion that the client's right to consult with counsel prevails but noted that the client was not the deponent in the *Callahan* case:

The court's reasoning in *Stratosphere* thus highlights a critical distinction between both *Stratosphere* and *Hall*, and this case — **the deponents in both of those cases were clients of the attorneys**, whereas here, Mr. Logan was not a client of Defense Counsel, but rather Defendants' expert. **Thus, a client's right to the assistance of counsel, which was a factor in the courts' analyses in *Stratosphere* and *Hall*, does not factor into the Court's decision here.**⁶⁶

⁶² See e.g. *Francisco v. Verizon S., Inc.*, 756 F. Supp.2d 705, 712 (E.D. Va. 2010) citing *Hall*, 150 F.R.D. at 528 (Although counsel who is defending a deposition may prepare a witness, once the deposition begins, "[t]here is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which

questions the witness should answer, and helping the witness to formulate answers.").

⁶³ 2016 U.S. Dist. LEXIS 195833 (D. Md. July 15, 2016).

⁶⁴ *Id.* at *7-8.

⁶⁵ *Id.* at *8-9 (internal citations omitted).

⁶⁶ *Id.* at *9 (emphasis added).

The *Callahan* court concluded that the conversations that took place during breaks with the expert were, in fact, protected by the work product doctrine but also concluded that defense counsel had improperly coached the expert.⁶⁷ As a sanction, the court struck portions of defense counsel's re-direct of the expert.⁶⁸

In sum, it appears that the law in the Fourth Circuit is that a defending attorney may consult with his client during regular deposition breaks and those conversations are permissible and privileged. An attorney defending an expert witness may consult with an expert but may not coach the expert.

H. What Are Proper Deposition Objections?

Another contentious issue in depositions is whether, and to what extent, a defending attorney can object during a deposition. Fortunately, the law is clearer in this area.

First, it is clear and has been for decades that a defending attorney cannot instruct a witness not to

answer a question unless he intends to invoke a privilege.

The action of plaintiff's counsel in directing Wagnon not to answer the questions posed to him was indefensible and utterly at variance with the discovery provisions of the Federal Rules of Civil Procedure.

The broad scope of discovery is evident in Rule 26(b)(1) which provides that "parties may obtain discovery regarding any matter, **not** privileged, which is relevant to the subject matter involved in the pending action." The Rule further states that "it is **not** ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."⁶⁹

⁶⁷ *Id.* at *12-13.

⁶⁸ *Id.*

⁶⁹ *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977) (emphasis added); see also *Smith v. US Sprint*, No. 92-2153, 1994 U.S. App. LEXIS 3630, at *14-15 (4th Cir. Feb. 28, 1994) (Affirming sanction of dismissal for deposition misconduct: "Furthermore, at the deposition Smith's counsel repeatedly counseled his client to not answer questions, a direct violation of *Ralston Purina Co. v. McFarland*.").

More frequent, but equally improper, are “speaking objections” that tend to signal to the witness that trouble lies ahead. These speaking objections include:

- “The document speaks for itself”;
- “The question calls for a legal conclusion”;
- “I don’t understand the question”;
- “The question assumes facts not in evidence”; and
- “What you are asking him is X but you know that there is no proof of X.”

Courts do not permit such objections. A good example of speaking objections and the court’s furious response is illustrated in *McDonough v. Keniston*:⁷⁰

During his client’s deposition plaintiff’s counsel repeatedly violated Rule 30(d). In particular, pages 93-107, 113-114, 119-122, 138-139, 162, 183-185 of Exh. A to document 85 **contain classic examples of witness coaching, speaking objections and improper instructions not to answer.** In his objection plaintiff’s counsel has attempted to justify his conduct by

recharacterizing the objections as justified by attacking defense counsel for berating plaintiff, and for being argumentative, sarcastic, oppressive and hostile. **He justifies his conduct as “an honest attempt by deponent’s attorney to limit the questioning... under...Rule 30(d)(3).”** The objection is disingenuous at best.

A few examples demonstrate the impropriety of counsel’s conduct.

a. *Speaking-coaching objections.*

P.93 Q. . . . why don’t you do your best to tell me what you say he did wrong?

[Defending Counsel]: I think that’s a very broad, broad question. I think it’s too broad to be answered. It calls for legal characterizations. He had no connection, he had no contact directly with Chuck

⁷⁰ 188 F.R.D. 22 (D. N.H. 1998).

Douglas except for one hearing and –

p.95 Q. . . . Can you tell me anything that you say Mr. Douglas did wrong that caused you to sue him?

[Defending Counsel]: Well, he read the deposition of Mr. Wheat: Wait a minute.
[Defending Counsel]: - Carlene Keniston, that states it right there.

The effectiveness of this coaching is clearly demonstrated when the plaintiff subsequently adopts his lawyer's coaching and complains of the broadness of the question (Exh. A. p.105, line 21) and answers referencing the Keniston deposition (Exh. A, p.102, line 15). Apparently encouraged by the effectiveness of his suggestive objections, plaintiff's counsel continued his antics.⁷¹

With respect to the common objection: "I don't understand the question", one court characterized the issue as follows:

Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear. Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The *witness*—not the lawyer—gets to decide whether he or she understands a particular question: **Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed. This duty is traditionally explained to the witness by the questioner before the deposition. If defending counsel feels that an answer evidences a failure to understand a question, this may be**

⁷¹ *Id.* at 24 (emphasis added).

remedied on cross-examination.⁷²

Courts in the Fourth Circuit apply these rules as well:

counsel interjected comments after questions in ways that could have suggested answers by the witness or otherwise improperly interrupted the question and answer process. *See* Fed. R. Civ. P. 30(c)(2) (“An objection must be stated concisely in a nonargumentative and nonsuggestive manner.”). . . .⁷³

While it is clear that speaking objections are prohibited, it is not enough for a defending attorney to simply object to “form” without specifying what is objectionable about the form:

Thus, if a question is propounded in an

improper form, the objection should be stated concisely on the record during the deposition in a manner that provides the questioner with a reasonable opportunity to correct the form of the question. Failure to do so waives the objection. **Simply stating “objection to form” does not necessarily preserve the objection. When “objection to form” does not indicate what is wrong with the form so that the questioner can correct the problem, it becomes nothing more than a statement that the objector finds the question “objectionable.”**⁷⁴

In summary, it appears that the rules for objecting in deposition are as follows:

⁷² *Sec. Nat’l Bank of Sioux City v. Abbott Labs.*, 299 F.R.D. 595, 605-606 (N.D. Iowa 2014) *rev’d on other grounds sub nom.* *Sec. Nat. Bank of Sioux City, IA v. Day*, 800 F.3d 936 (8th Cir. 2015).

⁷³ *Osborne v. Mt. Empire Operations, LLC*, 2015 U.S. Dist. LEXIS 76732 at *4 (W.D. Va. June 15, 2015) citing *Sec. Nat’l Bank of Sioux City*, 299 F.R.D. at 595 [admonishing counsel for “repeatedly object[ing] and interject[ing] in ways that coached the witness to give a particular answer or to unnecessarily quibble with” opposing counsel].

⁷⁴ *Henderson v. B&B Precast & Pipe, LLC*, 2014 U.S. Dist. LEXIS 112441, at *3 – 5 (M.D. Ga. Aug. 14, 2014); *see also* *Ethox Chem., LLC v. Coca-Cola Co.*, 2016 U.S. Dist. LEXIS 192840, at *21 (D. S.C. Feb. 29, 2016) (“It appears that counsel for both sides adopted the unfortunate practice of interposing an “Object to Form” to most questions without specifying the specific defect so as to allow the questioner to cure the objection - as is contemplated by the Rules” and citing *Henderson*.)

- A defending attorney cannot instruct a witness not to answer a question unless he seeks to assert a privilege;
- A defending attorney cannot engage in speaking objections; and
- A defending attorney can object to the form of a question but must concisely and non-suggestively identify the defect in the form of the question.

II. Are Treating Physicians Entitled to An Expert Fee for Fact Witness Depositions?

Treating physicians are often critical fact witnesses in litigation. They are also sometimes expert witnesses. Physicians are busy and have unique skills, so it is not unusual for them to ask for (and expect) expert witness fees even when testifying as a fact witness. The fees requested can be substantial. Additionally, many physicians tack on mandatory minimum fees and mandatory “pre-deposition conferences.” Courts are divided as to whether a physician fact witness is entitled to expert witness fees or simply witness fees:

The discovery question presented here regarding the proper rate of

reimbursement for a treating physician deponent-witness does not admit of a single, simple, easy answer. Quite the contrary, this legal question is defined by two sharply divergent lines of authority.⁷⁵

On balance, however, the stronger argument is that attorneys are not obligated to pay treating physicians’ “expert witness fees” for offering fact witness testimony. When deposed as a fact witness, a physician stands in the same position as any other fact witness. They are entitled to mileage and the standard witness fee.

While physicians certainly have significant overhead costs and a special expertise, so do a myriad of other professions. For instance, should fact witnesses who happen to be engineers, attorneys, accountants or consultants — professions also with special expertise and significant overhead costs — similarly be allowed more than the statutory fee prescribed by § 1821? If the answer is in the affirmative, then does §

⁷⁵ R.D. v. Shohola Camp Ground & Resort, 2017 U.S. Dist. LEXIS 70972 at *3 (M.D. Pa. May 10, 2017) (collecting cases pro and con).

1821 merely apply to less prestigious professions? Who decides what professions fall under § 1821 versus the more lucrative “reasonable fee” under [Federal Rule of Civil Procedure] 26(b)(4)(C)? This Court declines to set precedent in this jurisdiction that, essentially, singles out physicians for special treatment. Rather, the more prudent course of action is to follow the unambiguous tenets of FRCP 26(b)(4)(C) and § 1821, which provide that expert witnesses — *independent of their profession* — obtain

compensation at a “reasonable fee”, while fact witnesses — *independent of their profession* — receive compensation at the statutory fee of \$40. If Congress wishes to single out certain professions for higher compensation, that is certainly its prerogative, but this Court declines to enter that arena, which is, essentially, a slippery slope.⁷⁶

The contrary view holds that physicians have special training and experience and, consequently, their fact testimony about treatment and diagnosis is better analyzed as expert opinion testimony for which an expert witness fee is appropriate.⁷⁷

⁷⁶ Demar v. United States, 199 F.R.D. 617, 619-620 (N.D. Ill. 2001); *see also* McDermott v. FedEx Ground Sys., 247 F.R.D. 58, 61 (D. Mass. 2007) (there is no “logical explanation as to why [a special]... rule applies to physicians and no other class of professional or otherwise with ‘specialized knowledge’ about the testimony to be provided”); Mangla v. Univ. of Rochester, 168 F.R.D. 137, 140 (W.D.N.Y. 1996) (Physicians will “suffer no more inconvenience than many other citizens called forward to be deposed or testify as a trial witness in a matter in which they have first-hand factual knowledge.”).

⁷⁷ *See, e.g.*, Wirtz v. Kan. Farm Bureau Servs., Inc., 355 F. Supp.2d 1190, 1211 (D. Kan.

In sum, an attorney is not obligated to pay a physician fact witness an expert witness fee, only a witness fee. With that said, an attorney may be wise to provide something more than the nominal fee to insure the cooperation of the physician.

A. Can a Witness Make Wholesale Changes to Depositions Under Rule 4:5(e) and FRCP 30(e)?

Rule 30(e) allows a witness to make changes to “form and substance” if the changes are made within 30 days of submission to the witness. There is some dispute as to whether a witness can make wholesale changes to the deposition transcript. One view is that the Rule allows changes to “form or substance” so a witness can make wholesale changes. Another view is that a deposition is not a “take home exam” that can be revised by the

lawyers after the witness has testified. Both views are discussed and the District of Maryland expresses a preference for the “no take home exam” perspective:

Some courts hold that if the procedural requirements of Rule 30(e) are met, a deponent may, by the literal language of the rule, change any and all of the “substance” of the deposition testimony.⁷⁸ Other courts interpret the rule as foreclosing changes that materially alter the testimony or contradict the testimony.⁷⁹ The Court agrees with the latter line of cases. Quoting the oft-cited decision⁸⁰ the district court in Kansas described the types of corrections that are intended to be remedied by Rule 30(e). The court recognizes that

2005) (“[A] treating physician responding to discovery requests and testifying at trial is entitled to his or her ‘reasonable fee’ because such physician’s testimony will necessarily involve scientific knowledge and observations that do not inform the testimony of a simple ‘fact’ or ‘occurrence’ witness.”); *Mock v. Johnson*, 218 F.R.D. 680, 683 (D. Haw. 2003) (“As opposed to the observations that ordinary fact witnesses provide, the observations and *opinions* that medical professionals provide derive from their highly specialized training.”); *Grant v. Otis Elevator Co.*, 199 F.R.D. 673, 676 (N.D. Okla. 2001) (“[T]reating physicians who testify under Fed. R. Evid. 702 as to their

diagnoses, treatment and prognoses are experts within the meaning of [Fed. R. Civ. P.] 26(b)(4)(C) and are entitled to a reasonable fee.”); *and Coleman v. Dydula*, 190 F.R.D. 320, 323 (W.D. N.Y. 1999) (“Physicians provide invaluable services to the public and should be remunerated for their time when they cannot deliver medical care.” (citation omitted)).

⁷⁸ *See, e.g., Foutz v. Town of Vinton, Virginia*, 211 F.R.D. 293, 295 (W.D. Va. 2002).

⁷⁹ *See, e.g., Rios v. Bigler*, 847 F. Supp. 1538, 1546-1547 (D. Kan. 1994).

⁸⁰ *Greenway v. International Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992).

Fed. R. Civ. P. 30(e) allows a deponent to make changes to deposition testimony in form or substance. Nevertheless, the court finds that [the deponent's] errata sheets exceed the scope of the type of revisions contemplated by the Rule and serve only to improperly alter what was testified under oath.

As has been aptly acknowledged by the Tenth Circuit, a deposition is not a take home exam.⁸¹ The errata sheet “clarifications” in this case are akin to a student who takes her in-class examination home, but submits new answers only after realizing a month later that the import of her original answers could possibly result in a failing grade.⁸²

⁸¹ See *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 (10th Cir. 2002) (quoting *Greenway*, 144 F.R.D. at 325).

⁸² *Wyeth v. Lupin LTD*, 252 F.R.D. 295, 296-297 (D. Md. 2008) (emphasis added). See also *Paul Harris Stores, Inc. v. PricewaterhouseCoopers, LLP*, 2006 U.S. Dist. LEXIS 65840, at *3 (S.D. Ind. Sept. 14, 2006) (emphasis added). (where it is “apparent to the Court that [a party] seeks to ‘undo’ the testimony of its 30(b)(6) witnesses by adding errata,” the errata should be stricken as “really no more than

The United States District Court for the Eastern District of Virginia also adopts the “no take home exam” approach:

[T]he purpose of an errata sheet is to *correct alleged inaccuracies* in what the deponent *said* at his deposition, not to modify what he wishes that he had said... Rule 30(e) (allowing the submission of errata sheets), cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.⁸³

Even if a court allows wholesale changes to a deposition, the original and unedited transcript is still

‘lawyers’ statements,’ attempting to deflect potentially detrimental testimony”); *Eckert v. Kemper Fin. Servs., Inc.*, 1998 U.S. Dist. LEXIS 15788, at *5 (N.D. Ill. Sept. 30, 1998) (precluding “wholesale changes to previous sworn testimony” that was, in fact, a “damaging [party] admission”).

⁸³ *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 277 F.R.D. 286, 297 (E.D. Va. 2011) quoting *Touchcom, Inc. v. Bereskin & Parr*, 790 F. Supp.2d 435, 465, 2011 U.S. Dist. LEXIS 72905 at *9 (E.D. Va. July 7, 2011) (emphasis added).

admissible. The United States Bankruptcy Court for the Eastern District of Virginia in *Parker v. Grant (In re Grant)*,⁸⁴ extensively discussed the law in this area:

The Court in *Blackthorne v. Posner*,⁸⁵ ruled that plaintiff made handwritten corrections to his deposition transcript after the 30-day limitation and, therefore, found plaintiff to have waived his privilege to read, review and amend.⁸⁶

The *Blackthorne* court subsequently allowed plaintiff to admit his deposition testimony into evidence without the untimely corrections. The court held: [Plaintiff's] opportunity to amend changes to the deposition had lapsed, and plaintiff's errata sheet will not be

received as part of the deposition testimony."⁸⁷ The Second Circuit ruled similarly in *Podell v. Citicorp Diners Club*.⁸⁸ **The Podell court held that notwithstanding any errata modifications, Rule 30(e) allows the original deposition to be admitted at trial.**⁸⁹

The court in *Lugtig v. Thomas*,⁹⁰ reached an analogous result, holding that where a deponent amends his deposition, his original deposition testimony shall remain admissible at trial. **The Lugtig court stated that "nothing in the language of Rule 30(e) requires or implies that the original answers are to be stricken when changes are made...," implying that the original deposition is admissible at trial, regardless of deponent's decision to**

⁸⁴ 237 B.R. 97 (Bankr. E.D. Va. 1999).

⁸⁵ 883 F. Supp. 1443, 1454 (D. Ore. 1995).

⁸⁶ See *Barlow v. Esselte Pendaflex Corp.*, 111 F.R.D. 404, 406 (M.D. N.C. 1986) (holding that where plaintiff made so many changes to his deposition testimony that it became impossible for the reporter to enter the alterations and deeming "plaintiff to have

refused to have signed, or to have waived signing of... the transcript as set out in Rule 30(e)").

⁸⁷ *Blackthorne*, 883 F. Supp. at 1454 n.16.

⁸⁸ 112 F.3d 98 (2nd Cir. 1997).

⁸⁹ *Id.* at 103 (emphasis added).

⁹⁰ 89 F.R.D. 639, 641 (N.D. Ill. 1981).

amend his deposition or waive that privilege.⁹¹

B. Deposing Fact Witnesses Who Were Not Disclosed on FRCP 26(a)(1)(A)(i) Initial Disclosures

The Federal Rules of Civil Procedure require parties to identify the “names and if know, the address and telephone number of each individual likely to have discoverable information... which the disclosing party may use to support its claims or defenses unless the use would be solely for impeachment.”⁹²

Sometimes a party will try to depose a fact witness in order to memorialize testimony that is helpful to that party, even though the deposing party never identified the witness on its Initial Disclosures. The federal rules prohibit this. If a party intends to use a witness’s testimony to support its claims or defenses, it must disclose that individual in the Initial Disclosure (or on a Supplemental Initial Disclosure). Failure to identify the witness in the Initial Disclosure (or the supplement) with the individual’s name and identifying information is a basis to

quash a fact witness deposition of that witness.

Rule 26(a)(1)(A)(i) requires parties to disclose all fact witnesses that may have discoverable information. Rule 37 prevents a party from using undisclosed witness testimony: “If a party fails to provide information or identify a witness as required by Rule 26(a)... the party is not allowed to use that information or witness.”⁹³ Courts have previously excluded late-identified witnesses even when those witnesses were added due to the untimely death of an opponent’s expert witness:

Plaintiffs’ contention that they have been prejudiced by this lost opportunity relies on speculation that Mr. Litton would have attended large parts of the trial, seen plaintiffs’ product demonstration there, then fallen to his knees when confronted on cross-examination with evidence adduced by plaintiffs. While this was a possibility, it was far from a certainty. Accordingly, plaintiffs’ explanation for their late disclosure is lacking.⁹⁴

⁹¹ *Parker*, 237 B.R. at 108 (emphasis added), citing *Lugtig*, 89 F.R.D. at 641-642.

⁹² FED. R. CIV. P. 26(a)(1)(A)(i).

⁹³ FED. R. CIV. P. 37(c)(1).

⁹⁴ *SMD Software, Inc. v. EMove, Inc.*, No. 5:08-CV-403-FL, 2013 U.S. Dist. LEXIS 146864, at *27 (E.D.N.C. Oct. 10, 2013).

It is not enough that the undisclosed fact witness may have been identified in documents, depositions or even (collaterally) in interrogatory responses. A witness must be disclosed in an Initial Disclosure or its supplement.

To the extent that a party argues that they already disclosed late-identified witnesses in written discovery, this argument is without merit. The fact that a witness' name might have appeared in produced documents or interrogatory answers does not amount to proper disclosure under Rule 26(a)(1).⁹⁵

C. What to Do If You Object to a Deposition Date or Time

Parties sometimes notice depositions that are problematic for the witness or counsel. Some counsel believe that they can "object" to a problematic deposition notice and that "objection" stays the deposition. They are mistaken. It is well established that a party who

seeks to avoid attending a deposition must file a Motion for Protective Order.

[T]here is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued . . . **Put simply and clearly, absent agreement, a party who for one reason or another does not wish to comply with a notice of deposition must seek a protective order.** Unless a motion for protective order is pending, "[a] failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable."⁹⁶

⁹⁵ See *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 328-330 (4th Cir. 2011) (references to a witness in an interrogatory response and in deposition testimony did not prevent preclusion of the witness and was not a substitute for actual FRCP 26(a)(1) disclosure).

⁹⁶ *Robinson v. Quicken Loans, Inc.*, No. 3:12-cv-00981, 2013 U.S. Dist. LEXIS 59127, at *9 (S.D. W.Va. Apr. 25, 2013) (emphasis added; citations omitted); see also *Constellium Rolled Prods. Ravenswood, LLC v. Rogers*, 2016 U.S. Dist. LEXIS 194440, *4 (S.D. W.Va. Oct. 31, 2016) (same); *Graham v. Dhar*, 2019 U.S. Dist. LEXIS 218293, *10-11 (S.D. W.Va. Dec. 19, 2019) (same); cf. *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, Civil Action No. 3:16-cv-545, 2018 U.S. Dist. LEXIS 148840 (E.D. Va. Aug. 30, 2018) (holding that "sanctions are therefore mandatory" when a FED. R. CIV. PRO. 30(b)(6) is unprepared; which is

D. Privilege for Corporate Consultants

Corporations use consultants, and sometimes consultants address matters that wind up in litigation. Litigation consulting experts are protected from disclosure by the work product doctrine and the attorney-client privilege, but can a corporation assert privilege over work product of consultants that are hired to advise the corporation on business matters, independent of litigation? The answer seems to be “No.” The attorney-client privilege does not extend to consultants where the communications are intended to assist in a client’s business decisions:

It appears in this instance that [the consultant] chose to undertake legal research either **on its own or at the suggestion of a non-lawyer at Empire, and then provided the fruits of that research to the non-lawyer client and to Empire’s counsel. Such work by a non-attorney, undertaken without a request by the**

attorney to assist her, is not within the privilege...

This document consists of handwritten notes by [consultant] of a meeting of the “Board”, presumably of Empire. **The notes do not, on their face, reflect any legal advice by counsel, and appear to refer to a discussion of non-legal aspects of the decision whether to modify Empire’s benefit plans.** Since defendant offers no competent evidence that this document reflects attorney-client privileged communications, we conclude that it has not met its burden to demonstrate the applicability of the privilege.⁹⁷

tantamount to a failure to appear under FED. R. CIV. PRO. 37(d)(1)(A)(i) and citing *Robinson*).

⁹⁷ *Byrnes v. Empire Blue Cross Blue Shield*, 1999 U.S. Dist. LEXIS 17281, at *8 – 9; 12 (S.D.N.Y. Nov. 2, 1999) (emphasis added) citing *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 435 (W.D.N.Y. 1997) (No privilege absent proof that non-attorney was hired to assist counsel).