PREPARING A WITNESS FOR DEPOSITION: THE FIRST AND LAST GUIDE YOU'LL EVER NEED ®[1]

"The interviewing and preparation of witnesses . . . is a practice that, more than almost anything else, gives trial lawyers their reputation as purveyors of falsehoods." [2]

I. INTRODUCTION

An attorney acts properly when she tells her witness to act confidently, along with instructing the witness to answer truthfully, to limit answers to personal knowledge, and to admit uncertainty if the answer to a question is unknown. Well, yeah. The devil, of course, is in the details.

Is it unethical, for example, for the lawyer to not only suggest a proper (truthful) response to a question, but to go further and actually write it out for the witness? Is it unethical for an attorney to draft the language for the client's answers to written interrogatories or the client's declaration which will be filed with the court or the sworn statement submitted by the client to a legislative or congressional body?

Although volumes have been written on the subject of witness preparation, little authoritative guidance from the Bench or Bar is available beyond vague admonitions to avoid suborning perjury. Indeed, an ethics opinion issued by the District of Columbia Bar[3] in 1979 is still frequently referred to by commentators, even after the passage of more than a quarter of a century. District of Columbia Bar Opinion No. 79 is instructive for not only what it forbids, but for what it allows as well. For example, Opinion No. 79 indicates an attorney may ethically instruct her witness to choose certain words so long as the ultimate testimony remains truthful and not misleading. It may be proper to instruct the witness not to use prefatory phrases, such as "I think I saw," "I suppose I said," or "to tell the truth." Also, an attorney may properly advise her witness to avoid using technical jargon or colloquial expressions, since the attorney wants the witness to tell the jury a story that the jury can understand.

The bottom line is this: there are few concrete rules for how an attorney should go about preparing a witness for testimony without breaching ethics considerations. Because bright lines are frequently absent for the attorney preparing a witness for deposition or trial testimony, this paper seeks to identify recognizable places in the process where you, the

---

[2] D. Luban, Lawyers And Justice: An Ethical Study 96 (1988)

[3] District of Columbia Bar, Ethics Opinion No.79

attorney, should pause and reflect: am I being ethical?

II. The Ethics of Witness Preparation

1. Tell The Truth. The starting point of any witness preparation session should be the attorney's admonition for the witness to tell the truth. Lets be clear: inviting, suggesting or coaching a witness to say something other than the truth is wrong, unethical and potentially criminal. Don't do it. Ever. "*If you find yourself asking whether you are crossing the line, then you are probably standing too close to it.*"[4] If you are not crystal clear about "where the line" is, see The Idiot's Guide to Finding The Line", below.

2. The Idiot's Guide To Finding The Line. Do nothing, say nothing, and omit nothing in a meeting with a witness that you would be uncomfortable hearing repeated in front of a judge or jury. If you would be embarrassed by, or apprehensive about, your conduct with the witness if it were shown on videotape in court, you are going too far.

3. One Court's Useless Advice. The North Carolina Supreme Court offered the following useless platitude regarding witness preparation: "*It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes a more efficient administration of justice and saves court time.*"[5]

4. You Read It Here First: The Following Are Potentially Unethical

a) "Refreshing" Recollection Before Probing. This happens when you tell the witness what the facts are before you ask the witness to relate the facts to you.

b) Giving Overly Restrictive Admonitions Not to Volunteer Information. E.g., "pretend you are a 'prisoner of war' in an enemy camp Essentially, this statement tells the witness to evade the opposing counsel's questions, and as such is unethical.

c) Telling the Witness The Facts. A potential example of an attorney overreaching ethical lines would occur if the attorney said, "You will be asked if you

---

[4] Michael Owen Miller, Working with Memory, Litig., Summer 1993, at 10, 14.

[5] *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979)

ever saw any warning labels on containers of asbestos. It is important to maintain that you never saw any labels on asbestos products that said warning or danger."

d) Explaining the Legal Effect of Answers Which Provide the Witness with a Motive to Lie. By emphasizing that the client will receive less or no compensation if a certain answer is given, the attorney has provided the witness with a cash-incentive to respond accordingly.

e) Lecture on the Law. The pivotal issue on the propriety of an attorney lecture to a witness on the law of the case is the timing of the lecture. If the attorney lectures on the law before knowing the witness's version of the facts, she runs the risk of "suggesting" to the witness what the testimony should be. Lecturing a witness on the law before hearing the witness's version of the facts may unintentionally suggest what the witness should reveal as he composes his story.

f) Instruct The Witness To Claim A Lack Of Memory or Knowledge As To Any Question That The Witness Does Not Want To Answer. For instance, a simple instruction which tells the witness that if he is not 100% sure of an answer to respond "I don't know.", is frequently abused by the witness in situations where the witness has a duty to testify. For instance, a witness who began by reserving the "I don't know" answer for occasions when he genuinely knew nothing about a subject will use it (1) when he is not sure; (2) when he knows something but not exactly what the question asks; (3) when his memory is not crystal clear; (4) when he is scared; (5) when he is nervous; (6) when the answer he knows he ought to give is real trouble; or (7) when he can't think of anything else to do.

g) Provide Evasive Answers To Questions. In an Oregon case a witness was instructed by his attorney to "not volunteer information". The witness evaded a judge's questions as to his mother's whereabouts by responding that his mother "was in Salem" but failed to mention that she was dead and buried in Salem.

h) " I Don't Understand What You Mean By....." As a Way To Be Evasive.

III. What To Do BEFORE You Prepare Your Witness

1. Use A Checklist, Always. Each attorney has their own style for preparing witnesses for deposition. The attached checklist represents my thoughts gathered over many years. The notion of a "checklist" for witness preparation comes from my years as a pilot and sailor where checklists are absolutely mandatory in the cockpit for an obvious reason: we all

forget things we do repetitively. This checklist for preparing the witness, if followed, ought to touch upon most pitfalls and words of advice an attorney should give to the witness. (Your mileage may vary.) Add or subtract to the list yourself, but always use a checklist.

2. IT'S A LONG PROCESS. I believe the preparation of a critical witness is the single most important thing we can do as litigators to improve our chances of success. If a witness would give me 20 hours of prep time, I would take them all, with thanks. The cold written word on the transcript lingers long and mocks loudly my own personal failures to take whatever time is needed to prepare a witness. The answer to the question "Why in the world did my witness say *that* in the deposition?" is almost always "Because my preparation was *too short and too thin.*" Sure, there are un-trainable witnesses, but my experience teaches me a witness's mistake flows too frequently from some deficiency in my prep, rather than a problem with the witness. Multiple meetings are *frequently* needed with important witnesses.

3. KNOWING THE FACTS ACTUALLY HELPS. Read the file before you meet with the witness. Review documents with the witness to insure both of you understand what has been recorded and the implications of the facts.

4. KNOWING THE LAW ACTUALLY HELPS. Do you understand the legal consequences of the facts and witness's testimony? It's in the big book on your desk, page 314.

5. KNOWING THE CRITICAL ISSUES ACTUALLY HELPS. A good litigator can ordinarily identify the BIG PROBLEMS in his or her case early on. Identifying and thinking about weaknesses should be done before the first prep meeting. I strongly advise you to have a document titled "Critical Issues". Use your "Critical Issues" outline to focus your thoughts so that when the deposition preparation is complete, your witness will be well prepared on the very most important matters.

6. KNOWING WHAT YOU'VE PREVIOUSLY SWORN TO ACTUALLY HELPS. Read your client's discovery responses before you meet with the him or her. Review the discovery responses with the witness to insure both of you understand what has been written and what the legal implications are. Let us not impeach our own witness with a prior inconsistent position or statement we drafted.

7. WAR STORIES HELP A long deposition prep session can seem to the witness an endless blur of rules. Give the witness a short anecdote for some of the rules. This will help the witness immeasurably.

8. ASSUME THE WITNESS KNOWS NOTHING That will be just about right. I learned this rule when a doctor-client of mine with more degrees than Einstein asked if "the jury would be present at the deposition." Explain the system, explain the process, explain why certain things are important, explain the likely effect of certain things. Explain it as to a child of tender years.

9. WHAT ARE YOU GOING TO SAY WHEN ASKED.....? Some lawyers fear bad facts and bad news so much they shy away from asking the Bad Bingo Questions to their witness during preparation. Do not let the first time you hear your witness's answer to the Bad Bingo Question be when the witness is sworn and the opposing attorney is doing the asking. *You* ask the hard questions. *You* ask the hurtful questions. You have to know the answers. You cannot prepare for a deposition or trial if you do not know beforehand the answer to the "bad" questions. It is essential to know what a witness will say to the "killer" question so you can, for instance, be certain that the witness has the correct information upon which the answer is based. Work on the witness's responses to tough questions over and over again. It may never be pretty; it can always be better.

Checklist for Deposition Preparation

Robin Collins

Revised - October 7, 2010

_____ Deposition process

* Court reporter
* Plaintiff may be present
* Sworn testimony may be used in Court
* Wide discovery
* Few objections
* Purposes: 1) Pure discovery; 2) Pin down; 3) Prior inconsistency
* My questions at the end

_____ Have you given any prior depositions or statements?

_____ Goal of deposition: NOT to win, it is to avoid self-inflicted wounds

* Not necessary to get "Whole Story" out

_____ Tell the Truth

* Avoid saying "to be honest", To tell you the truth", "in candor"

_____ Not here to help [the other side] are you, you're here to help yourself?

* Here to tell the truth
* Job description of the lowly witness

_____ LISTEN very, very carefully to all questions

* Most critical aspect of being a witness is listening
* Last question as important as first question

_____ PAUSE/REFLECT/CONSIDER before answering

_____ NEVER answer question you don't fully understand

_____ Avoid industry jargon, hyper-technical, trade words

_____ Conventional Widom = Short answer?

* Yes/No
* Short vs. Yes/No
* Longer vs. Shorter (False Light)

_____ New Wisdom: Give the briefest response which is:

a) truthful
b) thoughtful
c) fully answers THE question on the table

_____ Do not feel compelled to explain or elaborate. You have no obligation to teach.

_____ STOP.

* Answer only the question asked. Then STOP.
* If a question asks "who," and you know "who," provide a name.
* If a questions asks "when," and you know "when," provide a time.
* You are not a teacher

BUT!!!

_____ Review client's Responses to Interrogatories, RFD's, RFP's, RFA's.

_____ Review subpoena duces tecum: have you sent his doc before?

_____ Review critical documents with witness

_____ Do NOT evade/Be responsive

_____Objections

* Instruction to answer and not answer
    * Privilege
    * Beyond the scope of discovery

* Warning flag-- * Must not suggest or coach answers, BUT...
    * Confusing—did you understand it?
    * Compound
    * Distorts record or fact
    * Not what the witness said

_____ In proper circumstances, "I don't know" is acceptable if it is the truth.

_____ Difference between "I don't know" and "I don't recall."
* "don't know" means I never knew.
* "can't recall" means I knew once, but have forgotten

_____ NO snide remarks/rolling eyes/ "arguing" with attorney or answering question with a question

_____ Audible answer - no uh-huh, nod of head

_____ Attorney-Client Issues
* "My lawyer told me..."

_____ Use neutral language. Do not risk offending anyone who might see remarks in the transcript regarding gender, race, national origin, age, orientation.

_____ Beware " Mr. Nice Guy" The opposing attorneys generally are cordial with each other at the beginning and the questioning will appear relaxed. The initial relaxed appearance of a deposition may be misleading. The plaintiff's attorney might suddenly ask you a startling question, such as,

"How many patients have died while you were doing this type of surgery?"

_____ NO comedy--The response to attempts at humorous or light comments is likely to be "Do you find Ms. Plaintiff's tragic injuries funny?

_____ Your views of the civil justice system?

_____ Time, Speed Distance

* Think through what your answer locks you into

_____ What the witness has reviewed for deposition

* Witness's own records and writings
* Expert Report?
* Instructions from attorney
* Text, literature, internet?
* Conversations with other witnesses
* Original Petition
* Responses to Interrogatories, RFD's, RFP's, RFA's?

_____ Must know your own records and writings cold.

_____ Do NOT guess/speculate versus "My best estimate"

_____ Never say NEVER, ALWAYS, ALL OF, EVERYONE, NO ONE

_____ Video?? Courteous & polite - TV camera is always ON

_____ Conservative dress

_____ Do NOT lose temper or argue with attorney.

_____ NEVER concede that you "might have done something else" which would have altered outcome for the better

_____ Do NOT bring notes, charts, records, books to deposition

_____ Repetitively repeating question before answering.

_____ Do NOT fill in gaps of silence. Some attorneys deliberately allow long gaps in questioning in hopes of making you volunteer information. If your answer is complete, do not feel pressured to continue talking.

_____ ALWAYS ask to see documents/records. If you are not provided the documents, make clear that in their absence you cannot be confident that you are providing a complete and fully accurate answer.

_____ Exaggeration, hyperbole, inaccurate

_____ Trick Questions?? Not likely

* Assume facts not in evidence
* Question contains false implications half-truths

_____ BEWARE: "Putting Words in My Mouth"

* "Wouldn't it be fair to say...."
* "Isn't it true that....?"
* "Don't you agree that....?"
* "Let me see if I understand...."
* "Let me summarize...."
* "Aren't you telling me that...."
* "Would you agree with me that....."
* Ending questions with..."Isn't that correct?"

_____ BEWARE cherry-picking factors

Q. And what are the various factors that officers were trained to look at as the risks created by a pursuit?
A. Road conditions, time of day, density of traffic, natural obstacles, speeds, traffic control. We frame it in terms of the totality of the circumstances you are confronting.
Q. Do you say, for example, there's lots of traffic so we can pursue them because they'll get trapped by traffic and so there's no risk, or do you say, there lots of traffic so this is a time you want to maybe be cautious and not pursue because you might put people at risk?
A. It's not formulaic, so it's going to depend upon the judgment of the officer confronting all of those circumstances. I think it could be either of those scenarios.
Q. Is that the kind of area where you'd look at it and say this is a factor that would lean toward not pursuing?
A. Not taken in isolation.
Q. I'm looking at them all one by one.
A. I understand, but I'm trying to answer your question. As a manager or as a commander in the police department, I will not make those kind of definitive, declarative statements about circumstances, particularly individual circumstances.
Q. When you're training people, and if you just consider volume of car and foot traffic, don't you have to tell trainees what it is they should be looking for in deciding whether this militates for or against initiating a pursuit?
A. In no part of our training do we just tell them one thing.
Q. I know that, but I havet to go at it one at a time. I mean you got to say, okay, when you look at volume of traffic, you're looking to see if there's a lot of cars on the road and it's the middle of the day, as opposed to 4:00 in the morning and out in a country road, you may not want to pursue. Is that the kind of thing you tell them?
A. You may not. But given other circumstances you may.
Q. I know that, but let's look at them one at a time. I realize that at the end you've got to factor them all together, but could the traffic at the Seattle Center area in the middle of the day be something that would generally weigh against pursuing somebody through that area?
A. I'm afraid I have to say not necessarily.
Q. So you can't say whether volume of car and foot traffic in the Seattle Center area at 1:00 would be the kind of environment that would weigh against pursuit?
A. It's a factor to be weighed. That's what we tell our trainees.
Q. Against pursuit or in favor of pursuit?
A. In the judgment of whether to pursue or not.
Q. And that's what I'm trying to figure out. Is it something that weighs against pursuit or in favor of pursuit? Let's say, for example, if you have everything else being equal, but a pursuit's at 3:00 in the morning down a country road, or it's in the Seattle Center area at one p.m., how does traffic weigh with respect to pursuing or not pursuing?
A. When we train officers, it is to take the totality of the circumstances they're confronted to make a reasonable judgment based upon the need to pursue or not pursue. You can't isolate out each of these individual characteristics and say this a pursue, non-pursue, go, no go criteria.

_____ BEWARE: Introductory clauses (jury argument) in questions

_____ BEWARE: Compound Questions Your answer should be: "Could you rephrase the question please or break it down.")

_____ BEWARE the same question in different clothing

_____ Do NOT close a "list" *THAT'S ALL I CAN REMEMBER AT THIS TIME*

* "Is that all of the rules you can recall?"
* "Is there anything else the claimant said?"
* "Is there anything else you remember about condition of the machine?"

_____ NO profanity

_____ Drawings

* I'm not an artist
* Remember Time, Speed, Distance issues
* Consider having the witness make a drawing for you

_____ Authoritative journal articles

_____ Legal issues:

* legal terms Unsafe, Hazardous, Dangerous, Negligent, Standard of Care, Ordinary care, Preponderance of Evidence
* When describing a work practices: reasonable, prudent, good practice, irregularity, non-standard.

_____ Are you an expert? -- opinion vs. fact

* Do NOT wander beyond your expertise

_____ Do NOT speculate about what another person was thinking.

_____ RECOLLECTION ISSUES & QUESTIONS

Q. You would agree with me that a person is unable to remember all the details of an event a year or two ago?

Q. As we sit here today, do you have a memory of this accident.

Q. So, you basically will be testifying from your records.

_____ Taking restroom breaks and questions following breaks:

* Cannot confer between question and answer
* I need to take a break
* What did you discuss?
* Want to change testimony?
* "Can I speak off the record?"

_____ Critical of plaintiff or other defendants?

_____ Read and sign deposition. Law permits the opportunity to review deposition when transcribed.

* Important step, but original answer may also be read to jury. [6]
* Must be done within 30 days of submission to the witness

_____ Good night's rest before

---

[6] *Seattle-First Nat. Bank v. Rankin*, 367 P.2d 835 (1962); *Young v. Group Health Co-op. of Puget Sound*, 534 P.2d 1349 (1975)

FOR EXPERTS

_____ When were you contacted
_____ Why were you retained–what was your "job"
_____ What did attorney tell you?
_____ Advertise in journals/internet?
_____ Plaintiff vs. Defendant split
_____ Keep list of past cases and depositions?
_____ Your own claims history?
_____ Talked to defendant/plaintiff ?
_____ Does your report contain ALL of your opinions
_____ Need to review anything else to render final opinions?
_____ Need to change, add, delete items from your report?
_____ Draft reports, other versions shown and discussed with attorney?
_____ Any 1-2 documents that are the "most important"/"critical" for you?
_____ *Frye/Daubert* issues???
_____ Critical of anything defendant did? Be prepared to say "NO!"
_____ Critical of other defendants or plaintiff
_____ Disagree with other defense experts?
_____ Be able to articulate disagreements with plaintiff experts

Braking/Stopping Distances

MPH	Ft./Sec.	Braking [7] Deceleration Distance Ft	Perception [8] Reaction Distance Ft	Total [9] Stopping Distance Ft
10	14.7	5	22	27
15	22	11	33	44
20	29.3	19	44	63
25	36	30	55	85
30	44	43	66	109
35	51.3	59	77	136
40	58.7	76	88	164
45	66	97	99	196
50	73.3	119	110	229
55	80.7	144	121	265
60	88	172	132	304
65	95.3	202	143	345
70	102.7	234	154	388
75	110	268	165	433
80	117.3	305	176	481
85	124.7	345	187	532

[7] Assumes reasonably good co-efficient of friction of about .75; better is .8 or higher while conditions or tire quality might yield a worse factor of .7 or lower.

[8] Assumes 1 second delay in brake application for driver reaction time.

[9] Assumes that no matter the velocity, that velocity is reduced 15 fps every second. If the initial velocity is 60 mph, 88 fps, after 1 second elapsed, the vehicle velocity would be 73 fps, after 2 seconds it would be 58 fps decreasing progressively thereafter.

RULE CR 30 DEPOSITIONS UPON ORAL EXAMINATION

(a) **When Depositions May Be Taken.** After the summons and a copy of the complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

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

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing of not less than 5 days (exclusive of the day of service, Saturdays, Sundays and court holidays) to every other party to the action and to the deponent, if not a party or a managing agent of a party. Notice to a deponent who is not a party or a managing agent of a party may be given by mail or by any means reasonably likely to provide actual notice. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A party seeking to compel the attendance of a deponent who is not a party or a managing agent of a party must serve a subpoena on that deponent in accordance with rule 45. Failure to give 5 days notice to a deponent who is not a party or a managing agent of a party may be grounds for the imposition of sanctions in favor of the deponent, but shall not constitute grounds for quashing the subpoena.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by rule 11 are applicable to the certification. If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

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

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or the order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections

under section (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in section (e), and the certification of the officer required by section (f)shall be set forth in a writing to accompany a deposition recorded by nonstenographic means.

(5) 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, including the time established by rule 34(b) for the party to respond to the request.

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

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or by other electronic means. For the purposes of this rule and rules 28(a), 37(a)(1), 37(b)(1), and 45(d), a deposition taken by telephone or by other electronic means is taken at the place where the deponent is to answer questions propounded to him.

(8) Videotaping of depositions.

(A) Any party may videotape the deposition of any party or witness without leave of court provided that written notice is served on all parties not less than 20 days before the deposition date, and specifically states that the deposition will be recorded on videotape. Failure to so state shall preclude the use of videotape equipment at the deposition, absent agreement of the parties or court order.

(B) No party may videotape a deposition within 120 days of the later of the date of filing or service of the lawsuit, absent agreement of the parties or court order.

(C) On motion of a party made prior to the deposition, the court shall order that a videotape deposition be postponed or begun subject to being continued, on such terms as are just, if the court finds that the deposition is to be taken before the moving party has had an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

(D) Unless otherwise stipulated to by the parties, the expense of videotaping shall be borne by the noting party and shall not be taxed as costs. Any party, at that party's expense, may obtain a copy of the videotape.

(E) A stenographic record of the deposition shall be made simultaneously with the videotape at the expense of the noting party.

(F) The area to be used for videotaping testimony shall be suitable in size, have adequate lighting and be reasonably quiet. The physical arrangements shall be fair to all parties. The deposition shall begin by a statement on the record of: (a) the operators name, address and telephone number, (b) the name and address of the operators employer, (c) the date, time and place of the deposition, (d) the caption of the case, (e) the name of the deponent, and (f) the name of the party giving notice of the deposition. The officer before whom the deposition is taken shall be identified and swear the deponent on camera. At the conclusion of the deposition, it

shall be stated on the record that the deposition is concluded. When more than one tape is used, the operator shall announce on camera the end of each tape and the beginning of the next tape.

(G) Absent agreement of the parties or court order, if all or any part of the videotape will be offered at trial, the party offering it must order the stenographic record to be fully transcribed at that party's expense. A party intending to offer a videotaped recording of a deposition in evidence shall notify all parties in writing of that intent and the parts of the deposition to be offered within sufficient time for a stenographic transcript to be prepared, and for objections to be made and ruled on before the trial or hearing. Objections to all or part of the deposition shall be made in writing within sufficient time to allow for rulings on them and for editing of the tape. The court shall permit further designations of testimony and objections as fairness may require. In excluding objectionable testimony or comments or objections of counsel, the court may order that an edited copy of the videotape be made, or that the person playing the tape at trial suppress the objectionable portions of the tape. In no event, however, shall the original videotape be affected by any editing process.

(H) After the deposition has been taken, the operator of the videotape equipment shall attach to the videotape a certificate that the recording is a correct and complete record of the testimony by the deponent. Unless otherwise agreed by the parties on the record, the operator shall retain custody of the original videotape. The custodian shall store it under conditions that will protect it against loss or destruction or tampering, and shall preserve as far as practicable the quality of the tape and the technical integrity of the testimony and images it contains. The custodian of the original videotape shall retain custody of it until 6 months after final disposition of the action, unless the court, on motion of any party and for good cause shown, orders that the tape be preserved for a longer period.

(I) The use of videotaped depositions shall be subject to rule 32.

(c) **Examination and Cross Examination; Record of Examination; Oath; Objections.** Examination and cross examination of witnesses may proceed as permitted at the trial under the provisions of the Washington Rules of Evidence (ER). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. A judge of the superior court, or a special master if one is appointed pursuant to rule 53.3, may make telephone rulings on objections made during depositions. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Motion To Terminate or Limit Examination.** At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 26(c). If the order made terminates the examination, it shall be resumed

thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) **Submission to Witness; Changes; Signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, 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 the witness, 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.

(f) **Certification and Service by Officer; Exhibits; Copies; Notice.** (1) The officer shall certify on the deposition transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. The officer shall then secure the transcript in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly serve it on the person who ordered the transcript, unless the court orders otherwise. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to the deposition transcript and filed with the court, pending final disposition of the case. (2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or the deponent. (3) The officer serving or filing the deposition transcript shall give prompt notice of such action to all parties and file such notice with the clerk of the court.

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

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

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

(h) Conduct of Depositions. The following shall govern deposition practice:

(1) Conduct of Examining Counsel. Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.

(2) Objections. Only objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition. All objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted.

(3) Instructions Not To Answer. Instructions to the deponent not to answer questions are improper, except when based upon privilege or pursuant to rule 30(d). When a privilege is claimed the deponent shall nevertheless answer questions related to the existence, extent, or waiver of the privilege, such as the date of communication, identity of the declarant, and in whose presence the statement was made.

(4) Responsiveness. Witnesses shall be instructed to answer all questions directly and without evasion to the extent of their testimonial knowledge, unless properly instructed by counsel not to answer.

(5) Private Consultation. Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court.

(6) Courtroom Standard. All counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.