OUT-OF-STATE DEPOSITIONS, AUDIOVISUAL DEPOSITIONS AND THE USE OF DEPOSITIONS AT TRIAL

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I. OUT-OF-STATE DEPOSITIONS

1. General Rules Regarding Place of Taking Deposition - Witness Attendance is Subject to Jurisdiction of the Court

A. Massachusetts Procedure

Under the Massachusetts Rules, where the deposition of a witness is to be taken within the Commonwealth, the place of taking of the deposition is ordinarily determined by the residence of the witness. Absent a court order, a resident of the Commonwealth cannot be required to attend a deposition more than 50 air miles from his residence, place of employment or place of business, whichever is nearest to the site for the deposition where he is subpoenaed. See Mass.R.Civ.P. 45(d)(2). Non-residents, on the other hand, may be required to attend a deposition only in the county where they were served, or within 50 air miles of the place of service. Mass.R.Civ.P. 45(d)(2). In the case of both residents and non-residents, however, upon motion for good cause, the court may fix another convenient place for the deposition. Id.

B. Federal Procedure

Under the federal rules, a deposition subpoena may be served at any place within the district of the court by which it was issued, or at any place outside the district that is within 100 miles of the place of deposition. Service may also occur at any place

within a state where a state statute or court rule permits service of a subpoena issued by a state court. A non-party witness cannot be compelled to travel more than 100 miles from his residence or place of employment to attend his deposition. Fed. R. Civ. P. 45(c)(3)(A)(ii).[1]

2. Taking Depositions Outside Massachusetts in an Action Pending in the Commonwealth

A. Federal Procedure

A significant advantage of proceeding in federal court in a case in which there are likely to be a significant number of out-of-state depositions is that the procedure for deposing witnesses who are not located within Massachusetts is far simpler than when the case is pending in state court. Under the federal rules, the deposition subpoena may be issued by either an attorney who is admitted to practice in the district where the deposition is to take place, or by an attorney admitted to practice in the district in which the action is pending. Thus, in a case pending in federal court in Massachusetts, an attorney admitted to practice here before the federal district court may issue a subpoena to compel the attendance of a resident of California to appear at a deposition in California.

B. Massachusetts Procedure

For actions pending in state court, the procedure to be followed is necessarily determined by the more limited geographic jurisdiction of the court. Thus, a

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[1] By the federal local rules, Boston is deemed a "convenient" place for taking the deposition of any person who resides in the eastern counties (including Worcester) and Springfield is deemed a "convenient" location for any person who resides in the western counties (i.e., Berkshire, Franklin, Hampden and Hampshire). See L.R. 30.1.

Massachusetts state court may not issue a subpoena to the resident of another state, located there, to compel his attendance at a deposition in that state. Securing the attendance of such a witness depends upon securing the assistance of the state court which has jurisdiction over the witness. The procedure to be followed is set forth in Mass. Gen. Laws 223A, §10. Mass.R.Civ.P. 28(a) and (b) must also be considered.

It is not necessary to seek court approval for taking a deposition outside the Commonwealth where all parties agree to the deposition and the witness consents to be deposed. See Mass. Gen. Laws c. 223A, §10(a)(4). Where the witness's attendance cannot be assured, or opposing counsel will object to the deposition, a letter rogatory and a commission to take testimony must be obtained. A letter rogatory and a commission will be issued on application and notice and on terms that are "just and appropriate." See Mass. Gen. Laws c. 223A, §10(b). The commission designates the person before whom the deposition is to be taken, typically a court reporter, either by name or by descriptive title. A letter rogatory, which is issued under the same procedure as a commission, is a formal written communication sent by a Massachusetts court having jurisdiction over the action to the court of another state or a foreign country, requesting that the testimony of a witness resident within that jurisdiction be taken. It is essential to confer with local counsel where the deposition is to be taken and provide him with the letter rogatory and commission so that he may secure an order and subpoena from the local court to compel the attendance of the witness at the out-of-state deposition.

Sample forms to be used in taking out-of-state depositions are attached to these materials. It should be noted there is no requirement in order to take an out-of-state

deposition that the taking of the deposition in any other manner is impractical or inconvenient. See Mass. Gen. Laws c. 223A, §10(b).

3. Practice Points in Conducting Out-Of-State Depositions

A cooperative witness can usually be persuaded to come to trial to testify in person. Sometimes the testimony of an important witness for your client's case who is located outside Massachusetts must be presented at trial by deposition. When this happens, and the witness cannot be relied on to appear at trial, consider videotaping the deposition. The procedural steps for taking an audiovisual deposition are discussed later in these materials. Frequently, however, your deposition will be a defensive one which you will take to enable you to effectively cross-examine the witness when he comes to Massachusetts and is called to testify at trial by your opponent. In taking such a deposition, you must carefully consider whether you should take a standard "discovery deposition" (as you would if the witness were a Massachusetts resident) or if you should attempt to cross-examine the witness. As with any discovery deposition, you will question the witness as to his knowledge of all relevant facts and pin him down carefully to his story. But should you do more?

If you fail to cross-examine such a witness and elect to save your cross-examination for trial so as not to forewarn the deponent as to how you intend to attack his testimony later, you face the risk that your opponent may elect to not call him at trial and simply read his deposition testimony to the jury. See Mass.R.Civ.P. 32(a)(3). The extent to which you cross-examine such a witness will depend on your assessment of the likelihood that he will appear at trial. At a minimum, you should ask questions in a way which will not create a clear record that your opponent can offer at trial and which

the jury will follow without difficulty. For example, consider asking about topics out of order. With-out-of-state depositions, the "usual stipulations" are not usually agreed to by counsel and all objections must typically be made at the time of the deposition. If motions to strike have not been reserved until trial, be careful to move to strike whenever the answers of the witness stray beyond the question.

If the out-of-state deposition is one noticed by your opponent and you expect that he intends to offer the testimony at trial (an indication of this is he seeks to take the deposition by videotape), you will be faced with the problem of how to effectively cross-examine the witness during what is, in effect, his trial testimony. Consider requesting the opportunity to take an abbreviated "discovery" deposition in advance of the full deposition. This request should be made first to opposing counsel and, if he refuses, by way of opposition to his motion for leave to take the out-of-state deposition. Since Mass. Gen. Laws c. 223A §10(b) permits the Court to issue a letter rogatory on terms that are "just and appropriate" you can certainly argue that permitting your opponent to take what would amount to trial testimony, in the absence of a fair opportunity for you to know what the witness will say and to have an opportunity for discovery, would be inequitable.

If the deponent is not called to testify at trial, you should at least object to any attempt by your opponent to read at trial any part of the deposition testimony which was given in response to his own leading questions. The introduction of deposition testimony at trial makes the deponent the witness of the party introducing the deposition. See Mass.R.Civ.P. 32(c).[2] Thus, even if you noticed and took the

[2] There are two important exceptions to this rule. It does not apply to

deposition, if your opponent asks leading questions, he will be precluded from offering any testimony he adduces thereby. Again, be sure to object if leading questions are asked.

It should be noted that Mass.R.Civ.P. 32(a) permits a party to read portions of a deposition rather than the entire transcript. Should your opponent do this, make sure that he does not omit any important testimony which explains or contradicts the selected testimony. You may insist that your opponent also read these parts. See Mass.R.Civ.P. 32(a) (4). While you have the right to read other parts of the testimony during presentation of your own party's case, insisting that your opponent do so has three significant advantages. First, it ensures that the jury immediately hears any testimony which explains or contradicts the testimony selected by your opponent and prevents that testimony from being given undue weight by the jury. Second, it creates the impression that your opponent was attempting to conceal relevant testimony from the jury by omitting the testimony that you ask be read. Third, this procedure may enable you to introduce testimony which may be objectionable if you offer it. For example, you may have cross-examined the witness as to the matters on which his testimony is being offered by your opponent. If you try to introduce this part of the deposition later during your party's case (for example, in a case in which you represent the defendant) you may yourself be foreclosed from offering the testimony by Mass.R.Civ.P. 32(c).

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deposition testimony used to impeach. Nor does it change the general rule that one may always introduce the deposition testimony of a party opponent. See Mass.R.Civ.P. 32(c) See also Mass.R.Civ.P. 30(a)(2).

II. AUDIOVISUAL DEPOSITIONS

It has become commonplace to use audiovisual depositions at trial in lieu of live testimony. The testimony of a fact witness by videotape is permitted in limited circumstances. Videotaped testimony by a medical provider or expert witness is allowed as of right, provided the proper procedure is followed.

The taking of an audiovisual deposition and its use at trial in Massachusetts state courts is governed by Mass.R.Civ.P. 30A. There is no federal analog to Mass.R.Civ.P. 30A, although Fed. R. Civ. P. 30(b)(4) refers to depositions taken "by other than stenographic means". Federal courts, like state courts, encourage the use of audiovisual depositions, where appropriate.

1. Audiovisual Depositions of a Fact Witness

A. Procedural Requirements

Any deposition may be taken by audiovisual means when all parties stipulate to the taking of the deposition in this fashion or a motion to videotape the deposition has been filed with the court and allowed. Mass.R.Civ.P. 30A(a). All parties who oppose the videotaping of the deposition must be given an opportunity to be heard before the deposition is taken. Id. Except by leave of court, an audiovisual deposition notice cannot be served until six months after the action has been commenced. Mass.R.Civ.P. 30A(b).

B. Strategic Consideration in Taking an Audiovisual Deposition

Strategic considerations as to how to conduct a videotaped deposition are more critical than for a regular stenographic deposition. As with an out-of-state deposition,

the strong possibility that a videotaped deposition will be used at trial in place of live testimony means that counsel for each party should consider whether they should limit themselves to conducting a "discovery" deposition or whether they should conduct a full-fledged examination or cross-examination of the type they would perform at trial. When cross-examining, bear in mind that although you risk disclosing your best ammunition to the witness -- who can then be better prepared for your questions at trial after the opportunity for a dry run, counsel who fails to question the witness as he would at trial will almost certainly lose the opportunity to do so if the videotape testimony is permitted in lieu of live testimony. See Anselmo v. Reback, 400 Mass. 865 (1987) (affirming trial court decision not to allow videotaped statement of the deceased to be placed in evidence where adverse party was not present and had no opportunity to cross-examine deceased).

It should be noted that Mass.R.Civ.P. 30A(a) provides that parties who oppose the videotaping of the deposition must be given an opportunity to be heard by the court before the deposition is taken. If you do have significant concerns that the deposition may be used at trial and that you will be deprived an opportunity to effectively cross-examine the witness, consider raising these concerns with the court in appropriate circumstances in advance of the deposition to try to obtain some measure of protection. For example, consider seeking a stipulation from opposing counsel or a court order that the audiovisual deposition will be used in lieu of live testimony irrespective of the actual availability of the witness at trial and request an opportunity to take an abbreviated "discovery" deposition first, a procedure which mirrors that provided for in the case of expert witnesses under Mass.R.Civ.P. 30A(m).

C. Mechanics of Conducting a Videotaped Deposition

The procedure to be followed in conducting a videotaped deposition is set out in detail in Mass.R.Civ.P. 30A(c). The deposition must begin with a statement on camera regarding the identity of the video operator, the caption of the case, the name of the deponent, the name of the party taking the deposition and all relevant stipulations. See Mass.R.Civ.P. 30(c)(i). Objections must be made in the same fashion as they would be made at a regular stenographic deposition. Mass.R.Civ.P. 30(A)(c)(7).

D. Preparing the Videotaped Deposition for Use at Trial

Mass.R.Civ.P. 30A(g) provides that objections to the audiovisual deposition which would otherwise be made at trial shall, where practicable, be submitted to the trial judge prior to the commencement of the trial. The recommended procedure to be followed is that contained in the pretrial order in Massachusetts Superior Court Standing Order 1-88, Appendix A, This states, inter alia:

> In the event deposition transcripts are to be offered at trial or videotaped depositions are to be shown, and there are objections to any of the answers set forth in the transcript or on the videotape, the parties, not less than three days prior to the commencement of trial, are to supply to the court a transcript of the testimony with objections highlighted and, in the margin, a brief statement of the grounds for the objection and the response by the proponent of the testimony.

After the Court has ruled on the objections, the videotape must be edited to reflect the rulings of the trial judge. See Mass.R.Civ.P. 30A(g).

E. Use at Trial

A videotaped deposition of a fact witness may be used for any purpose and under any circumstances in which a stenographic deposition may be used. Mass.R.Civ.P. 30A(i). This means that the videotaped testimony of the opposing party,

just like an ordinary stenographic deposition, may be used for all purposes, including showing the complete videotape or selected portions of it to the jury. You may introduce selective portions of the deposition of a non-party fact witness for purposes of showing impeachment or bias, where appropriate, and you may show the entire videotape of such a deposition if you can establish that the witness is "unavailable" within the meaning of Mass.R.Civ.P. 30(a)(3), the most common circumstances being that the witness is dead, out-of- state or imprisoned. Moreover, Mass.R.Civ.P. 30A(k))(1) permits the court to order, upon motion of a party, sua sponte, or by stipulation of all parties, that "in the interest of justice" all or part of a witness's testimony can be presented by audiovisual means. While the precise scope of this rule is unclear, it certainly gives the court broad discretion to permit the use of videotaped testimony in circumstances where counsel cannot meet the strict criteria for showing that a witness is unavailable to testify live at trial.

Note that, in Barrett v. Leary, 34 Mass. App. Ct. 659 (1993), the court held that during any jury trial, a judge should not absent himself from the courtroom while any audiovisual deposition testimony is presented.

2. Audiovisual Depositions of an Expert Witness

The problem of scheduling the appearance of a busy or out-of-state expert witness at trial has been significantly reduced by Mass.R.Civ.P. 30A(m) which permits a party to take the audiovisual deposition of his own treating physician or expert witness and to use the deposition at trial, without obtaining court permission or the agreement of the opposing counsel, irrespective of whether the witness is actually available.

A. Procedural Requirements

The procedure for taking the audiovisual deposition of an expert or treating physician differs in several respects from that which applies to taking the audiovisual deposition of a fact witness. Although some of the same rules apply -- you may not take such a deposition until six months after the action has commenced (Mass.R.Civ.P. 30A(m)(2)) -- the following distinctions must be noted:

(i) The audiovisual deposition of a doctor or expert cannot be scheduled until 30 days after a written report of the proposed deponent has been furnished to all parties. The report must contain the curriculum vitae of the witness, the subjects described in Rule 26(b)(4)(A)(i) (subject matter, substance and grounds of the expert opinion) and, for a treating physician, a description of the treatment and its costs. See Mass.R.Civ.P. 30A(m)(2).

(ii) Any party can move for further discovery of the witness, to take place prior to the audiovisual expert witness deposition for trial, in accordance with Rule 26(b)(4)(a)(ii). See Mass R. Civ. P. 30A(m)(3). Bear in mind that a court may be no more (or, depending on the judge, no less) inclined to grant the opportunity for a discovery deposition before the audiovisual deposition takes place than he would be if you were seeking to take the discovery deposition of an expert who is to testify live at trial.

(iii) The notice for taking an audiovisual expert witness deposition for trial must state that the deposition “is to be recorded by audiovisual means with the purpose of its being used as evidence at trial in lieu of oral testimony.” See Mass.R.Civ.P. 30A(m)(3).

(iv) Any motion filed in opposition to the audiovisual deposition notice must be filed within 14 days of receipt of the notice or before the date for the deposition, whichever is shorter. The deposition may not occur until the court rules on the motion for opposition. See Mass.R.Civ.P. 30A(m)(3).

(v) Although the procedure for taking the audiovisual deposition of an expert is the same as for the audiovisual deposition of a fact witness, in the case of an expert counsel are required to make all evidentiary objections during the course of the deposition. See Mass.R.Civ.P. 30A(m)(4).

B. Who is an Expert for Purposes of Taking an Audiovisual Deposition

As noted above, Mass.R.Civ.P. 30A distinguishes between fact witnesses and expert witnesses for purposes of audiovisual depositions. Among the most important distinctions are that the taking of an audiovisual expert deposition requires the party taking the deposition to provide an expert report of the expert more than thirty (30) days prior to the deposition. Provided the procedural requirements are met, a party may introduce an audiovisual deposition of an expert witness irrespective of whether the witness is actually available to testify live at trial.

The rule does not specifically address whether the type of expert who is subject to rule 30A(m) is limited to one who a party intends to call at trial (or would call absent the opportunity for an audiovisual deposition) by following the procedure set forth in Mass.R.Civ.P. 26(b)(4) or whether the rule applies to a broader definition of expert. Rule 26(b)(4) is limited to the discovery of facts known and opinions held by experts where the information was “acquired or developed in anticipation of litigation or for trial.” No such limitation appears in the body of Mass.R.Civ.P. 30A(m). Indeed

Mass.R.Civ.P. 30A(m)(1) defines the applicable expert more broadly as "a person qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion or otherwise.". In fact, Massachusetts Courts have distinguished between so-called "trial experts" and those who acquire relevant facts and opinions without regard to the litigation. Typically, discovery of facts known and opinions held by a percipient expert "operates exactly as it does with respect to facts and opinions held by any witness". J. Smith and H. Zobel, Mass. Practice Series, Rules Practice, ¶26.6 (1975). See also Elias v. Suran, 35 Mass App. Court 7, 10-11 (1993) (holding that the disclosure requirements of Rule 26(b)(4)(A) did not apply to nurse's testimony, which "did not pertain to facts and known opinions acquired or developed in anticipation of litigation or for trial"). In view of the broad definition of experts contained in Mass.R.Civ.P. 30A(m)(1), it could certainly be argued that the videotaped deposition of even a percipient expert must be taken pursuant to the provisions of Mass.R.Civ.P. 30A(m) rather than under Rule 30(A)(a). On the other hand, Mass.R.Civ.P. 30A(m)(2) provides support for the argument that the rule is limited to trial experts, since a party will not necessarily have any control over a percipient expert such as to enable it to provide a report by the expert to the opposing party. This issue is addressed in more detail in the attached materials.

C. Use of Audiovisual Deposition of an Expert at Trial Under Mass.R.Civ.P. 30A(m)

Mass.R.Civ.P. 30(m)(4) sets forth the procedure for obtaining a court ruling on objections. Objections made during the course of the deposition, and any other objections that would be made at trial, must be filed with the court no later than 21 days before the commencement of trial. Objections not so submitted are deemed waived

unless unforeseen events at trial warrant an objection. The party seeking to introduce the deposition must respond within 14 days. Failure to respond is deemed a waiver. See Mass.R.Civ.P. 30A(m)(4). The party making the objection is responsible for providing the judge with a stenographic record of the deposition and, if the judge requests, a copy of the videotape. The judge is required to rule on the objections prior to the commencement of trial and give notice to all parties of the rulings and instructions as to editing. The videotape must then be edited to reflect the rulings of the judge and to remove all references to the objection. See Mass.R.Civ.P. 30A(m)(4).

As with audiovisual depositions of a fact witness, the trial judge must be present in court when the deposition is shown to the jury. Barrett v. Leary, 34 Mass. App. Ct. 659 (1993).

3. Considerations in Deciding Whether to Videotape a Deposition

You should consider taking a videotaped deposition in the following circumstances:

A. When the Witness May be Unavailable at Trial

A witness may be deemed "unavailable" if, at the time of trial, he is dead, outside the jurisdiction, unable to appear because of age, illness or imprisonment, or otherwise not amenable to the court's subpoena power. See Mass.R.Civ.P. 32(a)(3). Obviously, the advantage of showing videotaped testimony to the jury over merely reading stenographically transcribed testimony is that the jury has an opportunity to hear and see the deponent, and thereby evaluate his credibility.

B. Expert Witnesses

You should consider taking an audiovisual deposition of your expert if you have any doubt as to the availability of your expert at trial. Most courts are now reluctant to grant continuances because of the unavailability of experts where a party could easily have foreseen the scheduling difficulty and have taken an audiovisual deposition. As discussed below, you should also consider taking an audiovisual deposition of an expert where you want him to conduct a demonstration for the jury during his testimony which can be done more effectively outside the courtroom.

C. Demonstrations

Consider taking an audiovisual demonstration when it is important to have the witness demonstrate an occurrence or event. This may be so with either an expert or a fact witness. For example, you might want to have an eyewitness to an accident, which occurred on a piece of machinery which cannot easily be brought into court, to demonstrate how the accident occurred by taking his videotaped deposition. In this way, you can present a demonstration of the accident in which the witness can point out relevant parts of the product or machinery. A motion to take and use at trial such a deposition should be filed pursuant to Mass.R.Civ.P. 32(a)(3)(E), which permits the use of deposition testimony of party and non-party witnesses where "exceptional circumstances" warrant, even if the deponent is available at the time of trial.

D. Dealing with the SOB Litigator

Consider videotaping depositions where opposing counsel is expected to use tactics which will impede a fair examination of the witness. Few lawyers, even SOB litigators, want to be caught looking like an ass by the judge or jury.

4. Preparing the Witness

Bear in mind that many experts are experienced in having their depositions taken on videotape and make good witnesses, but others will be enduring this experience for the first time. Prepare them in advance, make sure they are dressed appropriately and explain that this is their chance to persuade the jury. This should include, at the minimum, the following instructions: Maintain eye contact with the camera. Do not look bored. Do not slouch in your chair. Do not pause unduly in answering questions. Do not fidget or hold any objects in your hand during the deposition. If the deposition is in

the witness's office, make sure it is tidy and the table is uncluttered. Likewise, counsel questioning at the videotaped deposition of an expert should bear in mind that a little goes a long way. Even testimony which might be interesting or stimulating when presented live at trial can put a jury to sleep when presented on videotape. Therefore, modulate the tone of your questions, speak loudly and clearly, and get to the point quickly.

III. USE OF DEPOSITIONS AT TRIAL

Depositions are the most effective discovery tool. In addition to the opportunity they provide for performing discovery (learning about your opponent's case, the weaknesses of your own and as a means of performing valuable factual investigation) their use at trial can be critical.

1. Pre-Trial Considerations

In addition to exploiting the opportunity depositions provide for evaluating witnesses in advance of trial, you should plan to use depositions in order to lay a foundation for documents and to prove some of the elements of your case and weaknesses of your opponents by introducing the deposition testimony at trial. In this regard, bear in mind that Mass.R.Civ.P. 32(a)(2), permits the use "for any purpose" by an adverse party of the deposition of a party or of anyone who at the time of taking the deposition was an officer, director or managing agent of the person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership, or association or governmental agency that is a party.

2. Use at Trial Depends on Identity of the Witness and Purpose for Offering the Deposition

A. Use of Deposition of Opposing Party as if Witness were Present and Testifying

As noted above, one of the most important uses of depositions at trial involves reading helpful portions of the deposition testimony of the opposing party directly to the jury. You may do this -- and should do it -- even if the opponent is available to testify at trial. First, the party deposed may have made some damaging admissions during his

deposition which can often be most effectively used by reading them to the jury -- without giving the opposing party an opportunity to explain (as his lawyer will undoubtedly have prepared him to do) the damaging testimony.[3] Also, many of the matters which you need to establish may be fairly mundane and the opportunity to get them before the jury quickly and in a controlled atmosphere is valuable. Live witnesses, even ones who are making their best efforts, often forget critical facts because of the passage of time or as a result of their own nervousness and these basic facts can often be best established by reading the deposition testimony.

It is important to be familiar with how to present the deposition testimony of a party opponent under Mass.R.Civ.P. 32 (a). First, always notify the trial judge at the beginning of the trial (or as soon as possible during the trial) that you intend to read portions of the deposition transcript. Some judges have their own views about how and when they want this to be done and you do not want to be caught short, or to offend the trial judge, just as you are about to read the testimony. Second, think carefully about how you want to present the testimony. If the portions of the transcript you intend to read are short, it is preferable to read them to the jury yourself. Identify the deposition by stating the name of the witness, the date the deposition was taken, and the page and line of the deposition transcript. If the portions of the transcript you intend to read

[3] If you are defending against this tactic, you should take advantage of the provisions of Mass.R.Civ.P. 32(a)(4) which permits a party to request that the adverse party also read "any other part [of the deposition] which ought in fairness to be considered with the part introduced." Since you likely will not have examined your own client when his deposition was taken, you should focus on any responses to opposing counsel's deposition questioning which relate to the introduced testimony and which clarify or explain any damaging testimony.

are more than just a few questions and answers, always have another person present to assist you. You should read the questions and have your assistant (a colleague or paralegal in your office) read the answers given by the party opponent. Make sure you rehearse this with that person so that he or she uses the correct intonation and pauses to make the testimony as effective as possible. Also, give consideration to when you want to read this deposition testimony to the jury. For example, if you are representing the plaintiff and intend to call the defendant as a witness during the presentation of the plaintiff's case, think about whether it will be more effective to read portions of his deposition testimony before or after you cross-examine him.

B. Use of Depositions to Impeach or Show Bias

To be an effective trial attorney, you must master how to use deposition testimony to bolster or attack a witness's memory at trial.[4] This second method for utilizing a deposition transcript at trial involves its use during the testimony of a witness you are questioning on the stand. The most important method is impeachment. Most often, the crucial testimony you will want a jury to consider is the damaging testimony of an adverse witness when confronted with a prior inconsistent statement. When using prior statements in your cross-examination, you must know exactly the purpose for

[4] Depositions are but one -- albeit probably the most important -- method of impeaching a witness with documents at trial. Other types of valuable documentary evidence which can be used in the same fashion would include statements to investigators, statements to official investigative authorities, answers to interrogatories, and responses to requests for admissions. Likewise, another important strategy for using documents at trial is in connection with the exception to the hearsay rule, where the witness's memory has failed and you have a document which may be admitted as the "past recollection recorded" of the witness. Since such a document would rarely, if ever, be a deposition transcript, discussion of that method is beyond the scope of these materials.

which you are presenting the statement to the witness and the jury. This will allow you to effectively defeat any objections opposing counsel might make during your examination, maintain the momentum of your examination, and avoid confusing the judge when he rules on the objection. Be careful not to overdo it. Do not try to impeach a witness as to each part of his testimony which appears slightly inconsistent with prior deposition testimony. Doing so lessens the effectiveness of the technique and creates the appearance that you are simply harassing the witness. Save this impeachment for critical parts of your case and that of your opponent.

i) When May you Impeach

It is well settled that an adverse party may impeach the testimony of a witness by showing, through cross-examination, that the witness has previously made a statement which is inconsistent with the testimony he has given on the stand. See Robinson v. Old Colony Street Railway Co., 189 Mass. 594 (1905).[5] Because the prior inconsistent statement is not being offered for the truth of the matter it asserts, and is being offered only to impeach credibility, it does not fall within the hearsay rule. See Wheeler v. Howes, 337 Mass. 425 (1958); proposed Mass. R. Evid. 613. In

[5] A prior inconsistent statement made in the case by a party witness has traditionally been admissible substantively as an exception to the hearsay rule. See Lanigan v. Pianowski, 307 Mass. 149, 152 (1940). The proposed Massachusetts Rules of Evidence eliminate this distinction, and such admissions are treated as non-hearsay. See Proposed Mass. R. Evid. 801(d)(2)(A). In contrast, at least under Massachusetts practice, a prior inconsistent statement made by a non-party witness is only admissible for impeachment purposes. See Genova v. Genova, 28 Mass. App. Ct. 647, 651 (1996). Counsel must request a limiting instruction to hold this evidence to this effect. Id. It should be noted that in federal court, a prior inconsistent statement given under oath which was subject to cross-examination, is not treated as hearsay and may be offered substantively. Fed. R. Evid. 801(d)(1)(A). Massachusetts practice appears to be moving in this direction. See Proposed Mass. R. Evid. 801(d)(1)(A) and Commonwealth v. Daye, 393 Mass. 55 (1984) (grand jury testimony).

Massachusetts state court, you may impeach a witness called by the opposing party even if a witness is your own client, without the foundational requirement of describing the occasion of the prior statement to the witness and giving him an opportunity to explain the inconsistency. Hubley v. Lilley, 28 Mass. App. Ct. 468, 473, fn. 7, cp. Mass. R. Evid. 613(b).[6] In contrast, in federal court, extrinsic evidence of impeachment may only be used if the witness is given an opportunity to explain the prior inconsistency. Fed. R. Evid. 613(b).

Under both Massachusetts and federal practice, although the contents of the statement need not be shown or disclosed to the witness, opposing counsel is entitled to examine the statement so he may question the witness about it on redirect examination. See Hubley v. Lilley, supra at 472-473; Fed. R. Evid. 613(a); Proposed Mass. R. Evid. 612(a).

ii) How to Impeach

[6] There have been important recent changes to the traditional rule that you may not impeach your own witness, i.e. a witness you put on the stand. If it is your own witness who has testified inconsistently with prior statements he has made, you may, pursuant to Mass. Gen. Laws c. 233, §23, impeach your own witness with the statement, provided that "before proof of the inconsistent statement is given, the circumstances there sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and if so . . . be allowed to explain them." Commonwealth v. Rosa, 412 Mass. 147, 156 (1992); Commonwealth v. Johnson, 412 Mass. 318, 326 (1992).

Although there are many styles for impeaching witnesses, three basic principles should be kept in mind when you design your impeachment examination. First, commit the witness to the testimony.[7] Second, bolster the prior statement by demonstrating that when the witness made it, he knew what he was saying. Third, prove the prior statement. This can be accomplished by simply asking the witness if he made the statement. If he says yes, he is impeached. If he denies it, prove the statement by extrinsic means. Usually you should not, and need not, attempt to do more than this. Except in one circumstance discussed below, you should not ask the witness if he was telling the truth at the time of the earlier statement. Nor should you try to emphasize the inconsistent statement, for example by asking why the witness made the inconsistent statement before (don't ask a question on cross when you don't know what the answer will be), or by suggesting that the witness was either "lying then or lying now." The witness may defeat your efforts to impeach him by offering the jury an unexpected and plausible explanation for the inconsistency. Competent opposing counsel will certainly have prepared him to do this.

Impeachment by a prior inconsistent statement made during a deposition -- one of its commonest forms -- should typically be done as follows. First, although you certainly know what a deposition is, the jury likely will not. Explain it to the jury through your cross-examination. Second, don't give the witness the opportunity to claim that he did not give the deposition or that your transcript is inaccurate. An adverse witness,

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[7] This is a rare exception to one of Professor Younger's ten commandments, that you should not let the witness repeat on cross-examination what he testified to on direct. Here, if your impeachment is worthwhile, you should focus the jury on the upcoming impeachment by repeating the direct testimony as a prelude to offering the impeachment evidence.

particularly a well-schooled one, will seize such opportunities more often than you would think. Third, when you question the witness, this is the one circumstance when you should ask the witness if he was telling the truth when he gave the inconsistent testimony. The reason is that, when he was deposed, the witness was under oath when he gave the prior statement and, therefore, he cannot offer any plausible explanation for the inconsistency. Thus, he can hardly say that he was lying and, if he does, it will only help your case more. The following example illustrates how this should be done:

Q. Mr. Smith, I took your deposition six months ago in my office and you told the truth, didn't you? (Note how the question gives no opportunity to deny that his deposition was taken.)

A. Yes. (He can hardly say he lied. If he says he didn't tell the truth, the next questions will be just as appropriate).

Q. You were represented by your lawyer, Attorney Davis? Just like you are today? (This question is important because it reduces the risk that the jury may think that you were taking unfair advantage of the witness at the deposition.)

A. Yes.

Q. You were under oath then, just like you are today, correct?

A. Yes.

Q. You swore to tell the truth, just like you did today, correct?

A. Yes.

Q. I asked you a number of questions about the products your company makes and sells, and you answered them truthfully, didn't you?

A. Yes. (Once again, the witness can hardly disagree with a question phrased in this manner. Make sure you don't ask him if he answered the questions "accurately." That would present an opening he may have been prepared for.)

Q. The court reporter was present and she took down my questions and your answers, just like the court reporter is doing here today, is that correct?

A. Yes.

You are now in a position to impeach the witness. When you do so, always include the page and line number of the earlier deposition testimony in your impeachment question. Your opponent will ask you to, if you forget, and it will break up your cross-examination. Do this as you are approaching the witness with the deposition transcript in your hand. Ask the trial judge for permission to approach the witness (this is probably not an essential procedural requirement, but it again bolsters you in the eyes of the jury and reduces any impression that you are badgering the witness). For maximum effect, always read the witness's earlier deposition answers as part of your question to him, rather than asking the witness to read it.[8] As with reading the deposition of an opponent, this way you can put emphasis on just the prior testimony that you want. The following example illustrates how to ask the impeachment questions:

Q. Mr. Smith, earlier today you testified that when you inspected the product after the plaintiff's accident, it appeared to you that modifications had been made to it. (This commits the witness to his testimony.)

Then, after bolstering his prior deposition testimony, as described above, you can

impeach:

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[8] The prior inconsistent statement may be read by counsel or the witness. See Commonwealth v. Fort, 33 Mass. App. Ct. 181, 186, review denied, 413 Mass. 1106 (1992).

To the Court: May I approach the witness, Your Honor?

Court: You may.

Q. At your deposition, page 32, line 5, I asked you if you believed that modifications had been made to the product and (approaching the witness and showing him the transcript) let me show you your testimony. You testified: "I couldn't make a clear determination on that one way or the other." Did I read your answer correctly?

A. Yes.

If you fail to follow some of these rules, your impeachment will be less effective and often will generate objections from your opponent.

iii) Dealing with Objections

When objections are made (and sustained by the court), or your witness becomes argumentative, it is vital that you do not lose sight of the purpose of your cross-examination. Timely and appropriately handled, objections can and should be turned to your advantage. The following example demonstrates how an attempted impeachment can go wrong when the lawyer loses sight of his objective during the cross-examination. Assume that at the trial of a personal injury case, the deponent, an employee of a large products manufacturer, has testified that the corporation never received notice that the product at issue might be unsafe. In preparing for trial, the lawyer has obtained the transcript of the employee's deposition in another case, in which he admitted receiving such notice sometime before the plaintiff's accident. The following exchange occurs:

Q. (Showing Mr. Smith the transcript.) Your deposition was taken in another case which Mr. X brought against the ABC Corporation, wasn't it?

A. It may have been. I don't really recall.

Q. You testified at that deposition that you received a notice from Mr. X that the product might be unsafe, did you not?

A. I don't recall.

Q. (Showing Mr. Smith the relevant portion of the transcript). Let me show you the transcript from that deposition. Didn't you say in your deposition testimony in that case that: "I received a notice that the product might be unsafe"?

A. (Without reading from the transcript). I said I don't recall that.

Q. (Standing next to the witness -- and getting increasingly worried). Mr. Smith, please read lines 2-10 at page 22 of the transcript which I have placed before you to yourself. (After Mr. Smith has finished reading). Does reading this deposition transcript refresh your recollection that you testified in that case that you "received a notice that the product might be unsafe"?

Opposing Counsel: Objection, Your Honor.

Court: Sustained. You can't read from it. It's not in evidence. Now, you can show whatever you wish for the purpose of refreshing his recollection and ask him "did he receive the notice?", but you can't use the deposition transcript as if it were in evidence.

Q. (Not understanding the problem) But Your Honor, I am showing it to him to show that he did give that testimony in this earlier case.

Court: You have shown the witness what you think may refresh his recollection. Since you are describing it to the witness, you are, in effect, introducing it into evidence. That is why I am sustaining the objection. Move on, counsel.

What went wrong here? When the lawyer asked the witness whether he gave a deposition in the earlier case he forgot to eliminate -- or at least reduce -- the possibility of getting a bad answer. The employee claimed he did not recall the earlier examination and claimed that the transcript which the lawyer had was not authentic or certified. When the lawyer confronted the employee again with his prior inconsistent statement, asking him if he made it or not, opposing counsel was able to object to the

line of questioning on the basis that the witness did not recall making the statement, and that the transcript had not "refreshed his recollection" of having made it. The court sustained the objection. Unfortunately, the lawyer lost sight of the purpose of his cross-examination and did not immediately clarify to the judge why he proffered the prior inconsistent statement, i.e., that it was offered for impeachment purposes, not to refresh recollection. This undermined the momentum and effect of the lawyer's cross-examination. As you are using the prior statement to attack the credibility of the employee,[9] not introducing the prior statement into evidence to prove the truth of the matter it asserts or using the statement to refresh his recollection (a method discussed below), you must make this distinction clear to the judge.

The following is an example of how this cross-examination could have been done to avoid the judge's confusion, and clearly present the impeachment evidence to the jury. For the sake of brevity, the important introductory questions to your impeachment, bolstering the witness' earlier deposition testimony, are here omitted:

Q. Mr. Smith, you testified today on direct examination that you never received notice prior to the plaintiff's accident that the product might be unsafe, right? (Committing the witness and directing jury to point of impeachment).

A. Yes, that's true.

Q. In 1995, when you testified about the design of the product in another case brought by Mr. Y. against your employer, ABC Corporation, you testified truthfully, didn't you? (This question

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[9] Of course, if you can establish that the employee is at a sufficiently high level in the corporation or was its designated witness under Mass.R.Civ.P. 30(b)(6) at the time of his prior deposition, you should be able to offer the testimony as an admission, in which case it may be introduced for the truth of the matter it asserts. Brown v. Metropolitan Transit Authority, 341 Mass. 690, 695 (1961); Mass.R.Civ.P. 32(a).

makes it more difficult for the witness to deny giving the deposition).

A. Yes.

Q. You were under oath at that deposition, just like you are today?
A. Yes.

Q. (Approaching witness). You stated under oath at the deposition, p. 22, l. 4, that you "received a notice from Mr. Z that the product might be unsafe, did you not? (With this leading question, Mr. Smith is forced to admit or deny the statement).

A. I don't remember that. This transcript is not authentic. I've never seen that transcript before.

Q. (Holding the transcript before Mr. Smith). Mr. Smith, I direct you to p. 22, l. 4 of this transcript. Am I reading correctly that in response to counsel's questions "Did you ever receive a notice that the product might be unsafe?," you responded: "I received a notice from Mr. Z that the product might be unsafe." (Clear statement of the impeachment point. Note that counsel reads the testimony aloud instead of letting Mr. Smith read it, so that counsel can emphasize the damaging words he wants the jury to hear).

Opposing Counsel: Objection. Mr. Smith said he does not remember saying it and that the transcript is not authentic.

Court: Sustained.

Counsel: May I be heard at sidebar?

Court: You may.

Counsel: (Sidebar conference). Your honor, I'm attacking the credibility of this witness. I'm not offering this statement into evidence and I'm not seeking to "refresh his recollection." I'm asking Mr. Smith, simply, whether he made that prior inconsistent statement. If Mr. Smith denies that he made it, that's fine. Of course, your honor, if he denies having made the statement, I'll have to authenticate this transcript. I'll be pleased to do that by bringing the court reporter from that deposition here to testify that she transcribed Mr. Smith's

deposition testimony, and did so accurately.[10] (Clear and concise statement of purpose for using the impeaching prior testimony).

Court: Alright. You can use it to impeach Mr. Smith. Overruled.

Counsel: Mr. Smith, let me ask you again. Did you testify at a deposition in the case of Mr. Y v. ABC Corporation taken on January 26th of last year, in response to counsel's question: "Did you ever receive a notice that the product might be unsafe"?, that: "I received a notice from Mr. X that the product might be unsafe."? (Second clear statement by counsel of the impeachment point, emphasizing operative words).

[10] Doing so should not be necessary to establish your right to ask the question about his prior testimony. If a party witness refuses to authenticate the document you are showing him, you must take appropriate steps to authenticate it. First, you must establish that the prior statement is attributable to the witness. See e.g., Blake v. Hendrickson, 40 Mass. App. Ct. 579, 582-583 (1996). Then, the easiest way to authenticate the document in which the statement appears is to obtain a stipulation from opposing counsel that it is authentic. If counsel will not so stipulate, you must take steps to locate the witness who transcribed or obtained the statement, and have the witness testify that the document is what it purports to be. Proving that the prior statement was made, in the exact words you stated aloud before the jury, is critical to ensuring successful impeachment.

A. It Was Probably Taken Down Wrong

As this example demonstrates, effectively dealing with objections will not only make a witness appear evasive, but will also enable you to make your point repeatedly -- a wonderful opportunity in cross-examining a witness. Thus, once you know that you can deal with these predictable objections, you will also come to realize that you can use them to your advantage. In the jury's mind, a witness who protests the authenticity of a transcript or investigative report, subsequently shown to be authentic, appears disingenuous and not worthy of belief. Further, a lawyer who makes objections when his witness offers damaging testimony, which the court does not sustain, not only risks creating the impression that his witness has something to hide, but gives opposing counsel an opportunity to continually repeat and emphasize the damaging information the lawyer is trying to prevent the jury from hearing. A lawyer's opportunity to repeat harmful information to a jury after a witness attempts to evade the question or an opponent's objection is defeated increases the value of impeachment evidence to effective trial attorneys, who know how to deal with predictable objections to ensure a successful cross-examination.

B. Refreshing Recollection

Another important use of depositions at trial during the course of the examination of a witness on the stand occurs when the witness is unable to recollect, usually through nervousness, the factual matter you are asking him about. In this case, you are entitled to refresh his recollection by showing him a document which will jog his memory. Frequently, the witness has already given a deposition in the case. You may use his prior deposition testimony for this purpose.

The key to this hearsay exception is that the witness must have once had some knowledge of the subject which he cannot presently recall. See Fisher v. Swartz, 333 Mass. 265, 267 (1955). Thus, after a witness testifies that he cannot recall a particular matter, you should do the following. Approach the witness, ask him if he gave a deposition in the case, show him the pertinent pages of the deposition which you hope will refresh his recollection and then renew your earlier question. In response to your question, however, the witness must testify from his own recollection, not from the contents of the deposition, because the deposition is not in evidence. Liacos, Handbook of Massachusetts Evidence, ¶6.19, pp. 349-350. To do this, you should ask him if he has a present memory of the facts referred to in the deposition transcript.

As with any document used to refresh the recollection of a witness, when you are considering whether to use this technique, you must carefully consider the ramifications of using the deposition for this purpose. An opposing party is not only entitled to have a document used to refresh recollection produced so that he can inspect it, but may also cross-examine the witness about it and introduce into evidence those portions of the writing -- here the deposition -- which relate to the testimony of the witness. See Commonwealth v. O'Brien, 419 Mass. 470, 478 (1995); see also Proposed Mass. R. of Evid. 612(a); Cp. Mass.R.Civ.P. 32(a)(4). Therefore, if you use the deposition containing memory-triggering information to refresh the recollection of a trial witness, and the deposition also contains information which is harmful to your witness or case, you will give opposing counsel a chance to make use of it to attack the witness. It is a judgment call. In making your decision, don't forget that opposing counsel may be able to use the deposition transcript in any event as impeachment of an adverse witness.

C. Unavailability of a Witness

This is another situation where you may be able to offer deposition testimony without having a witness on the stand. Unlike the case of reading the deposition testimony of an opposing party, however, the deposition transcript of any other witness may only substitute for live testimony where the witness is unavailable. The definition of unavailability is set forth in Mass.R.Civ.P. 32(a)(3). To establish unavailability, you must show any of the following:

- the witness is deceased;
- the witness if out of the Commonwealth (unless the absence of a witness was caused by the party offering the deposition) ;
- the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment; or
- the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

Even if none of these circumstances can be met, it should be noted that Mass.R.Civ.P. 32A(3)(e) contains a catch-all provision providing that where "exceptional circumstances" exist, as to make it desirable in the interests of justice and with due regard to the importance of presenting testimony of witnesses orally in open court, then the deposition may be used. The trial court undoubtedly enjoys broad discretion in determining whether such exceptional circumstances are met. One other category of unavailable witnesses must, of course, be noted. Treating physicians and expert witnesses are, by virtue of Mass.R.Civ.P. 30(a)(m) treated as "unavailable"

when an audiovisual deposition of the witness has been taken (and the requirements of that rule met) whether or not the witness is in fact available to testify.