DEPOSITIONS AND YOUR DISCOVERY PLAN

BY: ROBERT E. KLEINPETER

LAJ LAST CHANCE CLE CONFERENCE 12/12/2014

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I. Introduction

At trial, jurors receive information from multiple sources, including the judge, lawyers, witnesses, and demonstrative and evidentiary exhibits. Only the court can admit evidence into the judicial record, so we, the attorneys, must take care to observe the basic rules of evidence. Aside from the occasional stipulation, most evidence comes in by way of lay witness testimony or expert opinion testimony.

When a witness is unable to testify in person, a deposition is usually the only practical way to produce that evidence. But the traditional method of deposing a witness by a court reporter generating a transcript from the attorneys' questions and the witness's answers has limitations.

For example, numerous studies have shown for decades that communication between people is mostly non-verbal. Jurors receive a huge amount of information on an automatic level within seconds of a perceived event. If this event is an uninspired reading of a tedious deposition, the unintended effect may be to put the jurors to sleep.

On the other hand, a properly focused video deposition can have the opposite result. Its effective use can engage jurors, communicate more information to a wider age range, allow information to be retained longer, and elicit a greater emotional response to the testimony.

This presentation will review procedural and evidentiary rules of particular interest when taking video depositions. Practical considerations on how best to take such depositions will be discussed. And use of video depositions for mediations, focus groups, and trial will be demonstrated.

II. Louisiana and Federal Statutes of Particular Interest

Trial procedure is largely a matter of (great) judicial discretion with some guidance from the evidence and civil procedure codes.

A. Evidence Rules

La. Code of Evidence article 607(D) – attacking credibility with extrinsic evidence to show witness' bias, interest, corruption, or defect of capacity; prior inconsistent statements and evidence contradicting the witness' testimony.

La. Code of Evidence article 613 – admissibility of extrinsic evidence of bias, interest, or corruption, prior inconsistent statements, conviction of crime, or defects of capacity after the proponent has first fairly directed the witness' attention to the matter.

La. Code of Evidence article 801(D)(2) and (3) – statements which are not hearsay and are offered against a party.

Fed. Rules of Evidence Rule 613 – admissibility of witness' prior inconsistent statement after witness is given opportunity to explain or deny the statement, and adverse party is given opportunity to examine the witness about the statement.

Fed. Rules of Evidence Rule 801(d)(2) – statements that are not hearsay and are those of an opposing party.

B. Procedural Rules

La. Code of Civil Procedure article 1434(C) – In a video deposition, the deponent can be sworn by anyone authorized to take oaths. The oath shall be recorded on tape.

La. Code of Civil Procedure article 1440 – for non-stenographic means of taking testimony at deposition, the notice shall designate the manner of recording, preserving, and filing the deposition, and shall include other provisions to assure that the recorded testimony will be accurate and trustworthy. A videotaped deposition may be taken and used without court order just as any other deposition. A certified shorthand reporter shall be present at the time of any videotaped deposition taken without a court order unless waived by all parties. A party may nevertheless arrange to have a stenographic transcription made at his own expense.

> **See *Brigsten v. S. Baptist Hosp.*, 96-2564 (La. App. 4th Cir. 12/13/96), 690 So. 2d 810, 812, holding that "a party seeking a deposition, if desirous of using a videotape of that deposition, shall provide a disinterested professional videographer to take the deposition."
>
> **But see *Pioneer Drive, LLC v. Nissan Diesel America, Inc.*, 262 F.R.D. 552, 555 (D. Mont. 2009) and *Ott v. Stipe Law Firm*, 169 F.R.D. 380, 381 (E.D. Okla. 1996), holding that the federal rules permit the recording of a deposition without the assistance of an independent videographer.

La. Code of Civil Procedure article 1443(E) – If the court finds that an objection made during a deposition taken for trial purposes is in violation of this Article, the court shall order the party in violation to pay for the editing or redacting of the transcript or video, along with any other costs or sanctions the court deems appropriate unless good cause is shown.

La. Code of Civil Procedure article 1445 – reading and signing of the transcript; a video deposition does not have to comply with the requirements of reading and signing by the deponents.

La. Code of Civil Procedure article 1450(A)(5) –deposition of expert witness can be used for any purpose upon notice to all counsel.

La. Code of Civil Procedure article 1633.1 – The court may order live testimony of a witness to be presented in open court by teleconference, video link, or other visual remote technology, if the witness is beyond the subpoena power of the court or when compelling circumstances are shown.

La. Revised Statutes § 13:4533 – allows costs of a deposition, including video deposition, to be taxed as costs by the court.

See also *Morgan v. ABC Mfr.*, 96-59 (La. App. 5th Cir. 1/15/97), 694 So. 2d 394, 400, *rev'd on other grounds*, 97-0956 (La. 5/1/98), 710 So. 2d 1077 (cost of playing video introduced as demonstrative evidence at trial may be assessed as court costs); *Roy v. Gupta*, 606 So. 2d 940, 946 (La. App. 3d Cir. 1992) (taxing as court costs the costs of playing the video deposition at trial).

Fed. Rules of Civil Procedure Rule 30 – Depositions by Oral Examination

Fed. Rules of Civil Procedure Rule 32 – Using Depositions in Court Proceedings

C. Use at Trial

All Louisiana circuits have approved the use of video depositions at trial.

Using depositions of expert witnesses is unquestionably allowed. CCP article 1450(A)(5); *Khalid-Abasi v. Richard*, 2011-2103 (La. App. 1st Cir. 8/31/12), 2012 WL 3781239; *Hepler v. Lin*, 2003-1217 (La. App. 3d Cir. 3/31/04), 869 So. 2d 969; *Poche v. Allstate Ins. Co.*, 04-1058 (La. App. 5th Cir. 3/1/05), 900 So. 2d 55. They can also be used for impeachment purposes when the witness testifies live at trial. *Tatum v. Old Republic Ins. Co.*, 94-157 (La. App. 3d Cir. 10/5/94), 643 So. 2d 419; CCP article 1450(A)(1).

Depositions of a *party* are another matter. If the party is unavailable per CCP article 1450(A)(3), the party's deposition can be used in lieu of live testimony. *Trascher v. Territo*, 2011-2093 (La. 5/8/12), 89 So. 3d 357; *Vargas v. Cont'l Cuisine, Inc.*, 2004-1029 (La. App. 4th Cir. 3/30/05), 900 So. 2d 208. Code of Civil Procedure article 1450(A)(2) permits the deposition of a party to be used for any purpose by the adverse party. Notwithstanding this explicit permission, judges sometimes balk at admitting the deposition of a party when the party is available to testify.

Rule 32(a) has been interpreted by the federal courts, including the Fifth Circuit, to permit the deposition of a party to be used by an adverse party for any legal purpose. *See* 4 Moore's Federal Practice, 2d Ed., 1190, § 26.29. The availability of the witness to testify is immaterial, and it is error to deny the admission of a deposition into evidence on this ground. However, the error is not prejudicial if the deposition contains no information that the witness' live testimony could not supply,

or where the substance of the deposition testimony in question is made available to the jury during trial. *See, e.g, Aetna Cas. & Sur. Co. v. Guynes*, 713 F.2d 1187, 1194 (5th Cir. 1983); *Jackson v. Chevron Chem. Co.*, 679 F.2d 463, 466 (5th Cir. 1982); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 308 (5th Cir. 1978).

Frequently in the case of lay witnesses, there is no need to play the entire video deposition. Rather than bore the jury with Q&A's regarding the witness' life history, you should only play those portions of the testimony which (1) sufficiently introduce the witness to the jury, and (2) prove an essential element of your case. Prior to trial, designate the pages and lines of transcript testimony and include the time frames of the video. (See example from the deposition of Defendant Driver, Exhibit "A"). Send the page and line designations to opposing counsel. If counsel cannot agree to edits before trial, provoke a hearing in advance of trial so the judge can rule on which portions are to be admitted. Otherwise, the editing of the video deposition must take place during a break in the trial.

III. Video Deposition Notice Forms

When noticing a video deposition, specify "video deposition" in the title and in the body of the notice. La. Code of Civ. P. art. 1440. Attached are two examples—one for a lay witness (Exhibit "B") and one for a corporate deposition (Exhibit "C").

IV. Define Goals for the Deposition

A. Have a Case Discovery Plan

Initial discovery usually includes interrogatories, requests for production, and requests for admissions. These tools, along with the initial investigation and the Petition and Answer, provide insight into the theories of recovery and the defenses to the case. Also, draft a jury verdict form and basic jury instructions on the significant legal issues. With this information in hand, you can plan how to sequence and take depositions for the case.

There is nothing wrong with asking standard questions of a witness along the lines of who, what, when, where, and how. Often, this information is necessary to provide context. You certainly want to ask these types of questions to gather the background information for your opening statement, which should be delivered in a present tense narrative form. But this kind of checklist is not enough. To take exceptional depositions you must prove your causes of action, defeat the defendant's affirmative defenses, and expose or defeat the juror biases which exist in the case.

Do not try to analyze your deposition approach in your head. After organizing the case information referenced above and thinking through the issues, outline the depositions you must take to prepare the case for motion practice and trial. What are

the critical issues that must be proved or refuted for your client to be successful? And remember, it is more effective if the opposing party, or a witness who is identified with that party, admits or proves a case fact in your favor.

For example, determine which witnesses can testify about:

- Facts that will support the basis for your expert's conclusions.
- Facts that allow you to file a dispositive motion.
- Facts that allow you to defeat a dispositive motion.
- Facts that allow you to file or defeat a motion in limine or *Daubert* motion.
- Facts that show an affirmative defense is baseless.
- Facts that will support your client's harms and losses (for general and special damages).
- Facts that address, in a positive way for your client, or a negative way for the opposing party, the juror biases below.

Be proactive, not reactive, with your discovery plan. Find and develop testimony that will help you win the case on liability, causation, and damages. And even when you are defending a deposition, question the deponent about facts that will help prove your case.

B. Juror Biases

For well over a decade, research (The Jury Bias Model, Greg Cusimano and David Wenner) has shown jurors hold five important beliefs that may affect every case. These attitudes are present in any case tried anywhere in the United States—and certainly any courtroom in Louisiana. Psychologists refer to these beliefs as biases. These beliefs/biases will emerge in discussions about the facts of a case no matter what type of case you are trying. The biases you will see in your case are:

1. Accountability/personal responsibility
2. Anti-plaintiff
3. Suspicion
4. Victimization
5. Stuff happens

When conducting your deposition, take care to address these biases to the extent possible with any witness. Obviously, not every witness can testify about each one. But many times you can ask questions in a deposition about one or more of these biases even when the deposition was noticed for another purpose. For example, a co-worker of the plaintiff may testify he personally observed her strong work ethic or caring nature. Or a supervisor may testify how the plaintiff always followed safety rules and had no reprimands in his file for violating the company's safety procedures.

V. Deposition Protocol When Attorney Misconduct Exists

See Motion for Protective Order in drunk driving case (Exhibit "D").

See also the recent opinion from an Iowa federal district court, *Security Nat. Bank of Sioux City, Iowa v. Abbott Labs.*, __ F. Supp. 2d __ (2014). The district judge took it upon himself to file a *sua sponte* order to show cause why the court should not sanction counsel for serious deposition misconduct, including:

(1) Excessive use of "form" objections;
(2) Numerous attempts to coach witnesses; and
(3) Ubiquitous interruptions and attempts to clarify questions posed by the examiner.

As a sanction, the judge ordered the offending counsel to write and produce a training video addressing the rationale of the court's opinion and providing specific steps lawyers must take to comply with its rationale in future depositions.

VI. Video Depositions by Telephone

Travel to another state is expensive and time consuming, sometimes excessively so, considering the size of the case. Think about the cost and time effectiveness of a video deposition by telephone. All you need is a good phone connection between you and the deponent (and any other attendees), a court reporter, and a videographer. Alert the court reporter and videographer in advance to transcribe or record any inappropriate conversation between counsel and the witness. And make sure to have your exhibits marked in advance and forward them to the court reporter. That way, when you say to the witness, "let's now look at exhibit nine," everyone understands the reference and which document the deponent should be viewing for examination.

VII. Miscellaneous Suggestions

- When playing the video deposition at trial, do not have the transcript testimony scrolling across the bottom of the video. Jurors' eyes will be drawn to the scrolling text, and they will miss the key benefit of the video—the deponent's body language.

- As a precaution, introduce into evidence both the video and the written transcript.

- If you make video depositions a common element of your practice, consider investing in trial presentation software which allows you to easily create and arrange clips of the video deposition. This will be important if the court sustains opposing counsel's objections to certain clips of the deposition which are different from your proposed page and line designations.

Deposition of Defendant Driver – Page and Line Designations

00:00 – 01:19
p. 6, ll. 8-9
Q Please tell us your name.
A **********.

03:20 – 04:11
p. 8, ll. 3-25
Q And so you left your Riverbend home, usually, and drove down the River Road?
A Yes.
Q And that would be driving north on the River Road?
A Yes.
Q So the Mississippi River would be on your left, you would be driving north?
A Correct.
Q And then you would turn at what street?
A Oklahoma.
Q And so you would turn and head what direction?
A I make a right turn.
Q Okay. And do -- and then you would head generally east?
A Yes.
Q Okay. And so after going down Oklahoma, what -- what would be the first stop sign?
A At Oklahoma and Nicholson Drive.
Q And was this something you had -- had been doing for quite some time?
A Yes.

06:24 – 07:01
p. 10, ll. 22-25; p. 11, ll. 1-5
Q So the best you can give us right now is you probably left around 6:30?
A Yes.
Q And how long does it take you to get from Riverbend where your home is, to the intersection of Nicholson and Oklahoma?
A Depending on how slow the traffic is, how heavy the traffic is on River Road, maybe ten minutes or less.

12:14 – 12:44
p. 15, ll. 11-24
Q Okay. Now, when did you -- when did you get your license?
A I don't know the year. I was in high school.
Q Okay. And when did you first learn what to do at a stop sign?
A When I first started taking driver's ed and studying for the test.
Q Okay. What -- what were you taught to do at a stop sign?
A Stop.
Q Anything else?
A Look both ways. Don't move until it's -- it is clear.

EXHIBIT A

15:23 – 15:31
p. 18, ll. 2-4
Q First, you were driving what vehicle at the time?
A A red Expedition.

18:08 – 18:28
p. 20, ll. 4-7
Q So here on Page 2 of Exhibit 5, where did you stop at the intersection of Oklahoma and Nicholson?
A In front of the stop sign.

18:43 – 18:59
p. 20, ll. 14-19
Q Your intent was to get from one side of Oklahoma across completely Nicholson, correct?
A Yes.
Q So do you know how many lanes of travel that is?
A Four.

26:45 – 27:01
p. 27, ll. 21-25; p. 28, ll. 1-2
Q How long did you wait?
A I don't know how many minutes, but I do remember that the -- there was a lot of traffic. And so I sat a good wait. You know, as if there were a few cars passing, it wouldn't have taken as long, but there was -- the traffic was heavy out on Nicholson that morning.

27:28 – 27:43
p. 28, ll. 17-20
Q So at 6:40 a.m., you're at the corner of Nicholson and Oklahoma. And there is traffic going both ways on Nicholson, correct?
A Correct.

30:00 – 30:22
p. 30, ll. 15-23
Q Now, it says here, the next sentence, "I pulled out and was hit by the truck." You see, you see that sentence?
A Yes.
Q Okay. And the truck we have talked about, is that the Hummer?
A Yes.
Q The yellow Hummer?
A Yes.

35:01 – 35:17
p. 35, ll. 1-6
Q Okay. So you took your foot off of the brake.
A Yes.
Q And you then put it where as you began to enter Nicholson?
A On the accelerator.

35:26 – 35:33
p. 35, ll. 12-17
Q So you -- you chose to put your foot on the brake, correct?
A Correct.
Q And then you chose to put it on the accelerator?
A Correct.

36:54 – 37:00
p. 36, ll. 20-22
Q And do you know how much damage was done to your vehicle?
A Quite a bit. It was totaled.

37:10 – 37:40
p. 37, ll. 1-12
Q Okay. Have you ever talked to the driver of the Hummer?
A No, I haven't.
Q Do you know anything at all about the driver of the Hummer?
A No.
Q Have you ever called to -- to check up on the driver of the Hummer?
A No, I didn't think that was my responsibility. That's why I have insurance, and whoever is affiliated with the insurance agency. Did he call to check up on me? I don't think he did.

40:42 – 40:47
p. 40, ll. 8-10
Q Do you accept sole responsibility for causing the accident?
A No, I don't.

41:50 – 42:02
p. 41, ll. 12-15
Q Okay. Do you -- I mean, using your experience as a driver, you have been driving at – in November 2009, how many years have you been driving?
A Since I was a teenager.

46:13 – 46:22
p. 44, ll. 12-15
Q But if your vehicle is in Nicholson, which street do you understand is the favored street Oklahoma or Nicholson?
A Nicholson.

48:59 – 49:05
p. 46, ll. 18-20
Q All right. So you look left and then you look right, and then you went forward?
A Yes.

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

SUIT NUMBER: XXX,XXX DIVISION: X

PLAINTIFF

versus

DEFENDANT

NOTICE OF VIDEO DEPOSITION UPON ORAL EXAMINATION OF JANE SMITH

TO: Jane Smith
Through her counsel of record,
Big Defense Firm
123 Main Street
Baton Rouge, Louisiana 70801

PLEASE TAKE NOTICE that Plaintiff, through undersigned counsel, will take the video deposition of **JANE SMITH** at the offices of **Big Defense Firm, 123 Main Street, Baton Rouge, Louisiana 70801**, on **Friday, May 23, 2014, at 9:00 o'clock a.m**.

The deposition will be taken for all lawful purposes in accordance with the Louisiana Code of Civil Procedure before an official court reporter authorized to administer oaths and by audio visual means. You are invited to attend and participate as you deem fit and proper.

Respectfully submitted,

KLEINPETER & SCHWARTZBERG, L.L.C.

BY: _____
Robert E. Kleinpeter (#07448)
6651 Jefferson Highway
Baton Rouge, Louisiana 70806
(225) 926-4130 Telephone

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Notice of Video Deposition Upon Oral Examination of Jane Smith has this __ day of _____, 2014 been served on counsel for all parties in these proceedings by first class U.S. mail, postage prepaid and properly addressed.

_____
Robert E. Kleinpeter

EXHIBIT B

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

SUIT NUMBER: XXX,XXX DIVISION: X

PLAINTIFF

versus

DEFENDANT

NOTICE OF LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 1442 VIDEO DEPOSITION UPON ORAL EXAMINATION OF DEFENDANT CORPORATION

TO: Defendant Corporation
Through its counsel of record,
Big Defense Firm
123 Main Street
Baton Rouge, Louisiana 70801

PLEASE TAKE NOTICE that Plaintiff, through undersigned counsel, will take the video deposition of **DEFENDANT CORPORATION**, through one or more officers, directors, or managing agents or other persons who consent to testify on its behalf or bind said corporation in accordance with Louisiana Code of Civil Procedure article 1442.

The deposition will be taken at the offices of **Big Defense Firm, 123 Main Street, Baton Rouge, Louisiana 70801**, on **Friday, May 23, 2014, at 9:00 o'clock a.m.**, and will continue until completed.

The deposition will be taken for all lawful purposes in accordance with the Louisiana Code of Civil Procedure before an official court reporter authorized to administer oaths and by audio visual means. You are invited to attend and participate as you deem fit and proper.

The subject matters contained in Exhibit A will be discussed. Each person selected on behalf of Defendant Corporation is also subject to examination as to his/her personal knowledge.

Respectfully submitted,

KLEINPETER & SCHWARTZBERG, L.L.C.

BY: _____
Robert E. Kleinpeter (#07448)
6651 Jefferson Highway
Baton Rouge, Louisiana 70806
(225) 926-4130 Telephone

EXHIBIT C

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Notice of Louisiana Code of Civil Procedure Article 1442 Video Deposition Upon Oral Examination of Defendant Corporation has this __ day of _____, 2014 been served on counsel for all parties in these proceedings by first class U.S. mail, postage prepaid and properly addressed.

_____
Robert E. Kleinpeter

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DOCKET NO.: XXX,XXX DIVISION X

PLAINTIFF

vs.

DEFENDANT

MOTION FOR PROTECTIVE ORDER ON BEHALF OF PETITIONER

NOW INTO COURT, through undersigned counsel, comes Petitioner, who respectfully requests that the Court enter a protective order governing all future depositions in the above entitled and numbered case on the following terms and for the following reasons:

1.

Several depositions have been taken in this matter at which all parties substantially adhered to the rules outlined by article 1443 of the *Louisiana Code of Civil Procedure*, to wit, by "conduct[ing] themselves as required in open court" and stating objections "concisely and in a non-argumentative and non-suggestive manner." As a result, deponents understood the questions clearly and provided helpful information untainted by the direct or indirect intervention of counsel.

2.

Circumstances changed at the deposition of defendant John Doe. Mr. Doe's attorney repeatedly violated the rules set forth in article 1443 with the result that the witness was either confused and could not provide adequate answers or directly echoed counsel's speaking objection. Instead of contacting the Court during the deposition or temporarily terminating the deposition to seek judicial relief, counsel for petitioner attempted to elicit as much information as possible in an effort to keep discovery on track.

3.

Future depositions will be taken of witnesses located in or from the State of Ohio, for example, and in all probability defended, at least in part, by attorneys from that state who have recently been added as counsel of record. A protective order will alert all counsel, those admitted to the bar of Louisiana and those who are not, that Louisiana procedure will govern all future

depositions and that the rules of article 1443 will be enforced. A protective order now will obviate the necessity of obtaining telephonic rulings from this Court mid-deposition, or, in the alternative, the time consuming and expensive process of recessing a deposition for clarification hearings in New Orleans and then resuming them at a later date.

4.

Petitioner requests a protective order be entered governing all future depositions and setting forth the following rules:

(1) Counsel will limit any objections to those pertaining to a testimonial privilege or to the form of the question;

(2) Counsel will not, through an objection, suggest an answer or engage in argument;

(3) Any other objection is reserved until trial without the necessity of counsel making an objection;

(4) All counsel shall cooperate with each other, be courteous to each other and the deponent, and otherwise conduct themselves as required in open court; and

(5) Any violation of this protective order shall subject the violator to the immediate risk of contempt of court and sanctions.

Respectfully submitted,

KLEINPETER & SCHWARTZBERG, L.L.C.
6651 Jefferson Highway
Baton Rouge, Louisiana 70806
Tel: (225) 926-4130
Fax: (225) 929-9817

By: _____
Robert E. Kleinpeter

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion for Protective Order on Behalf of Petitioner has this ____ day of December, 2012, been served on counsel for all parties in these proceedings by e-mail.

_____
Robert E. Kleinpeter

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DOCKET NO.: XXX,XXX DIVISION X

PLAINTIFF

vs.

DEFENDANT

ORDER

Considering the above and foregoing:

IT IS HEREBY ORDERED that Plaintiffs and Defendants show cause on the ____ day of _____, 2013, at ____ o'clock __ .m., why a protective order should not be entered herein governing all future depositions and setting forth the following rules:

(1) Counsel will limit any objections to those pertaining to a testimonial privilege or to the form of the question;

(2) Counsel will not, through an objection, suggest an answer or engage in argument;

(3) Any other objection is reserved until trial without the necessity of counsel making an objection;

(4) All counsel shall cooperate with each other, be courteous to each other and the deponent, and otherwise conduct themselves as required in open court; and

(5) Any violation of this protective order shall subject the violator to the immediate risk of contempt of court and sanctions.

New Orleans, Louisiana, this _____ day of _____, 2012.

_____

JUDGE
CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DOCKET NO.: XXX,XXX DIVISION X

PLAINTIFF

vs.

DEFENDANT

MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER ON BEHALF OF PETITIONER

MAY IT PLEASE THE COURT:

I. Introduction

The substantive rules for taking depositions are relatively simple and straightforward. Three rules pertinent to this motion for protective order are:

1. Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner.[1]
2. Counsel shall cooperate with and be courteous to each other and to the witness and conduct themselves as required in open court.[2]
3. Counsel may instruct a deponent not to answer for only four reasons:
    a. When necessary to preserve a privilege,
    b. To enforce a limitation on evidence imposed by the court,
    c. To prevent harassing or repetitious questions, or
    d. To prevent questions which seek information that is *neither* admissible at trial *nor* reasonably calculated to lead to the discovery of admissible evidence.[3]

Depositions have such restrictions because it is within the Court's, not counsel's, authority to decide what evidence is admissible. La. Code of Evid. art. 104. Because depositions occur without direct judicial

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[1] *Louisiana Code of Civil Procedure* article 1443(B).

[2] *Louisiana Code of Civil Procedure* article 1443(B).

[3] *Louisiana Code of Civil Procedure* article 1443(D).

supervision, the clear statutory bias favors free questioning of the witness and minimal participation by counsel for the witness, with issues of admissibility to be determined later by the Court.

Discovery has proceeded apace in this consolidated litigation. Depositions of parties and independent witnesses proceeded uneventfully and constructively until the deposition of defendant John Doe on October 4, 2012. In that deposition, the parties stipulated that "all objections, save those as to the form of the question and the responsiveness of the answer, are hereby reserved until such time as this deposition, or any part thereof, may be used or sought to be used in evidence" (see Stipulation page, attached as Exhibit A). Notwithstanding this standard stipulation, and in spite of the known rules of deposition procedure listed above, counsel for Mr. Doe exhibited a pattern of lengthy "coaching" and "speaking" objections which at times suggested answers to the witness and at other times appeared to confuse him. The result was an unreasonably difficult and, at times, unconstructive deposition.

Counsel for Mr. Doe is an experienced professional but may have a different understanding than undersigned counsel as to the rules of engagement. Counsel's aggressive methodology appears to reflect practice as it existed prior to cases such as *MTU of North America, Inc. v. Raven Marine, Inc.*, 475 So. 2d 1063 (La. 1985) and the 2004 amendments to the *Louisiana Code of Civil Procedure*. Undersigned counsel takes a differing view of proper current deposition practice. More importantly, a number of depositions may occur in Ohio and be handled by, or advice provided by, Ohio counsel only specially admitted in Louisiana for purposes of this litigation. Consequently, a protective order is required to lay the ground rules for future depositions for all counsel, both Louisiana and Ohio. All counsel need to understand and follow Louisiana procedural rules for taking depositions so that future depositions in this litigation serve the purpose for which they were designed: to perpetuate witness testimony in a cooperative, courteous, and effective manner.

While a motion for protective order technically does not require a predicate meet and confer conference of counsel, undersigned counsel thought it best to include the issue in a Rule 10.1 conference, hoping to avoid troubling the Court (see three Rule 10.1 conference notices, attached as Exhibit B). Telephone conferences were held on November 27, 2012. The proposed order was sent for consideration to all counsel later that same day (see e-mail to all counsel, attached as Exhibit C). A deadline of December 11, 2012 was stated (see e-mail to all counsel, attached as Exhibit D); undersigned counsel has

heard nothing further; thus, the Court needs to consider the issue.

II. Argument

A. Louisiana Rules of Civil Procedure

The three aforementioned rules governing deposition practice are codified in article 1443 of the *Louisiana Code of Civil Procedure*. Article 1443 was extensively amended in 2004 in response to the growing concern about obstructionism in depositions and the loss of professionalism in the bar. Of particular relevance to the present issue are three sentences added to article 1443(B).

> Any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Evidence objected to shall be taken subject to the objections. Counsel shall cooperate with and be courteous to each other and to the witness and otherwise conduct themselves as required in open court and shall be subject to the power of the court to punish for contempt.

The Official Comment provides further explanation and links the amendment to the rising interest in professionalism in Louisiana and many other jurisdictions.

> (a) A sentence has been added to Paragraph B providing that objections at a deposition must be made in a concise and non-argumentative and non-suggestive manner. The purpose of this amendment is to curtail a practice of using lengthy or "speaking" objections designed to coach the witness or berate or argue with opposing counsel or the witness. The language was taken from Fed. R. Civ. P. Rl. 30(d)(1). Many other states have enacted a similar procedural rule. See Phelps Gay, Professionalism in Depositions: The Sound of Silence, 54 Fed. Def. & Corp. Counsel Quarterly, p. 213 (Spring 2004).
>
> (b) A second sentence has been added to Paragraph B codifying the obligation of all counsel attending a deposition to treat each other and the witness and otherwise conduct themselves in a professional manner as though they were in open court. Since depositions are taken without the presence of a judge, abusive and unprofessional conduct may occur which would not be permitted in open court. Article 221 broadly defines a contempt of court as "any act or omission tending to obstruct or interfere with the orderly administration of justice. . ." Accordingly, the court has the power to treat improper behavior at depositions as a constructive contempt of court and invoke sanctions in accordance with Article 225.

Although the amendment would allow undersigned counsel to proceed directly for contempt, in the interest of proceeding professionally ourselves, undersigned counsel has opted for the less onerous avenue of simply requesting a protective order be entered.

B. Amendments to Article 1443 Stem from the Federal Rules

As stated in the Official Comment, the 2004 revisions to article 1443 were based on the language of *Federal Rules of Civil Procedure* Rule 30. Louisiana courts have yet to address the substance of amended article 1443; however, there is ample federal experience with the language mandating that

objections be stated in a non-suggestive, non-argumentative manner. In the case of *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), the court evaluated what was to be considered appropriate deposition conduct. The court explained:

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

The Court went on to explain that:

> . . . depositions are to be limited to what they were and are intended to be: question and answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit. When a deposition becomes something other than that because of strategic interruptions, suggestions, statements, and arguments of counsel, it not only becomes unnecessarily long, but it ceases to serve the purpose of the Federal Rules of Civil Procedure: to find and fix the truth.

Hall, 150 F.R.D. at 527. The principles emanating from *Hall* have been recognized by courts throughout the country.[1]

Rule 30(c)(2) (formerly 30(d)(1)) provides for the type and manner in which objections during a deposition may be made. Objections are to be non-argumentative and non-suggestive.[2] The Advisory committee notes following Rule 30 offer insight into the purpose of this rule:

> Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond . . .

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[1] *See Armstrong v. Hussmann Corp*., 163 F.R.D. 299, 301-05 (E.D. Mo. 1995); *ML-Lee Acquisition Fund II, L.P. Litigation*, 848 F.Supp. 527, 567 (D. Del. 1994); *Bucher v. Richardson Hosp. Authority*, 160 F.R.D. 88, 94 (N.D. Tex. 1994); *Holland v. Fisher*, 1994 WL 878780 (Mass. Super. Ct.); *Van Pilsum v. Iowa State University of Science and Tech*., 152 F.R.D. 179, 180-81 (S.D. Iowa 1993); *Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56, 58-59 (E.D. Pa. 1993); *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359 (D. Del. 1990); *In Re: Amezaga*, 195 B.R. 221 (Bankr. D.P.R. 1996); *Damaj v. Farmers Ins. Co.*, 164 F.R.D. 559 (N.D. Okla. 1995); *Bucher v. Richardson Hosp.*, 160 F.R.D. 88 (N.D. Tex. 1994); *Odone v. Croda Int'l*, 170 F.R.D. 66 (D.D.C. 1997); *Acri v. Golden Triangle Management Acceptance Co.*, 142 Pitt. Legal J. 225 (Pa. Ct. 1994); *Paramount Communications Inc. v. QVC Network, Inc.*, 637 A.2d 34,55 (Del.Supr. 1994); *Dominick v. Troscoso*, WL 408769 (Mass.Super. 1996): *Burrows v. Redbud Community Hosp. Dist.*, 187 F.R.D. 606 (N.D. Cal 1998); *Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697(S.D.Fla. 1999); *Collins v. International Dairy Queen, Inc.*, WL 293314 (M.D.Ga. 1998): *Chapsky v. Baxter V. Mueller Div., Baxter Healthcare Corp.*, WL 327348 (N.D. Ill 1994); *Sinclair v. Kmart Corp.*, WL 748038 (D.Kan. 1996); *Boyd v.University of Maryland Medical Systems*, 173 F.R.D. 143 (D. Md. 1997); *Metayer v. PFL Life Ins. Co.*, WL 33117063 (D.Me. 1999).*Phinney v Paulshock*, 181 F.R.D. 185 (D.N.H. 1998); *Mruz v. Caring, Inc.*, 107 F.Supp.2d 596 (D.N.J. 2000); *Prudential Ins. Co. of American v. Nelson*, 11 F.Supp. 572 (D.N.L 1998); and*Teletel, Inc., v. Tel-Tel Us Corp.*, WL 1335872 (S.D.N.Y 2000); *Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 54 Fed.R.Serv.3d 191 (M.D. Pa. 2002) ("We believe that *Hall* has established clear, workable guidelines.").

[2] Fed.R.Civ.P. 30(d)(1).

> [o]bjections . . . should be limited to those that under Rule 32(d)(3) might be waived if not made at that time ...[o]ther objections can ... be raised for the first time at trial and therefore should be kept at a minimum during a deposition.
>
> Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated . . . .
>
> In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of objections may itself constitute sanctionable conduct.[3]

Speaking objections occur when the defending attorney actually engages in coaching the witness, attempting in the course of articulating the objection to direct the witness' attention to what the "right" or "correct answer should be."[4] Such objections are prohibited. "Objection to form" should be sufficient explanation to notify the examiner of the grounds for the objection and thereby allow revision of the question.[5] Any further explanation is inappropriate. Counsel should avoid the prohibited practice of engaging in so-called *Rambo Tactics* where counsel attacks or objects to every question posed, thus interfering with, or preventing, the elicitation of any meaningful testimony and disrupting the orderly flow of the deposition.[6] The advisory committee notes for Rule 30(d) explain that "the making of an excessive number of unnecessary objections may itself constitute sanctionable conduct."[7]

If the deponent does not understand the question, or the meaning of a word or phrase, or even if the deponent has a question about a document, the deponent should ask the questioning attorney. If the deponent lacks knowledge or understanding, then the deponent should say so, not seek understanding or direction about how to answer the question from his or her attorney. The examiner has the right to the deponent's answers, not an attorney's answers.[8] A lawyer's purported lack of understanding is not proper

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[3] Fed.R.Civ. P.30(d), Advisory Committee Note.

[4] *Applied Telematics, Inc., v. Sprint Corp.,* WL 79237 (E.D. Pa, 1995) citing the Federal Bar Council Committee on Second Circuit Courts, "*A Report on the Conduct of Depositions"* 131 F.R.D. 613, 617 (1990), quoted by Virginia E. Hench, Mandatory Disclosure and Equal Access to Justice: *The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 Temple L. Rev. 179, 218 n.182 (1994).

[5] *See* 8A Wright, Miller, & Marcus, *Federal Practice and Procedure Civil 2d*., § 2156 at 206 (1994).

[6] *American Directory Service Agency Inc. v. Beam,* 131 F.R.D. 15, 18-19 (D.D.C. 1990).

[7] Fed.R.Civ. P. 30(d)(1), Advisory Committee notes on the 1993 amendment.

[8] *In Re: Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D.Nev. 1998).

reason to disrupt the deposition.[9] It does not matter if an attorney does not understand the question. It is only the witness' understanding of the question which is of significance.

C. Application of the Rules to this Litigation

Petitioner does not seek relief lightly. Litigation is not for the thin skinned or easily intimidated; but when a pattern of conduct, as opposed to isolated instances, emerges which threatens fair discovery, some guidance from the Court is required. Attached as Exhibit E is an abstract of all objections entered by Mr. Doe's attorney at his deposition. It demonstrates something far beyond a few isolated instances. This abstract should be compared with Exhibit F, an abstract of the same attorney's objections at the deposition of defendant ____. Exhibit F shows the standard method of objection as to form, with all other objections reserved, which is the proper current procedure and which is the underpinning of the proposed protective order.

Recall the rules governing deposition practice in Louisiana:

1. Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner.
2. Counsel shall cooperate with and be courteous to each other and to the witness and conduct themselves as required in open court.
3. Counsel may instruct a deponent not to answer for only four reasons:
    a. When necessary to preserve a privilege,
    b. To enforce a limitation on evidence imposed by the court,
    c. To prevent harassing or repetitious questions, or
    d. To prevent questions which seek information that is neither admissible at trial nor reasonably calculated to lead to the discovery of admissible evidence.

Speaking or coaching objections are specifically prohibited by the first rule. Attorneys are not allowed to gratuitously insinuate obstacles in the path of an examiner's questioning of a witness. The second rule requires attorneys to cooperate and act as they would in court, which in this case would be in front of a judge and jury. The third rule prohibits an attorney from instructing the deponent not to answer except

[9] *Applied Telematics, Inc. v. Sprint Corp.*, WL 79237 (E.D. Pa, 1995).

in four limited circumstances. The examiner has a right to elicit reasonable and non-privileged information from the deponent.

Three examples from Exhibit E illustrate where Mr. Doe's counsel violated these three rules, thereby requiring a protective order. Undersigned counsel refers the Court to the abstract for more examples if needed. The purpose of these examples is not to point fingers, but to demonstrate that rules have been broken and that future depositions will be unreasonably contentious and inefficient if the Court permits these violations to continue.

1. Example Number 1

The first example reveals a violation of the third rule on instructions not to answer. Specifically, "relevancy" is not a proper justification for instructing the witness not to answer,[10] because it is the Court's duty to decide what evidence is relevant and therefore admissible. La. Code of Evid. art. 104(B). Moreover, the parties in this case had specifically agreed to reserve such objection until trial (see Exhibit A), as is the standard practice.

In inquiring about what, if any discipline, Mr. Doe may have received regarding a clear violation of company rules pertaining to drunk driving in a company vehicle, undersigned counsel was met with pure, unjustified obstruction.

[Insert portions of transcript.]

The witness was instructed not to answer a question reasonably calculated to lead to the discovery of admissible evidence, thereby violating the third rule. But the instruction not to answer did not stop there. Counsel for Mr. Doe continued with argumentative responses and objections based on relevancy. How Mr. Doe perceives he is treated because of his father being CEO is highly relevant to the jury's evaluation of Mr. Doe's credibility. It is also relevant to the issue of enforcement, or lack thereof, of company rules regarding the use of company vehicles while under the influence of alcohol.

2. Example Number 2

The second example reveals a violation of rules 1 and 2. A mere 18 seconds into undersigned counsel's examination, in response to a benign standard question designed to set the foundation for

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[10] Article 1443(D) permits an instruction not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence imposed by the court, to prevent harassing or repetitious questions, or to prevent questions which seek information that is *neither* admissible at trial *nor* reasonably calculated to lead to the discovery of admissible evidence. Note that "relevancy" is not listed.

comparing records with testimony and possibly refreshing the latter, counsel for Mr. Doe interjected herself into the exam.

[Insert portions of transcript.]

Counsel for Mr. Doe used the standard "object to form" as a platform for argumentative speaking objections which surely would not be permitted in open court.

3. Example Number 3

In the third example, undersigned counsel questioned Mr. Doe regarding the amount of alcohol he and fellow defendant drank that fateful night. When the issue turned to Mr. Doe's level of drunkenness compared to his companion's on the night in question, counsel, now joined by counsel for another defendant, first objected in the correct manner but then resorted to direct coaching which the witness heard and used to provide himself an out.

[Insert portions of transcript.]

It is clear that the witness' response was simply an echo of his counsel's speaking objection. As a result, undersigned counsel was unable to elicit a true, unadulterated response from Mr. Doe. This is a permanent taint on that defendant's testimony.

III. Conclusion

The fact that undersigned counsel was able at times to secure some type of answer to a question after extended coaching and suggestive answers misses the point.[8] It is the *substance* of the objection which violates article 1443(B), because the argumentative, suggestive, and uncooperative substance of the objection interrupts the flow of discovery, thereby imposing unnecessary litigation costs and judicial diseconomies. For these reasons, this Court would not allow such a colloquy at trial, and article 1443 now forbids it in deposition. Furthermore, counsel may not strategically make extensive speaking objections and then use the standard 'object to form; asked and answered' when the examiner is forced to repeat the question numerous times in order to elicit a genuine response from the deponent. Finally, instructions not to answer must only be based on the four reasons set forth in the rule, as codified by article 1443(D), such as to protect a privilege. Relevancy is not a proper reason to instruct the witness not to

[8] For example, while Mr. Doe finally admitted the elementary truth that review of contemporaneous records aids later recollection, *id.*, p. 104, lines 11–14, it took four pages of testimony to extract that simple admission, *id.* pp. 102–106, which is what article 1443(B) was amended to prevent.

answer.

Thus far, the depositions of two out of five defendants have been taken. Future depositions include those of defendants _____, _____, _____. Undersigned counsel anticipates that, given what transpired at Mr. Doe's deposition, similar conduct will occur at future depositions, which will result in tainted testimony and obstruction of the judicial process.

WHEREFORE, undersigned counsel respectfully requests this Court consider the issue set forth in the Motion and accompanying Memorandum, and render such order as may be appropriate under the circumstances.

Respectfully submitted,

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