4 Colo. Prac., Civil Rules Annotated R 30 (4th ed.)

West's Colorado Practice Series TM | September 2016 Update
Civil Rules Annotated

Sheila K. Hyatt [a0], Stephen A. Hess [a1]

Chapter 4. Disclosure and Discovery

Rule 30. Depositions Upon Oral Examination

(a)When Depositions May Be Taken.

(1) Subject to the provisions of C.R.C.P. Rules 26(b)(2)(A) and 26(d), a party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2) of this section. The attendance of witnesses may be compelled by subpoena as provided in C.R.C.P. 45.

(2) Leave of court must be obtained pursuant to C.R.C.P. Rules 16(b)(1) and 26(b) if:

(A) A proposed deposition, if taken, would result in more depositions than set forth in the Case Management Order;

(B) The person to be examined already has been deposed in the case;

(C) A party seeks to take a deposition before the time specified in C.R.C.P. 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the state and be unavailable for examination within the state if the person's deposition is not taken before the expiration of such time period; or

(D) The person to be examined is confined in prison.

(b)Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) Consistent with C.R.C.P. 121, sec. 1-12, a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be

examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded, which, unless the court otherwise orders, may be by sound, sound-and-visual, or stenographic means. Unless the court otherwise orders, the party taking the deposition shall bear the cost of the recording.

(3) Any party may provide for a transcription to be made from the recording of a deposition taken by non-stenographic means. With reasonable prior notice to the deponent and other parties, any party may designate another method of recording the testimony of the deponent in addition to the method specified by the person taking the deposition. Unless the court otherwise orders, each party designating an additional method of recording the testimony of a deponent shall bear the cost thereof.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated pursuant to C.R.C.P. 28 and shall begin with a statement on the record by the officer that includes (a) the officer's name and business address; (b) the date, time, and place of the deposition; (c) the name of the deponent; (d) the administration of the oath or affirmation to the deponent; and (e) an identification of all persons present. If the deposition is recorded other than stenographically, items (a) through (c) shall be repeated at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted by the use of camera or sound-recording techniques. At the conclusion of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording, the exhibits, or other pertinent matters.

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

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

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and C.R.C.P. Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by telephone or other remote electronic means is taken at the place where the deponent is to answer questions propounded to the deponent. The stipulation or order shall include the manner of recording the proceeding.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Colorado Rules of Evidence except CRE 103. The witness shall be put under oath or affirmation and the officer before whom the deposition is to be taken shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subsection (b)(2) of this Rule.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or in any other respect to the proceedings shall be noted by the officer upon the record of the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d)Schedule and Duration; Motion to Terminate or Limit Examination.

(1) Any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. An instruction not to answer may be made during a deposition only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion pursuant to subsection (d)(3) of this Rule.

(2)

(A) Unless otherwise authorized by the court or stipulated by the parties, a deposition of a person other than a retained expert disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial is limited to one day of 6 hours. Upon the motion of any party, the court may limit the time permitted for the conduct of a deposition to less than 6 hours, or may allow additional time if needed for a fair examination of the deponent and consistent with C.R.C.P. 26(b)(2), or if the deponent or another person impedes or delays the examination, or if other circumstances warrant. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person

responsible therefor an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

(B) Depositions of a retained expert disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial are governed by C.R.C.P. 26(b)(4).

(3) At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in C.R.C.P. 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall be notified by the officer that the transcript or recording is available. Within 35 days of receipt of such notification the deponent shall review the transcript or recording and, if the deponent makes changes in the form or substance of the deposition, shall sign a statement reciting such changes and the deponent's reasons for making them and send such statement to the officer. The officer shall indicate in the certificate prescribed by subsection (f)(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent.

(f)Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.

(1) The officer shall certify that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. This certificate shall be set forth in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked “deposition of (here insert name of witness)” and shall promptly transmit it to the attorney who arranged for the transcript or recording. The receiving attorney shall store the deposition under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition and may be inspected and copied

by any party, except that: if the person producing the materials desires to retain the originals, the person may

(A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or

(B) offer the originals to be marked for identification, after giving each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(g)Failure to Attend or to Serve Subpoena; Expenses.

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

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

Amended eff. July 1, 1990; Jan. 1, 1995, for all cases filed on or after that date; Jan. 9, 1995; June 4, 2001; Jan. 1, 2002; Jan. 1, 2012; effective July 1, 2015 for cases filed on or after July 1, 2015.

Committee Comment

Revised C.R.C.P. 30 is patterned in part after Fed.R.Civ.P. 30 as amended in 1993 and now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of depositions and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

Language in C.R.C.P. 30(c) and C.R.C.P. 30(f)(1) differs slightly from the language of Fed.R.Civ.P. 30(c) and Fed.R.Civ.P. 30(f)(1) to facilitate the taking of telephone depositions by eliminating the requirement that the officer recording the deposition be the person who administers the oath or affirmation.

Historical Notes

Supreme Court Change effective January 1, 1995, provides that rule 30 amended by the court is effective January 1, 1995, for all cases filed on or after that date.

West's Key Number Digest

- West's Key Number Digest, Pretrial Procedure 91 to 227

Legal Encyclopedias

- C.J.S., Depositions §§ 4 to 6
- C.J.S., Depositions §§ 10 to 17
- C.J.S., Depositions § 24
- C.J.S., Depositions § 33
- C.J.S., Depositions §§ 35 to 54
- C.J.S., Depositions §§ 63 to 66
- C.J.S., Depositions §§ 70 to 72
- C.J.S., Depositions § 74
- C.J.S., Depositions §§ 76 to 77

- C.J.S., Depositions §§ 109 to 129
- C.J.S., Depositions §§ 132 to 138
- C.J.S., Discovery §§ 2 to 3
- C.J.S., Discovery §§ 6 to 7
- C.J.S., Discovery §§ 9 to 10
- C.J.S., Discovery §§ 12 to 32
- C.J.S., Discovery §§ 34 to 60
- C.J.S., Discovery § 69
- C.J.S., Discovery § 77
- C.J.S., Discovery § 125

Cross References

Depositions outside Colorado, see Civil Procedure Rule 28.

Failure to attend deposition, see Civil Procedure Rule 37.

Failure to make discovery, see Civil Procedure Rule 37.

Persons before whom depositions may be taken, see Civil Procedure Rule 28.

Protective orders, see Civil Procedure Rule 26.

Authors' Comments

30.1 Generally

This rule describes the manner in which depositions are to be taken. It must be read together with the pretrial procedure provisions of Rule 16 and the discovery limitations under Rule 26. These changes were enacted in order to effectuate differential case management, ensuring that discovery in each case is tailored to the needs of the case. Counsel is advised to read the Committee Comments appearing in connection with those rules for a broad view of the changes that affect this rule as well. In the past, parties have relied upon Rule 29 to allow great flexibility in the taking of depositions, and under many circumstances, if the parties agreed in writing, many of the "requirements" of Rule 30 could be dispensed with. A careful reading of Rules 16 and 26 reveals that court permission is now required for many deviations from the Case Management Order, the presumptive allowable number

of depositions, and the time for the taking of depositions, even where the parties agree.

Rule 30 is substantially equivalent to F.R.C.P. 30 and prescribes the procedures to be followed in taking oral depositions. Oral depositions are perhaps the most useful of the discovery devices, but also often the most expensive. For a discussion of the advantages, disadvantages, uses and tactics connected with oral depositions, see Krendl, 1B Colorado Methods of Practice § 31.5. Forms for notice of deposition and other pertinent discussion may be found in Knapp, 12 Colorado Practice: Colorado Civil Procedure Forms & Commentary §§ 30.1 *et seq.,* and Hess, 5A Colorado Practice: Handbook on Civil Litigation § 8.3 (2006 ed.).

30.2 Limitation on number and length of depositions

The number of depositions permitted without approval by the court is set out in Rule 26(b)(2)(A) as "one deposition of each adverse party and of two other persons." No depositions may be taken prior to the development and approval of the Case Management Order under Rule 16, which is the appropriate time for requesting additional depositions if needed. The standard for additional depositions is a high one. Rule 16(b)(1)(IV) states that "no discovery schedule which exceeds the [numerical limitations] shall be approved by the court unless good cause is shown …" Good cause, as described in Rule 26(b)(2) entails an examination into the need for the additional depositions. Among the list factors to be considered by the court is whether the information is obtainable from some other source that is more convenient, less burdensome, or less expensive. Since depositions are probably the most expensive form of discovery, parties may be asked to use less costly means to acquire the information they seek. Along with court approval to exceed the "party plus two" limitation, counsel is required to certify under Rule 16(b)(1)(IV) that the client has been advised of the estimated costs and fees involved in conducting such discovery. As stated in the Committee Comment to this rule, it is "the parties in the first instance, and ultimately the Court [who] are responsible for setting reasonable limits and preventing abuse."

Rule 26(b)(4)(A) authorizes a party to depose any person who is identified as an **expert** who may testify at trial without limitation on the number of such depositions. Expert depositions do not count against the presumptive limitations on depositions of fact witnesses.

The presumptive limitation to one "party" deposition raises interesting questions when the party is not an individual, but is instead an entity such as a corporation.

What does it mean to take only a single deposition of a corporation that necessarily must speak through individual employees? There are three possible answers.

First, one may construe this limitation as permitting one deposition of a single corporate employee. This interpretation may be an unwarranted restriction inasmuch as it is a rare occurrence when a single person's testimony will answer all questions properly directed to a corporate party. The second alternative at the other extreme would hold that any deposition of a corporate employee is but part of the single corporate deposition. This interpretation would often unjustifiably permit numerous discrete depositions of corporate employees, well beyond the intent of the limits.

The third alternative is to read the limit on depositions in tandem with Rule 30(b)(6), which permits the deposition of a party such as a corporation through service of a notice that names the corporation as the party deponent, identifies the subjects of the examination, and imposes on the corporation the burden of tendering corporate employees to answer to the corporation's knowledge. In such a case, while several employees may be tendered from diverse departments, this is literally a single corporate deposition and may serve as the one "party" deposition permitted.

This third alternative presumes that the party deponent designates the individuals who will testify. If the party taking the deposition identifies the employees to testify, as permitted under 30(b)(1), different considerations apply and it may better serve the purposes of the limitations to count these as separate depositions, depending on the circumstances surrounding the identification of witnesses. Until a clear interpretation of this rule is announced, parties should address their intentions (and any disputes) in the Case Management Order.

Counsel should note the special requirements for taking the deposition of experts. Rule 26(b)(4)(A) authorizes a party to depose any person who is identified as an expert who may testify at trial. There are, however, special disclosure requirements for experts and depositions are not permitted until that disclosure is complete. Although not entirely clear, it appears that expert depositions are subject to the "party plus two additional persons" limitation unless otherwise specified in the Case Management Order.

Length of depositions. Rule 30(d)(2) places a presumptive time limit of one day of not more than seven hours for each deposition. Although the Rule does not state so expressly, the seven hours appears to include only actual deposition time and does

not include breaks. In addition, the Rule is written to encompass any deposition, and because a deposition of a corporation or other artificial entity under Rule 30(b)(6) is still a single deposition, the Rule limits such depositions to one day of seven hours even if several people are identified to respond on behalf of the entity deponent. The amended rule retains the provision allowing the court to limit the examination (including limiting the deposition to less than seven hours).

There are two ways in which the deposition time can be extended. First, Rule 30(d)(2) authorizes the parties to extend the time by stipulation. Second, Rule 30(d)(2) allows the court to extend the time. The rule countenances a court-ordered extension: (a) where necessary for a fair examination of the deponent so long as the extension is "consistent with C.R.C.P. 26(b)(2)" (thereby importing the good cause standard and criteria under Rule 26); (b) where the deponent or another person delays or impedes the exam; or (c) "if other circumstances warrant."

2015 Amendments

For cases filed on or after July 1, 2015, depositions of both lay and expert witnesses are limited to six hours absent leave of the court. The reduction from seven hours under the pre-2015 rules to six hours as amended is to facilitate the completion of depositions in a single day.

30.3 Compelling the deponent's attendance: notice and subpoena

Unlike interrogatories and requests for admissions, the oral deposition is available against nonparty witnesses as well as parties. However, the manner of securing the deponent's attendance at the deposition differs depending on the deponent's status. If the deponent is a party, presence is secured or compelled by serving the party with proper notice of the deposition. A party deponent who fails to appear for his or her deposition after proper notice is subject to the sanctions of Rule 37(d). If the deponent is not a party, presence is secured by means of a subpoena as provided by Rule 45, and the failure to appear is punishable by contempt. For further discussion of the scope and reach of subpoenas for the taking of a deposition, see the comments under Rule 45. *See also* Rule 28(d) concerning the taking of depositions outside Colorado.

30.4 Contents of the notice; production of documents

Whether the presence of a deponent is secured by notice or by subpoena, all parties to the action must be notified of the time and place of the deposition. Rule 30(b) requires that the notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, the notice must contain a general description sufficient to identify the deponent or the group or class to which the deponent belongs. The notice need not state either the subject that will be covered in the deposition (with the exception of Rule 30(b)(6) depositions) or the name of the person before whom it will be taken.

If the deponent is a party, the attorney taking the deposition may, under Rule 30(b)(1), include in the notice a request for the production of documents or tangible things as provided by Rule 34. Unfortunately, it is not clear whether the time limits of this rule or of Rule 34 apply. Under Rule 34, the party served with such a request normally has 30 days to respond; under Rule 30, a deposition may be taken upon "reasonable notice," which may be considerably less than 30 days. The Advisory Committee on the Federal Rules apparently intended that when a Rule 34 request is appended to a notice of deposition, the deposition should not be scheduled for less than 30 days from the time of the notice. On the other hand, a nonparty deponent may be requested to produce documents in response to a subpoena *duces tecum* under Rule 45, which allows only 10 days (or less) to object to the request. Thus, it is actually more expeditious to secure documents from a nonparty than from a party. This problem is probably best resolved by agreement between counsel in the context of the conference required by Rule 16 during which the parties jointly prepare, for court approval, a Case Management Order, which includes a schedule for discovery.

30.5 Reasonableness of notice, time and place

Notice. Under Rule 26(d), the depositions of parties and other persons may not be taken prior to the submission of a proposed Case Management Order drawn up according to Rule 16, unless the parties agree or the court orders. The presumptive Case Management Order precludes discovery until forty-five days after the case is at issue, unless the court orders otherwise. Section (a)(2)(C) of Rule 30 indicates that earlier depositions are permitted only upon a certification, with supporting facts, that the person to be deposed is about to leave the state and thereby become unavailable. Presumably, other reasons, including the agreement of the parties, will also permit taking early depositions. This limitation, however, does serve to encourage an orderly discovery process and to discourage the practice of routinely noticing the opponent's deposition at the same time the complaint is filed. Leave of court is also required for exceeding the number of depositions set in the Case

Management Order, the taking of a second deposition of the same deponent, or the taking of a prisoner's deposition.

What constitutes "reasonable notice" for the taking of a deposition depends on the circumstances of each case. A notice of deposition served in Colorado three days before the deposition was to be taken in California was held not to be reasonable notice. Nielsen v. Nielsen, 111 Colo. 344, 141 P.2d 415 (1943). On the other hand, 24 hours notice was held to be sufficient in at least one federal case, where all of the attorneys were already present for the taking of another deposition. Radio Corp. of America v. Rauland Corp., 21 F.R.D. 113 (N.D.Ill.1957). The Statewide Practice Standards, Rule 121, § 1-12(1), provide that reasonable notice shall not be less than five days, and before serving a notice to take a deposition, counsel must make a good faith effort to "schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all parties." Counsel with special time constraints may seek a protective order under Rule 26(c), or under Rule 30(b)(3), which provide that the time shown in the notice for the deposition may be enlarged or shortened by the court upon a showing of cause. Because parties are required to propose a discovery schedule for court approval in the Case Management Order, conflicts of this nature should be reduced.

Location. The location for taking a deposition will be controlled, in part, by the witness's status in the case. If the deponent is a party to the action, presence is secured by notice only, the party must attend at any place named in the notice, unless ordered otherwise by the court under Rule 26(c). If the deponent is not a party to the action, attendance can be secured only by means of a subpoena under Rule 45(d). Under Rule 45(d) a resident of Colorado may be required to attend only in the county wherein he or she resides, or is employed, or transacts his or her business in person, or at such other convenient place as is fixed by an order of the court. A nonresident of Colorado may be required to attend only in the county wherein he or she is served with the subpoena or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of the court. These places, however, are those to which the deponent may be compelled to travel. Other places may be arranged by agreement, which may require the payment of travel expenses.

Even if the deponent is a party, the place set for the deposition should be reasonable. Depositions are frequently taken at the offices of the examining attorney, but in Freeland v. Fife, 151 Colo. 339, 377 P.2d 942 (1963), a party residing out-of-state was not held to be in default for failing to appear in Denver for a deposition, when she had volunteered to appear in Colorado Springs.

Failing to appear for a deposition presents many risks for a party, including the sanction of dismissal. *See* Kwik Way Stores, Inc. v. Caldwell, 745 P.2d 672 (Colo. 1987). Thus, rather than failing to appear, counsel should object to the place set in the notice and should seek a protective order under Rule 26(c) if a more reasonable place for the deposition cannot be agreed upon.

30.6 Deposing a corporation, organization or agency

Prior to 1971, a party seeking discovery by way of an oral deposition from a corporation, partnership, association or governmental agency was saddled with the burden of ascertaining which officer or employee of the organization possessed the knowledge relevant to the inquiry. Time and expense would be wasted if the person named in the notice was not knowledgeable about the facts sought. Under the current Rule 30(b)(6), the party seeking the deposition is permitted to name the entity as the deponent, to specify with reasonable particularity the matters upon which the examination is sought, and the organization then has the burden of designating the individual who will provide the testimony on its behalf. That individual is to testify on matters of which the individual has personal knowledge and also on matters reasonably available to the organization. Thus, the burden is similar to that required of an organization to which interrogatories are propounded. See Rule 33(a)(interrogatories to an organization may be answered by an officer or agent who shall furnish such information as is available to the organization).

A party wishing to depose a specific officer or agent may still do so, and is not required to accept the organization's designee as the only source of information. Such a deposition, however, may not be considered a party deposition under the "party plus two" limitation on depositions. The relationship between this provision and the presumptive limits on the number of depositions allowed without court order is discussed in section 30.2 of these comments, *supra.*

30.7 Recording; oath; examination; objections

In the past, a typical deposition was recorded by a court reporter who took stenographic notes of the testimony. Rule 30(b)(2) now provides that the party taking the deposition is to designate the method by which the testimony shall be recorded, which includes, sound recording, video-recording or stenographic means, and traditionally, that party bears the initial costs of the method chosen.

However, under the next section of the rule, any other party may designate a method of recording other than that designated by the party taking the deposition. This means that if the original notice of deposition specifies a stenographic deposition (the most expensive kind), other parties may record by electronic means. Similarly, if the original notice designates electronic recording, other parties may arrange for a stenographer. Each party bears their respective costs of recording and transcription, and all these matters are subject to the court ordering otherwise if the circumstances warrant. The current provisions attempt to decrease the cost of litigation, where possible, for all parties involved, and alternatives should be allowed freely by the court unless "the objecting party shows that there exists a potential for abuse or harassment of a witness or party, … or where the objecting party otherwise establishes a bona fide claim for protective orders under Rule 26(c)". Sanchez v. District Court In and For Larimer County, 624 P.2d 1314 (Colo. 1981).

Counsel should consult Rule 30(b)(4) and Rule 121, Section 1-13, which describes the procedures for **videotaped and audio taped** depositions. West's C.R.S.A. § 13-16-122 governs the issue of whether discovery costs, such as those incurred in the taking of depositions, are recoverable for the prevailing party.

Under Rule 30(c), witnesses at a deposition are to be examined and cross-examined as they would be at trial under the Colorado Rules of Evidence. However, counsel may inquire into matters that may not be admissible in evidence since the scope of discovery under Rule 26(b) includes inadmissible matters, as long as such matters are reasonably calculated to lead to admissible evidence. Witnesses are to be placed under oath, usually by the officer before whom the deposition is taken. The examining party has the option of submitting written questions to be propounded by the officer in lieu of attending the deposition. *See* Rule 31. The officer who administers the oath need not be the same person who records the deposition, thus enabling the taking of telephone depositions under Rule 30(b)(7).

Any objections made at the time the deposition is taken to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, or the conduct of any party, or any other objections, are to be noted on the deposition by the officer taking the deposition. The validity of such objections will be determined by the court at trial, if such deposition is offered in evidence. According to Rule 30(d), all objections must be stated concisely and in a non-argumentative manner. Counsel may instruct a deponent to refuse to answer a question during a deposition *only* when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to make a motion to terminate a deposition as discussed

in the next section. Objections may or may not be waived if not made before or during the taking of the deposition, depending on the basis for the objection. *See* Rule 32(d).

30.8 Motions to terminate or limit examination

Rule 26(c) affords protection against abuse of the discovery process before an examination begins; Rule 30(d)(3) then provides continued protection during the taking of the deposition. An order protecting against an abusive deposition may be sought at any time during the course of the examination. A party or the deponent may move for an order either that the officer taking the deposition immediately cease taking it, or an order that limits the scope and manner of taking the deposition. In addition, a party who is wary of his opponent's tactics may choose to videotape the deposition, a strategy that will at once discourage overtly abusive conduct, while at the same time preserve a more vivid record should court involvement become necessary.

The order to terminate or limit the examination may be made by the court in which the action is pending or by the court in the district where the deposition is being taken. The moving party must establish that the deposition is being conducted in bad faith or so as to unreasonably annoy, embarrass or oppress the deponent or party, and the deponent or party is entitled to have the taking of the deposition suspended as necessary to move for a protective order. However, a motion to terminate or limit examination should occur only in extreme circumstances, since section (c) of this rule generally contemplates that most testimony is to be given following objections which are merely noted for the record.

Under section (d)(2), the court can maintain supervisory control over the conduct of the deposition. It may limit, cut short, or lengthen the time permitted for the examination and make other orders to insure that the examination is conducted fairly and without obstruction. The changes in this rule, along with the power to enter protective orders under Rule 26(c), remain necessary to prevent delays and impediments to the taking of depositions caused by overly aggressive conduct by counsel.

If the court terminates the examination, a further order of the court is necessary before the examination may be resumed. The expenses of the motion may be awarded according to the provisions of Rule 37(a)(4). The expenses associated with terminating a deposition, motions invoking court action to resolve the dispute,

rescheduling, and completing the deposition are substantial, and are awardable against any party who takes a position that is not substantially justified.

30.9 Submission to witnesses; changes; signing

A deponent does not enjoy an absolute right to review and correct the deposition after it is transcribed. In order to review and correct a transcript, a party must make that request before the deposition is completed, and the deponent may be advised of this right, on the record, to obviate further argument on this issue. A deponent who wishes to make any changes signs a statement reciting the changes and the reasons for making them. The officer appends that statement to the deposition. The apparent inadequacy of the reasons may not be used to prevent any changes or corrections the deponent wishes to make.

There is no longer a requirement that the deponent sign the deposition transcript. Unsigned deposition transcripts may be used for impeachment. The admissibility of deposition testimony is governed by Rule 32 of these rules and Colo. R. Evid. 801(d).

30.10 Certification and filing by officer; exhibits

Rule 30(f) prescribes the mandatory procedures to be followed after the deposition has been completed. The officer must certify that the deposition is a true record of the testimony given by the witness. The transcript is to be sealed and delivered to the requesting attorney, who has a duty to store and protect it against loss, destruction, tampering, or deterioration. This section of the rule was amended in 1982 to eliminate any requirement that the deposition be filed with the court. *See also* Rule 121, § 1-12(4).

When exhibits and documents have been produced for inspection at a deposition, these may, upon request, be marked for identification and annexed to the deposition or, if requested, returned to the person producing them. Even if so returned, they may be copied and substituted for the originals, as long as all of the parties have an opportunity to compare the copies with the originals. However, any party may move for a court order that the original be annexed to the deposition. Exhibits produced at the deposition may be inspected and copied by all parties. Any party or the deponent may obtain a copy of the deposition by paying the officer a reasonable charge therefor.

Where these procedures for certifying and delivering the deposition are not strictly followed, Rule 32(d) provides that objections to such irregularities are waived unless a motion to suppress the deposition is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. Furthermore, such objection "must be substantial and must affect the value of the deposition as evidence in order to preclude its use at the trial." Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

30.11 Failure to attend or to serve subpoena; expenses

Rule 30(g) provides that penalties may be imposed upon an examining party who gives notice of the taking of a deposition and then either fails to attend the deposition or fails to serve a subpoena on the witness named in the notice, resulting in the witness not attending. Under these circumstances, if the opposing party attends, the court may impose sanctions upon the delinquent party, as stated in the rule. The rule makes no provision for attendance by the attorney for the party who gives the notice, in lieu of attendance by the party himself, but a fair interpretation of the rule would seem to indicate that the presence of the attorney would satisfy the purpose of the rule. The rule is permissive and calls for the exercise of the court's discretion as to imposing penalties.

While Rule 30(g) governs the consequences of an examining party who fails to appear, Rule 37(d) provides consequences and sanctions for deponents who fail to appear.

Colorado Decisions

—

1. In general
2. When depositions may be taken
3. Notice, recording, production of documents & things; Deposition of organization
4. Examination and cross-examination; record of examination; oath; objections
5. Motion to terminate or limit examination
6. Submission to witness; changes; signing
7. Certification and filing by officer; exhibits; copies; notice of filing
8. Failure to attend or to serve subpoena; expenses
9. Expenses, generally

1. In general

A water court may issue sanctions for failure to appear when a corporation designates a deponent who appears at the deposition, but who is unable to answer all the questions specified in the Rule 30(b)(6) notice. Municipal Subdistrict v. OXY USA, Inc., 990 P.2d 701 (Colo. 1999).

Non-resident corporate officer in civil action was not "aggrieved party" and was not entitled to writ prohibiting district court from ordering defendants in a civil action to secure his attendance in deposition hearing. Weissman v. District Court, 189 Colo. 497, 543 P.2d 519 (1975).

Non-resident officer of corporate codefendant in civil action who was not named party to such action was not legally compelled to give deposition as a result of district court's order requiring defendants in such action to secure his attendance at deposition hearing. Weissman v. District Court, 189 Colo. 497, 543 P.2d 519 (1975).

District court could not compel attorney general of sister state to appear in Colorado for purpose of taking deposition even though sister state had brought action in which defendants sought such relief. State of Minnesota ex rel. Minnesota Attorney General v. District Court In and For El Paso County, 155 Colo. 521, 395 P.2d 601 (1964).

Statutory provisions for taking of depositions are generally considered in derogation of common law, and, although they are to be liberally construed, such statutes must be strictly or substantially complied with. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

Colorado district court lacked jurisdiction to compel corporate official, who was not party to action therein and who was domiciled in foreign state, to appear in foreign jurisdiction and give testimony by deposition, notwithstanding fact that corporation had brought in district court, action wherein defendants sought such relief. Solliday v. District Court In and For City and County of Denver, 135 Colo. 489, 313 P.2d 1000 (1957), *followed in* 135 Colo. 500, 313 P.2d 1005 (1957).

A corporation may offer corporate witnesses knowledgeable about matters known to the corporation even if the witnesses it offers are not those who are identified in

response to a prior Rule 30(b)(6) designation. Camp Bird Colorado, Inc. v. Board of County Com'rs of County of Ouray, 215 P.3d 1277 (Colo. App. 2009).

A party who produces a witness in response to a Rule 30(b)(6) notice bears the responsibility to produce witnesses who are knowledgeable about the matters that are the subject of the inquiry. Camp Bird Colorado, Inc. v. Board of County Com'rs of County of Ouray, 215 P.3d 1277 (Colo. App. 2009).

A corporation that fails to designate a knowledgeable witness in response to a Rule 30(b)(6) notice may face sanctions under Rule 37. D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC, 2008 WL 2522232 (Colo. App. 2008).

A company designating a witness or witnesses under Rule 30(b)(6) has an obligation to make a conscientious good faith effort to identify knowledgeable witnesses and to prepare them to answer questions fully and unevasively regarding the designated subject matters. In responding a Rule 30(b)(6) deposition notice, a company may not plead that no person within its company has knowledge. D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC, 2008 WL 2522232 (Colo. App. 2008).

Federal cases interpreting Rule 30(b)(6) are highly persuasive with respect to interpretation of the Colorado rule. D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC, 2008 WL 2522232 (Colo. App. 2008).

A trial court's error in applying the wrong legal standard to discovery rulings constitutes prejudicial (and thus reversible) error when proper discovery may have enabled a party to meet its burden of establishing a prima facie case. Tuscany, LLC v. Western States Excavating Pipe & Boring, LLC, 128 P.3d 274 (Colo. App. 2005).

Examinations under oath conducted by an insurance company during the course of its claims investigation are governed by the terms of the insurance policy and not by the Rules of Civil Procedure. Ahmadi v. Allstate Insurance Co., 22 P.3d 576 (Colo.App. 2001).

2. When depositions may be taken

There is no absolute right to a videotaped preservation deposition for a party unable to be present at trial, and the trial court, therefore, did not abuse its discretion when it refused to grant a continuance to enable the taking of such a deposition when the request was made on the eve of trial and the plaintiff's

absence from trial was not sudden or unexpected. Cherry Creek School District #5 v. Voelker, 859 P.2d 805 (Colo. 1993).

In action by insured against insurer, where evidence was in sole possession of insured who failed to appear for taking of her deposition, trial court was without jurisdiction to proceed until and unless insurer was afforded every opportunity to secure all evidence to which it was entitled. Reserve Life Ins. Co. v. District Court of City & County of Denver, 126 Colo. 217, 247 P.2d 903 (1952).

Trial court erred in dismissing misrepresentation claim, which admittedly failed to state cause of action, without allowing plaintiff to depose defendant's president prior to hearing on summary judgment motion, where plaintiff had had notice of deposition at least one month prior to hearing; conceivably, after deposition, misrepresentation claim could have been amended to state claim upon which relief could be granted. Cheyenne Mountain Bank v. Whetstone Corp., 787 P.2d 210 (Colo.App. 1990).

It was abuse of discretion to order plaintiff in personal injury action to pay for defense counsel's transportation to New York State to depose one of plaintiff's treating physicians, where defendants presented no evidence of unnecessary inconvenience, expense or hardship other than cost of plane trip itself and no reason appeared why defendants could not have employed New York counsel to take routine depositions of treating physician who was unavailable for trial. Berrey v. White Wing Services, Inc., 44 Colo.App. 506, 619 P.2d 82 (1980).

3. Notice, recording, production of documents & things; Deposition of organization

There is no absolute right to a videotaped preservation deposition for a party unable to be present at trial, and the trial court therefore did not abuse its discretion when it granted a protective order against the taking of such a deposition when the request was made on the eve of trial and the plaintiff's absence from trial was not sudden or unexpected. Cherry Creek School District #5 v. Voelker, 859 P.2d 805 (Colo. 1993).

It is not condition precedent to taking tape-recorded depositions that moving party first make good-faith effort to obtain information by other discovery methods. Sanchez v. District Court In and For Larimer County, 624 P.2d 1314 (Colo. 1981).

Trial judge properly may deny motion for tape-recorded depositions where objecting party shows that there exists potential for abuse or harassment of witness

or party or objecting party otherwise establishes bona fide claim for protective orders. Sanchez v. District Court In and For Larimer County, 624 P.2d 1314 (Colo. 1981).

In absence of exceptional circumstances, exercise of discretion in ruling on discovery motion for tape-recorded depositions should be limited to considerations of accuracy and trustworthiness with respect to procedures and conditions to be followed in recording, transcription and filing of depositions. Sanchez v. District Court In and For Larimer County, 624 P.2d 1314 (Colo. 1981).

Proposed order for taking tape-recorded depositions contained sufficient provisions to assure accuracy and trustworthiness, including use of two tape recorders and procedure for identification of speakers; it was not necessary to require independent operator for recording equipment or independent transcriber for completed tapes or to adopt other technical procedures proposed by opposing party such as microphones for each speaker, third tape recorder for playback, and detailed log index with cross references to all parties and exhibits. Sanchez v. District Court In and For Larimer County, 624 P.2d 1314 (Colo. 1981).

Application of rule with respect to recording testimony at deposition other than by stenographic means, when party proposes an inexpensive mode of deposition discovery, should not be conditioned on a showing of indigency, financial need, or economic disparity between the parties, as the rule is designed to decrease everyone's stenographic costs whenever that can be accomplished with no loss of accuracy and integrity. Sanchez v. District Court In and For Larimer County, 624 P.2d 1314 (Colo. 1981).

Where wife, after commencing action in Denver for separate maintenance, returned to former home in Chicago and showed that she was without funds available for journey to Denver, if husband, in good faith, desired to take deposition of wife before trial, he should not be required to proceed to trial without such deposition, but deposition should be ordered taken few days before trial to avoid expense of additional trip to Denver. Manning v. Manning, 136 Colo. 380, 317 P.2d 329 (1957), *overruled on other grounds*, Kwik Way Stores, Inc. v. Caldwell, 745 P.2d 672 (Colo. 1987).

Notice that depositions were to be taken, served upon litigant in Colorado three days before depositions were to be taken in California, was not "reasonable notice." Nielsen v. Nielsen, 111 Colo. 344, 141 P.2d 415 (1943).

Where suit was brought on behalf of plaintiff by next friend, who thereafter moved to another state, next friend, as nonparty, could not be compelled to testify, absent subpoena properly served upon her, and even if properly served, next friend could not be required to attend deposition away from her home county unless she were personally served elsewhere, nor could sanctions be imposed upon plaintiff for any failure of next friend to perform properly. Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo.App. 1983).

4. Examination and cross-examination; record of examination; oath; objections

In negligence action brought against hospital and staff, question asked by plaintiff to director of nursing services relating to standards of nursing care in effect at hospital when alleged acts of negligence took place sought evidence which was reasonably calculated to lead to discovery of admissible evidence, even if answer itself would not have been admissible at trial, and was proper. Seymour v. District Court In and For El Paso County, 196 Colo. 102, 581 P.2d 302 (1978).

5. Motion to terminate or limit examination

Objection to question asked at deposition that proper foundation has not been laid for question, that question is formulated poorly, or that it seeks evidence which would not be admissible at trial is not proper basis for obtaining protective order from court under rules of civil procedure concerning conduct of deposition. Seymour v. District Court In and For El Paso County, 196 Colo. 102, 581 P.2d 302 (1978).

In absence of proper showing to indicate in any way how requested depositions of Governor of Colorado and certain other individuals named in requisition documents from State of Connecticut would benefit court in determining narrow issue before it in habeas corpus proceeding, trial court did not err in granting motion for protective orders against taking of the various depositions and in denying motion for continuance to take such depositions. Hithe v. Nelson, 172 Colo. 179, 471 P.2d 596 (1970).

The mere fact that an objection to a question is valid does not standing alone constitute grounds to instruct a witness not to answer the question or to suspend part of a deposition. Liscio v. Pinson, 83 P.3d 1149 (Colo.App. 2003).

The only circumstances under which a party may instruct a witness not to answer a question during a deposition under Rule 30(d)(1) are when necessary to preserve a privilege, to enforce a court-ordered limitation, or to move for a protective order under Rule 30(d)(3). Liscio v. Pinson, 83 P.3d 1149 (Colo.App. 2003).

Even when a valid objection is made to a pending question during a deposition, a party is not entitled to interrupt the deposition outside circumstances authorized by Rule 30. Liscio v. Pinson, 83 P.3d 1149 (Colo.App. 2003).

A party may be sanctioned for improperly terminating a deposition to seek a protective order even when the initial objection was proper where the circumstances do not warrant imposition of the protective order. Liscio v. Pinson, 83 P.3d 1149 (Colo.App. 2003).

6. Submission to witness; changes; signing

Fact that deposition had not been corrected and signed by witness did not preclude its use, in laying foundation for impeaching witness, by asking witness whether she had been asked particular question in deposition, despite contention that such use and witness' answer had same effect as introducing deposition into evidence. Transamerica Ins. Co. v. Pueblo Gas & Fuel Co., 33 Colo.App. 92, 519 P.2d 1201 (1973).

Where, in laying foundation for impeaching witness called by him, attorney read purportedly inconsistent statement made by witness in unsigned deposition and witness admitted having made statement, it was not necessary for deposition to be admitted in evidence and its admission would have been improper. Transamerica Ins. Co. v. Pueblo Gas & Fuel Co., 33 Colo.App. 92, 519 P.2d 1201 (1973).

7. Certification and filing by officer; exhibits; copies; notice of filing

Court should not have suppressed plaintiff's deposition on basis that it was not properly certified and filed where defendants merely sought to establish impeaching foundation by asking plaintiff whether she had made particular statements on occasion of giving of deposition, but, since deposition could only tend to establish plaintiff's lack of capacity, which was already established, reversal was not required. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

Defendants, for impeachment purposes, were entitled to refer to plaintiff's deposition or any other document which would serve to bring to attention of plaintiff any prior statement which she had made regardless of compliance with rule as to certifying and filing depositions. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

Where deponent died when deposition was recessed and before counsel for defendant had completed his questioning, but deposition was signed and certified by officer before whom it was taken after deponent's death, there was substantial compliance with rule and deposition was admissible. Smith v. Kalavity, 515 P.2d 473 (Colo.App. 1973).

8. Failure to attend or to serve subpoena; expenses

9. Expenses, generally

Question of allowing travel and attorney expenses for taking of depositions was matter solely within discretion of trial court. Orth v. Bauer, 163 Colo. 136, 429 P.2d 279 (1967).

One who avails himself of procedure for taking depositions of witnesses in preparation for trial does so at his own expense. Morris v. Redak, 124 Colo. 27, 234 P.2d 908 (Colo. 1951).

Plaintiff was not entitled to recover as part of costs amounts spent for depositions taken in advance of trial and for amount spent for transcript of testimony taken on first trial of action when all witnesses whose depositions were taken made personal appearances at trial and depositions were used solely for purpose of discrediting testimony given in open court. Morris v. Redak, 124 Colo. 27, 234 P.2d 908 (Colo. 1951).

It was abuse of discretion to order plaintiff in personal injury action to pay for defense counsel's transportation to New York State to depose one of plaintiff's treating physicians, where defendants presented no evidence of unnecessary inconvenience, expense or hardship other than cost of plane trip itself and no reason appeared why defendants could not have employed New York counsel to take routine depositions of treating physician who was unavailable for trial. Berrey v. White Wing Services, Inc., 44 Colo.App. 506, 619 P.2d 82 (1980).

10. Waiver of right to object

Insured who resided in Alamosa, Colorado, but who brought suit against insurer in Denver, waived any right which she had to object to her deposition being taken in Denver by her failure to file motion seeking to be relieved from notice requiring her to appear there. Reserve Life Ins. Co., Dallas, Texas v. District Court of City & County of Denver, 126 Colo. 217, 247 P.2d 903 (1952).

Where an insured, living in Alamosa, being properly served with a notice to take her deposition in Denver, takes no action under this rule prior to the time specified in the notice for the taking of the deposition, she thereby waived any objection to the place of taking the deposition or for financial assistance to enable her to attend. Reserve Life Ins. Co. v. District Ct., 126 Colo. 217, 247 P.2d 903 (1952).

a0 University of Denver College of Law, Member, Colorado Bar.

a1 Colorado Springs, Member, Colorado Bar.

End of Document