

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the twenty-fifth day of April, in the year of two thousand and twenty-two:

present,

<u>KIMBERLY S. BUDD</u>)	Chief Justice
)	
<u>FRANK M. GAZIANO</u>)	
)	
)	
<u>DAVID A. LOWY</u>)	Justices
)	
)	
<u>ELSPETH B. CYPHER</u>)	
)	
)	
<u>SCOTT L. KAFKER</u>)	
)	
)	
<u>DALILA ARGAEZ WENDLANDT</u>)	
)	
)	
<u>SERGE GEORGES, JR.</u>)	

ORDERED: That the Massachusetts Rules of Civil Procedure adopted by order dated July 13, 1973, as amended, to take effect on July 1, 1974, are hereby amended as follows:

Rule 30 By striking Mass. R. Civ. P. 30 and inserting in lieu thereof the new Mass. R. Civ. P. 30 attached hereto.

Rule 30A By striking Mass. R. Civ. P. 30A.

The amendment accomplished by this order shall take effect on September 1, 2022.

ORDERED:

<u>KIMBERLY S. BUDD</u>)	Chief Justice
)	
<u>FRANK M. GAZIANO</u>)	
)	
<u>DAVID A. LOWY</u>)	Justices
)	
<u>ELSPETH B. CYPHER</u>)	
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<u>SCOTT L. KAFKER</u>)	
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<u>DALILA ARGAEZ WENDLANDT</u>)	
)	
<u>SERGE GEORGES, JR.</u>)	

Amendments to Mass. R. Civ. P. 30 and Repeal of Mass. R. Civ. P. 30A

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

(a) *When a Deposition May Be Taken.*

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1), if:

(A) the party seeks to take the deposition within 30 days of service of the summons and complaint upon any defendant or service made under Rule 4(e), unless:

(i) a defendant has served a notice of taking deposition or otherwise sought discovery;

(ii) the party certifies in the notice, with supporting facts, that before the 30-day period following service has expired the deponent is expected to leave the Commonwealth and be unavailable thereafter;

(B) there is no reasonable likelihood that recovery will exceed \$7,000 if the plaintiff prevails, unless the plaintiff primarily seeks equitable or declaratory relief;

(C) there has been a hearing before a master; or

(D) the deponent is confined in prison.

(b) *Notice of the Deposition; Other Formal Requirements.*

(1) *Notice in General.* A party who wants to depose a person by oral questions must give written notice to every other party at least 7 days before. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. If a party shows that when it was served with notice under Rule 30(a)(2)(A)(ii) it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition, the deposition may not be used against that party.

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition. Notwithstanding Rule 30(b)(1), such a request for production at the deposition under Rule 34 shall be made with 30 days' notice to every party, although the court may allow for a longer or shorter time.

(3) *Method of Recording.*

(A) *Method(s) Stated in the Notice.* The party who notices the deposition must state in the notice the method(s) for recording the testimony. If the notice states that the deposition will be recorded by audiovisual means, the notice shall also indicate if the operator is an employee of the noticing attorney.

(B) *Permissible Methods.* A stenographic record shall always be prepared, unless the parties otherwise stipulate. Additionally, the noticing party may choose to record the deposition by audiovisual means.

(C) *Costs and Equipment.* The noticing party bears the recording costs, except that each party shall bear the cost for a copy of the stenographic record and of any audiovisual recording. The party noticing an audiovisual deposition shall be responsible for assuring that the necessary equipment is present. Any party may arrange to transcribe a deposition at the party's own expense. The taxation of costs, including that of taking, editing, and using an audiovisual deposition at trial, shall be governed by Rule 54(e).

(D) *Additional Methods.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the additional expense unless the court orders otherwise.

(4) *By Remote Means.* By leave of court upon motion with notice and opportunity to be heard in opposition, or by stipulation in writing of all parties, a deposition may be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(1), 37(b)(1), and 45(d), the deposition takes place where the deponent answers the questions.

(5) *Officer's and Operator's Duties.*

(A) *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. In the event the deposition is recorded by audiovisual means, the recording shall be performed by an operator acting in the presence and under the direction of the officer. The officer or operator must begin the deposition with an on-the-record statement that includes:

- (i) the officer's and, if applicable, operator's name and business address;
- (ii) the date, time, and place of the deposition;
- (iii) the caption of the case;
- (iv) the name of the witness-deponent;
- (v) the name of the party on whose behalf the deposition is being taken; and
- (vi) any stipulations by the parties.

Counsel shall identify themselves by stating their names, their addresses, the names of the parties or persons for whom they appear at the deposition, and nothing more.

(B) *During the Deposition.* After putting the deponent (and any interpreter) under oath or affirmation, the officer and, if applicable, operator, must record the testimony by the method or methods designated under Rule 30(b)(3)(A).

(C) *Closing of Deposition.* At the end of a deposition, the officer and/or operator must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization.* In a notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it shall set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(7) *Audiovisual Recordings.* The following provisions shall apply in the case that a deposition is recorded by audiovisual means:

(A) *Multiple Units.* When the length of the deposition requires the use of more than one recording unit, the end of each recording unit and the beginning of each succeeding recording unit shall be announced on camera by the operator.

(B) *Index.* The deposition shall be timed by a digital clock on camera which shall show continually each hour, minute and second of each recording unit of the deposition, or otherwise suitably indexed by a time generator. The date(s) on which the deposition is taken shall be shown.

(C) *Interruption of Recording.* No party shall be entitled to cause the officer to interrupt or halt the recording of the audiovisual deposition without the assent of all other parties present.

(D) *Use of Camera.* During the taking of the audiovisual deposition, the officer shall assure that the audiovisual recording records the witness in a standard fashion at all times during the deposition, unless all counsel agree otherwise, or unless on motion before the court, the court directs otherwise. In no event shall the officer use, or permit the use of, audiovisual recording techniques to vary the view which is being recorded for presentation in the courtroom unless agreed upon or ordered by the court as recited above. As an exception to the foregoing, the officer shall, at the request of the attorney questioning the witness, cause a close-up view of a deposition exhibit or visual aid to be taken while the witness is being questioned concerning the exhibit.

(c) *Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.*

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under Rule 43.

(2) *Objections.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) *Sanction; Motion to Terminate or Limit.*

(1) *Sanction.* The court in which the action is pending or the court in the county or judicial district, as the case may be, where the deposition is being taken may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person, including the deponent, who impedes, unreasonably delays, or frustrates the fair progress of the examination.

(2) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted or is proceeding in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the court in the county or judicial district, as the case may be, where the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) *Review by the Witness; Changes; Signing.* When the testimony is fully transcribed the deposition transcript and any audiovisual recording thereof shall be submitted to the witness for examination and the deposition transcript shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition transcript by the officer with a statement of the reasons given by the witness for making them. The deposition transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition transcript of any day of the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition transcript may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d)(4) the court rules that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.*

(1) *Certification and Delivery.* The officer must certify in writing that the witness was duly sworn and that the transcript accurately records the witness's testimony. As soon as the officer has completed the transcript, the officer must promptly deliver the certificate and transcript to the party taking the deposition. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things.*

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a

deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. Except upon order of the court, audiovisual recordings on file with the clerk of the court in which the action is pending shall not be available for inspection or viewing after their filing and prior to their use at the trial of the case or their disposition in accordance with this rule.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) *Failure to Attend a Deposition or Serve a Subpoena; Expenses.* A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

(h) *Rulings on Objections; Editing of Recording.* If any party has any objections to the audiovisual deposition which would otherwise be made at trial, such objections shall be submitted to the trial judge reasonably in advance of trial or as ordered by the court. The trial judge shall, if practicable, rule on the objections prior to the commencement of the trial or hearing and shall return the recording to the party who took the audiovisual deposition, with notice to all parties of the rulings and any instructions as to editing. The editing shall reflect the rulings of the trial judge and shall then remove all references to the objections. After causing the audiovisual deposition to be edited in accordance with the court's instructions, both the original audiovisual recording and the edited version thereof, each clearly identified, shall be returned to the trial judge for use during the trial or hearing. The original audiovisual recording shall be preserved intact and unaltered.

(i) *Transcribing of Audio Portion; Marking for Identification.* At a trial or hearing, that part of the audio portion of an audiovisual deposition which is offered in evidence and admitted, or which is excluded on objection, shall be transcribed in the same manner as the testimony of other witnesses. Both the original unedited audiovisual recording and the edited version shall be marked for identification.

(j) *Use of Audiovisual Deposition and Responsibility for Assuring Necessary Equipment at Time of Use.* An audiovisual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used. The party desiring to use the audiovisual deposition for any purpose shall be responsible for assuring that the necessary equipment for playing the audiovisual recording back

is available when the audiovisual deposition is to be used. When an audiovisual deposition is used during a hearing, a trial, or any other court proceeding, the party first using such audiovisual deposition in whole or in part shall assure the availability of the same or comparable audiovisual playback equipment to any other party for such other party's use in further showing such audiovisual deposition during the hearing, the trial, or other court proceeding or at any rehearing, recess, or continuation thereof.

(k) *Discrepancy Between Audiovisual Recording and Stenographic Transcript.* Upon the claim of a party that a discrepancy exists between the audiovisual recording and the stenographic transcript, the trial judge shall determine whether such discrepancy reasonably appears and whether the relevant part of the audiovisual recording is intelligible. If the relevant part of the audiovisual recording is not intelligible, the stenographic transcript controls. If the relevant part of the audiovisual recording is intelligible and the trial judge rules that a discrepancy reasonably appears, the jury, in a jury action, shall determine from the audiovisual recording the deponent's testimony. The trial judge may permit the jury to be aided in its determination by the stenographic transcript.

(l) *Evidence by Audiovisual Recording.*

(1) *Authorization of Previously Recorded AudioVisual Testimony or Other Evidence.* Upon motion with notice and an opportunity to be heard, or by stipulation of all parties approved by the court, or upon the court's initiative, the court may permit, if it finds it to be in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, that all or part of the testimony, and such other evidence as may be appropriate, may be presented at trial by audiovisual means. The provisions of Rule 30 shall govern such audiovisual recordings.

(2) *Introduction as Evidence.* Notwithstanding Rule 30j or Rule 32(a)(3), but subject to rulings on objections pursuant to Rule 30(l)(3), any party may introduce any such audiovisual recording, that has been authorized under Rule 30(l)(1), at trial if the court finds its introduction to be in the interest of justice.

(3) *Part of the Record; Not an Exhibit.* Any portion of the audiovisual recording so introduced shall be part of the record, and subject to the provisions of Rule 30i, but not an exhibit.

(m) *Costs.* The reasonable expense of recording, editing, and using an audio-visual deposition may be taxed as costs, pursuant to the provisions of Rule 54(e).

(n) *Audiovisual Depositions of Treating Physicians and Expert Witnesses for Use at Trial.*

(1) *Authorization and Definitions.* Unless the court upon motion orders otherwise, any party intending to call a treating physician or expert witness at trial as that party's own witness may take the oral deposition of any such treating physician or expert witness by audiovisual means for the purpose of its being used as evidence at trial in lieu of oral testimony. This rule 30(n) does not apply to another party's treating physician or expert, discovery from whom is subject to the provisions of Rule 26(b)(4)(A) or 26(b)(4)(B). A "treating physician" is a physician who has provided medical treatment to a party or other person involved in the lawsuit, and who will be questioned about such treatment and matters related thereto. An "expert witness" is a person qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion or otherwise.

(2) *Timing, Curriculum Vitae, and Report.* Except by leave of court, a notice for the taking of an audiovisual expert witness deposition for trial shall not be served (i) sooner than 6 months after the action has been commenced, and (ii) until 30 days after a written report of that witness has been furnished to all parties. Such report shall contain a curriculum vitae of that witness, shall cover the subjects described

in, Rule 26(b)(4)(A)(i) and, in the case of a treating physician, a description of the treatment and its costs. Any party may move for further discovery of that witness, to take place prior to the audiovisual expert witness deposition for trial, in accordance with Rule 26(b)(4)(A)(ii).

(3) *Notice; Opposition.* Notice for the taking of an audiovisual treating physician or expert witness deposition for trial shall state that it is to be recorded by audiovisual means with the purpose of its being used as evidence at trial in lieu of oral testimony. Any motion in opposition to the taking of an audiovisual treating physician or expert witness deposition for trial must be filed within 14 days of receipt of the notice or on or before the specified time for taking of the audiovisual deposition for trial, if such time is less than 14 days from receipt of the notice. The audiovisual deposition shall not occur until the court rules on the motion opposing the deposition.

(4) *Objections.* When an audiovisual treating physician or expert witness deposition for trial is taken, all evidential objections shall, to the extent practicable, be made during the course of the deposition. If any party has made objections during the course of the audiovisual treating physician or expert witness deposition for trial, or has any objections to such deposition which would otherwise be made at trial, such objections shall be filed with the court reasonably in advance of trial or as ordered by the court and pursuant to the procedure set out in Rule 30(g).

(5) *Use at Trial.* Unless the court upon motion orders otherwise, a previously recorded audiovisual treating physician or expert witness deposition for trial may be used by any party for any purpose and under any circumstances in which a stenographic deposition may be used and, in addition, may be used at trial in lieu of oral testimony whether or not such witness is available to testify.

MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

Reporter's Notes--2022

In 2020, the Standing Advisory Committee on the Massachusetts Rules of Civil Procedure, charged with the task of reviewing and recommending to the Rules Committee of the Supreme Judicial Court amendments to the Massachusetts Rules of Civil Procedure, published for comment proposed amendments to Mass. R. Civ. P. 30 ("Depositions Upon Oral Examination") and Mass. R. Civ. P. 30A ("Audiovisual Depositions and Audiovisual Evidence").

The proposal was accompanied by a memorandum from the Standing Advisory Committee explaining the proposed amendments. These Reporter's Notes are taken in part from this memorandum.

The goal of the proposed amendments was to streamline and modernize the rules governing depositions. Given the prevalence of audiovisual depositions in current practice, the Committee believed it was anachronistic to maintain one rule for depositions recorded solely by stenographic means and a second rule for depositions also recorded by audiovisual means. Accordingly, the amendments to Rules 30 and 30A combine these two rules into a single Rule 30 and repeals Rule 30A. Because guidance from prior caselaw and the Reporter's Notes to Rule 30A may be relevant to interpretation of the revised Rule 30, the Reporter's Notes to repealed Rule 30A are reproduced as an appendix to the 2022 Reporter's Notes to Rule 30.

Two provisions in the published draft that have not been adopted involved limitations on the number of depositions and the duration of depositions.

(1) *Number of depositions.* The proposal would have required a stipulation of the parties or leave of court "if the deposition would result in more than ten total depositions by the plaintiffs, or by the defendants, or by the third-party defendants, or by any group of parties which share a common interest in the litigation." This change, if adopted, would have been consistent with the ten-deposition rule set forth in Fed. R. Civ. P. 30(a)(2)(A)(i) and Local Rule 26.1(c) of the United States District Court for the District of Massachusetts.

(2) *Duration of depositions.* The proposal also would have adopted a deposition time limitation of one day of seven hours, excluding reasonable breaks, absent a court order or agreement of the parties. A court would have been required to allow additional time "if necessary for a fair examination of the witness, or if any circumstance, including conduct by the witness or counsel, impedes or delays the deposition." The one-day/seven-hour limitation would have been consistent with Fed. R. Civ. P. 30(d)(1).

After consideration of the many comments received after publication of the proposal and after deliberation, the Standing Advisory Committee on the Massachusetts Rules of Civil

Procedure voted not to include the limitations on the number and duration of depositions in the proposal sent to the Rules Committee of the Supreme Judicial Court, thus retaining the existing Massachusetts practice in this area. A majority of Committee members expressed the view that there were not sufficiently strong reasons to change long-standing Massachusetts practice that did not include an express limitation on the number and duration of depositions and that existing provisions in the rules provided sufficient tools to address abuses arising from an excessive number of depositions or from unnecessarily lengthy depositions.

Revised Rule 30 follows the structure of Fed. R. Civ. P. 30 (“Depositions by Oral Examination”), as the federal rule covers both stenographic and audiovisual depositions. In addition, Fed. R. Civ. P. 30 has been updated numerous times since its adoption and is generally clearer and more concise than its Massachusetts counterpart. Except where noted, the 2022 amendments have preserved the existing substantive differences between the Massachusetts rules and the federal rule.

Rules 30(h)-(n) contain the provisions of existing Mass. R. Civ. P. 30A(g)-(m), with the changes described below. Sections (g)-(m) of Rule 30A relate to how audiovisual depositions may be used at trial. While these rules might more logically be placed in Rule 32 (“Use of Depositions in Court Proceedings”), moving these provisions to Rule 32 would necessitate a broader rethinking of the structure of Rule 32, so these provisions have been maintained in Rule 30 with streamlining edits only.

Rule 30(a).

Rule 30(a) follows the structure of Fed. R. Civ. P. 30(a), though preserves, with certain modifications, provisions unique to Massachusetts practice.

Rule 30(a)(2)(A)(ii) substantially simplifies the description of the applicable requirements when a party seeks to take a deposition within 30 days after service of a summons and complaint, but the witness plans to travel during that period. Prior Rule 30(b)(2) required a certification that the witness “is about to go out of the country where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage abroad....” The revised rule requires a certification that “before the 30-day period following service has expired the deponent is expected to leave the Commonwealth and be unavailable thereafter.”

Except in cases where the plaintiff seeks primarily equitable or declaratory relief, Rule 30(a)(2)(B) requires leave of court if there is no reasonable likelihood that recovery in the matter will exceed \$7,000, as opposed to the \$5,000 floor in the prior Massachusetts rule. The jurisdictional ceiling for small claims matters under G.L. c. 218, § 21, is \$7,000. No discovery is permitted in small claims matters except for good cause shown. Uniform Small Claims Rule 5.

The revised rule eliminates two provisions in prior Rule 30(a) which are no longer necessary. It eliminates the requirement for leave of court for depositions where the action is pending in Superior Court following a trial in District Court. Since 2004, parties dissatisfied with a judgment in a District Court damage action can no longer seek a new trial in the Superior

Court. G.L. c. 218, § 19B. The revised rule also eliminates prior Rule 30(a)(v), requiring leave of court for a deposition in certain domestic relations matters. The Massachusetts Rules of Domestic Relations Procedure provide the procedures in such cases.

Rule 30(b).

Rule 30(b) is modeled after Fed. R. Civ. P. 30(b), though like Rule 30(a) it preserves certain requirements in existing Massachusetts practice not present in the federal rule. These include the requirement for 7 days' written notice before taking a deposition in prior Rule 30(b)(1), the provision that if a party served with a deposition notice under prior Rule 30(b)(2) within 30 days of the service of the summons and complaint is unable to retain counsel to represent it at the deposition, then the deposition may not be used against that party; the provision in prior Rule 30(b)(4) that a stenographic record of the deposition will be prepared even if the deposition is recorded by audiovisual means, unless the parties otherwise stipulate; and the provision in prior Rule 30(b)(5) that a request under Rule 34 to a party deponent to bring documents to the deposition shall be made with at least 30 days' notice unless otherwise ordered by the court.

Rule 30(b)(3)(A) adds a requirement that if the notice of the deposition indicates that it will be recorded by audiovisual means, it will also indicate if the operator of the audiovisual equipment is an employee of the noticing attorney.

Rule 30(c).

The prior rule has been simplified to more closely follow the federal rule and to eliminate redundancy with revised Rule 30(b).

Rule 30(d).

Rule 30(d)(2) adds a provision enabling the court to impose appropriate sanctions, including reasonable expenses and attorney's fees, on any person, including the deponent, who impedes, delays or frustrates the fair examination of the deponent. Sanctionable conduct may include frequent inappropriate objections, coaching of the witness, refusal to agree on a reasonable apportionment of time among parties to examine a witness, or other inappropriate or unprofessional conduct. Sanctionable conduct may also include, as reflected in the 2001 Reporter's Notes to Rule 30(c), an instruction to a deponent not to answer, unless a privilege or some other legal protection against disclosure applies. As set forth in the notes to the analogous Federal rule, "[i]n general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer." Notes of Advisory Committee on the Federal Rules of Civil Procedure, 1993 Amendment.

Rule 30(e).

Rule 30(e) clarifies that the 30-day day period for signing of the transcript by the witness runs from the completion of each day of the deposition, not from the completion of an entire,

multi-day deposition. The amended rule is consistent with the decision of the Appeals Court in *Tam v. Federal Management Co., Inc.*, 99 Mass. App. Ct. 41 (2021).

Otherwise, the prior rule remains unchanged, except for stylistic changes (for example, the previous language the court "holds" has been changed to the court "rules.")

Rule 30(f).

Rule 30(f) largely adopts the text of the analogous federal rule, although it eliminates the requirement that once the transcript is complete the officer must seal in an envelope and deliver a physical copy to the party taking the deposition. Given the multiple ways to transmit the completed transcript electronically, the rule simply requires “delivery.”

Rule 30(g).

The rule adopts the text of the federal rule.

Rule 30(h).

Prior rule 30A(g) has been simplified to eliminate redundancy, with stylistic changes.

Rule 30(i).

The text of Rule 30(i) is the same as former Rule 30A(h), with stylistic changes.

Rule 30(j).

The text of Rule 30(j) is the same as former Rule 30A(i), with stylistic changes.

Rule 30(k) (formerly Rule 30A(j)).

The prior rule has been simplified to eliminate redundancy, with stylistic changes.

Rule 30(l) (formerly Rule 30A(k)).

The prior rule has been simplified to eliminate redundancy and update cross-references, with stylistic changes.

Rule 30(m) (formerly Rule 30A(l)).

The text of Rule 30(m) is the same as former Rule 30A(l), with stylistic changes.

Rule 30(n) (formerly Rule 30A(m)).

The prior rule has been simplified to eliminate redundancy. Stylistic changes and updated references have been made.

APPENDIX

Reporter's Notes to Repealed Rule 30A

AUDIOVISUAL DEPOSITIONS AND AUDIOVISUAL EVIDENCE

Reporter's Notes--1984

This amendment permits a court to authorize in advance of trial, or at the trial, the use of an audio-visual recording as testimony or other evidence "in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court." The major purpose of this rule is to permit judges to prevent the delay of trials which often occurs in order to accommodate the schedule of witnesses, particularly experts. Rule 30A(k)(3) makes the obtaining of rulings on objections and the editing of the audio-visual recordings subject to the provisions of 30A(g). Rule 30A(k)(4) provides that any portion of the audio-visual recording that is introduced "shall be part of the record, but not an exhibit." This is so testimony by audio-visual recording is not accorded more weight than live testimony. Rule 30A(k)(4) makes any portion of the audio-visual recording that is introduced subject to the transcription and marking provisions of Rule 30A(h).

Even without a Rule 30A(k)(1) order, one may still be able to use an audio-visual deposition at trial pursuant to the provisions of Rule 32(a). (See Rule 30A(i).)

Reporter's Notes--1989

These amendments accompany the simultaneous amendment adding Mass.R.Civ.P. 30A(m), which creates a new category of videotape depositions called "audio-visual expert depositions for trial." See Reporter's Notes to Proposed Amendment Adding Mass.R.Civ.P. 30A(m). That amendment will make audio-visual depositions a more frequent occurrence. In considering the addition of Rule 30A(m), it made sense to make some clarifications for all audio-visual depositions. The provisions of Rule 30A(a)-(l) apply to audio-visual expert depositions for trial except when altered by Rule 30A(m). Mass.R.Civ.P. 30A(m)(6).

The amendment to Mass.R.Civ.P. 30A(c) gives the party taking any audio-visual deposition the responsibility for assuring that the necessary equipment is available at the time the deposition is taken. The amendment to Mass.R.Civ.P. 30A(i) requires the party first using an audio-visual deposition in whole or in part to be responsible for providing the necessary play-back equipment for the use of all parties at such hearing, trial, or any other court proceeding or "at any rehearing, recess, or continuation thereof."

The amendment to Mass.R.Civ.P. 30A(d) adds to the recording officer's duties the obligation to assure "that the audio-visual tape records the witness in a standard fashion at all times during the deposition, unless all counsel agree otherwise, or unless on motion before the court, the court directs otherwise." The purpose is to make the audio-visual deposition as

close as possible to what the fact-finder would see and hear if the witness were present in the courtroom.

Mass.R.Civ.P. 30A(c), (d), and (i) are otherwise left intact, except for appropriate changes to the titles in Rules 30(d) and (i) which reflect the additions.

The amendments borrow in part from a similar rule in South Carolina (S.C.Cir.Ct.Prac.R. 99C.(4) and 99K.).

Rule 30A deals generally with "Audio-visual Depositions and Audio-visual Evidence." This amendment adds a new set of provisions dealing specifically with "Audio-Visual Depositions of Treating Physicians and Expert Witnesses for Use at Trial."

Delays in court have been a substantial problem in the Commonwealth. Many lawyers and judges believe that a major reason for the seeking and granting of continuances in the past has been the unavailability of expert witnesses and treating physicians on the day set for trial. Unlike Rule 30A(k)(1), which requires prior court approval for the use of audio-visual testimony at the trial, the amendment authorizes such use with respect to a party's own treating physicians and expert witnesses or neutral treating physicians and expert witnesses whom that party intends to call at trial as that party's own witness, regardless of whether the witness is available to testify in person, unless the court orders otherwise. Rule 30A(m)(5). The goals are to eliminate a major reason for continuances; to facilitate intelligent settlement, since the lawyers will know in advance that the testimony of such expert or treating physician will be available for the trial; and to aid physicians and other experts in more predictably scheduling and efficiently utilizing their time.

The amendment does not apply to "another party's treating physician or expert, discovery from whom is subject to the provisions of Rule 26(b)(4)(A) or 26(b)(4)(B)." Rule 30(m)(1).

The amendment covers both treating physicians and experts, because there may be occasions when a treating physician's testimony relates only to observable facts and not expert opinion. The amendment's inclusion of the treating physician, whether or not the physician's testimony is technically that of an expert, should both help to eliminate disputes over the boundary between fact and opinion and to meet the other goals of the amendment, such as eliminating a major reason for continuances.

Because such audio-visual testimony is in lieu of live testimony, the amendment contains a number of protections for the opposing party, e.g., notice in advance that the audio-visual deposition is for the "purpose of its being used as evidence at trial in lieu of oral testimony" (Rule 30A(m)(3)); the requirement that a curriculum vitae and a report covering "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion," and, in the case of a treating physician, providing a description of the treatment and its costs, be furnished to all parties at least thirty days before such audio-visual deposition (Rule 30A(m)(2)); the ability to move for a discovery deposition prior to the audio-visual expert witness deposition (Rule 30A(m)(2)); the ability to move to oppose the deposition before it is taken, with the deposition stayed until the court rules on the

motion (Rule 30A(m)(3)); and detailed provisions for the ruling on objections and the editing of the audio-visual recording (Rule 30A(m)(4)).

Rule 30A(m)(5) permits a party either to use live testimony of the treating physician or expert, or the audio-visual expert witness deposition for trial, but not both. However, if a party chooses to use the live testimony of the witness, the opponent may still cross-examine and use portions of the audio-visual expert witness deposition for trial for appropriate purposes.

Except where this amendment changes the audio-visual deposition rules for this specific type of deposition for use at trial, the remaining provisions of Rule 30A apply. Rule 30A(m)(6). Consequently, all of Rule 30A applies to audio-visual expert witness depositions for trial, except the first sentence of Rule 30A(a) (requiring prior leave of court or stipulation of all parties to authorize the deposition), the provisions of Rule 30A(g) (Rulings on Objections, Editing of Recording), and Rule 30A(k)(1)(2)(3) (Evidence by Audio-Visual Recording). Rule 30A(k)(4), making any portion of an audio-visual recording introduced at the trial part of the record, but not an exhibit, is applicable to audio-visual expert witness depositions for trial. Although Rule 30A(b) (Notice) is applicable to Rule 30A(m) depositions, Rule 30A(m)(2) adds an additional requirement related to the timing of such deposition (requirement of written report) and Rule 30A(m) requires additional information in the notice for the taking of such deposition.

There may be occasions when a party becomes aware of the need for an audio-visual deposition of a treating physician or expert witness at a time too close to trial to permit compliance with all of the provisions of Rule 30A(m). The discretionary motions under Rule 30A(a) and 30A(k)(1), and the court's authorization under Rule 30A(k)(2), remain available to meet such emergency situations.

The amendment borrows in part from a similar rule in New Jersey (N.J.Civ.Prac.R. 4:14-9) and from a paragraph of the South Carolina videotaped deposition rule (S.C.Cir.Ct.Prac.R. 99 I.). The definition of "expert witness" (30A(m)(1)) is derived from a portion of Fed.R.Evid. 702 and Proposed Mass.R.Evid. 702.

Reporter's Notes--1996

With the merger of the District Court civil rules into the Mass.R.Civ.P., Rule 30A of the Mass.R.Civ.P. governing audio-visual depositions is made applicable to District Court proceedings.

Reporter's Notes--2017

Since the 1980s, the Massachusetts Rules of Civil Procedure have provided for two types of audio-visual depositions. The first is an audio-visual deposition by leave of court or by

stipulation of the parties under Rule 30A(a)-(k). The second is an “audio-visual expert witness deposition for trial” under Rule 30A(m). Rule 30A(m) allows a party to depose a treating physician or expert witness whom the party intends to call at trial as his or her own witness without the need to obtain leave of court or a stipulation and to use that deposition at trial in lieu of live testimony. Rule 30A(m) does not apply to another party’s treating physician or expert.

The 2017 amendments to Rule 30 and Rule 30A deal with the first type of audio-visual deposition and make no change to the Rule 30A(m) deposition. The changes allow audio-visual depositions as a matter of right, making Massachusetts practice consistent with the approach in other jurisdictions and consistent with the Federal Rules of Civil Procedure. The amendments recognize the advantages of audio-visual depositions in addition to written transcripts of depositions.

Rule 30A(a). Rule 30A(a) allows a party as a matter of right to record a deposition by stenographic and audio-visual means. The party who chooses to have testimony recorded by stenographic and audio-visual means is required to bear the cost of the audio-visual recording. A party who requests a copy of the audio-visual recording is required to bear the cost of a copy of the recording.

Rule 30A(b). Prior to amendment, Rule 30A(b) precluded service of a notice of taking of an audio-visual deposition prior to six months after commencement of the action. The six-month provision has been deleted by virtue of the 2017 amendments.