

## **Proposed Revisions to Massachusetts Rules of Civil Procedure Rule 30 and 30A**

### **Rule 30. Depositions by 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 injunctive or declaratory relief;

(C) the deposition would result in more than 10 depositions being taken 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;

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

(E) 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 seven 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 thirty 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 Method.* 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) *Duration; Sanction; Motion to Terminate or Limit.*

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *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 who impedes, unreasonably delays, or frustrates the fair examination of the deponent.

(3) *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 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*.

(1) *Review; Statement of Changes*. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate*. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(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 30A(m) 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 six (6) months after the action has been commenced, and (ii) until thirty (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 fourteen (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 fourteen (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.



Rule 30A. Audiovisual Deposition and Audiovisual Evidence. [Repealed]