

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the eleventh day of July, in the year two thousand and seventeen:

present,

<u>HON. RALPH D. GANTS</u>)	Chief Justice
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<u>HON. BARBARA A. LENK</u>)	
)	
<u>HON. GERALDINE S. HINES</u>)	Justices
)	
<u>HON. FRANK M. GAZIANO</u>)	
)	
<u>HON. DAVID A. LOWY</u>)	
)	
<u>HON. KIMBERLY S. BUDD</u>)	
)	
<u>HON. ELSPETH B. CYPHER</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 deleting the current Rule 30(b)(4) and
 inserting the new Rule 30(b)(4), attached hereto.

By deleting the current Rule 30(e) and inserting
the new Rule 30(e), attached hereto.

By deleting the current Rule 30(f) and inserting
the new Rule 30(f), attached hereto.

Rule 30A By deleting the current Rule 30A and inserting the
 new Rule 30A, attached hereto.

The amendments accomplished by this order shall take effect on September 1, 2017.

ORDERED:

<u>HON. RALPH D. GANTS</u>)	Chief Justice
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<u>HON. BARBARA A. LENK</u>)	
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<u>HON. GERALDINE S. HINES</u>)	Justices
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<u>HON. FRANK M. GAZIANO</u>)	
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<u>HON. KIMBERLY S. BUDD</u>)	
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<u>HON. ELSPETH B. CYPHER</u>)	

Mass. R. Civ. P. 30 Depositions Upon Oral Examination

Rule 30(b)(4) Any oral deposition may be recorded by (i) stenographic or (ii) stenographic and audio-visual means. If the deposition is recorded by stenographic and audio-visual means, the parties shall comply with the provisions of Mass.R.Civ.P. 30 and 30A. 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. Except as otherwise provided by this rule, the rules governing the practice and procedure in depositions and discovery shall apply. The party choosing to have the testimony recorded by stenographic and audio-visual means shall bear the entire cost of the audio-visual recording, except that each party shall bear the cost for a copy of the audio-visual recording and the stenographic record. By leave of court upon motion with notice and an opportunity to be heard in opposition, or by stipulation in writing of all parties, a party taking an oral deposition may have the testimony recorded by other than stenographic or stenographic and audio-visual means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means. In any event, however, where testimony is to be recorded by audio-visual means, the provisions of Rule 30A shall apply.

Mass. R. Civ. P. 30

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition transcript and any audio-visual 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 is not signed by the witness within 30 days of its submission to him, 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 holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

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

(1) The officer shall certify on the deposition transcript that the witness was duly sworn by him and that the deposition transcript is a true record of the testimony given by the witness. Unless otherwise ordered by the court generally or in a specific case or stipulated by the parties, he shall then securely seal the deposition transcript in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly deliver or send it to the party taking the deposition.

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 the deposition transcript and may be inspected and copied by any party, except that if the person producing the material desires to retain them he may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he 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 to 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 transcript to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its receipt to all other parties.

Mass. R. Civ. P. 30A: Audiovisual Depositions & Audiovisual Evidence

(a) Authorization of Audio-Visual Depositions. Any oral deposition may be recorded by stenographic and audio-visual means by complying with the provisions of this rule. Except as otherwise provided by this rule, the rules governing the practice and procedure in depositions and discovery shall apply. At the taking of any such deposition, unless the parties otherwise stipulate, or the court for good cause otherwise orders, there shall also be prepared a simultaneous stenographic record of the deposition. The party choosing to have the testimony recorded by audio-visual means shall bear the entire cost of the audio-visual recording, except that each party shall bear the cost for a copy of the audio-visual recording and the stenographic record .

(b) Notice. Every notice for the taking of an audio-visual deposition and the subpoena for attendance at that deposition shall state that it is to be recorded by audio-visual means and the name and address of the person whose deposition is to be taken. If the operator is an employee of the attorney choosing the audio-visual recording, the notice shall so indicate.

(c) Procedure. The party taking the audio-visual deposition shall be responsible for assuring that the necessary equipment for making an audio-visual recording of the deposition is present at the time the deposition is taken.

The following procedure shall be observed in recording an audio-visual deposition:

(1) Opening of Deposition. The deposition shall begin with an oral or written statement on camera which includes:

- (i)** the operator's name and business address;
- (ii)** the name and address of the operator's employer;
- (iii)** the date, time and place of the deposition;
- (iv)** the caption of the case;
- (v)** the name of the witness-deponent;
- (vi)** the name of the party on whose behalf the deposition is being taken; and

(vii) any stipulation by the parties.

The opening statement, if oral, shall be made by the operator, unless counsel agree that one of counsel will make the statement.

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

(3) Oath. The officer before whom the deposition is taken shall then identify himself and swear or affirm the witness on camera.

(4) 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.

(5) Closing of Deposition. At the conclusion of the deposition, a statement shall be made on camera that the deposition is concluded. A statement may be made on camera setting forth any stipulation made by counsel concerning the custody of the audio-visual recording and exhibits and other pertinent matters.

(6) 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.

(7) Objections. An objection shall be made as in the case of depositions taken solely by stenographic means.

(8) Interruption of Recording. No party shall be entitled to cause the operator to interrupt or halt the recording of the audio-visual deposition without the assent of all other parties present.

(9) Submission to Witness; Changes; Signing. Unless the parties have stipulated that a simultaneous stenographic record of the deposition not be prepared, the provisions of Rule 30(e) shall apply to the stenographic record of the deposition. **(10) Certification.** The operator before whom the audio-visual deposition is taken shall attach to the original audio-visual recording a certificate

stating that the audio-visual recording is a true record of the testimony given by the witness.

(d) Recording Officer; Use of Camera; Copies. The operator before whom an audio-visual deposition is taken shall be subject to the provisions enumerated in Rule 28(a)-(c).

During the taking of the audio-visual deposition, the operator shall assure that the audio-visual 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 operator use, or permit the use of, audio-visual 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 operator 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.

Upon the request of any of the parties, the officer shall provide, at the cost of the party making the request, a copy of the deposition transcript in the form of an audio-visual recording or a written transcription.

(e) Custody; Filing; Notice of Filing. Unless the parties have otherwise stipulated, the officer shall take custody of each recording unit upon its completion and shall retain custody of all completed units throughout the deposition. When a deposition is to be completed on another day, the officer shall also take custody of any uncompleted recording unit during the interval.

(f) Inspection and Release of Audio-Visual Recordings. Except upon order of the court and upon such terms as may be provided, the audio-visual 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. The clerk may release the audio-visual recording to the operator taking the deposition, without an order of court, for the purpose of preparing a copy at the request of a party as provided in subdivisions (a) and (d) of this rule.

(g) Rulings on Objections; Editing of Recording. If any party has any objections to the audio-visual deposition which would otherwise be made at trial, pursuant to Rule 32(b) , such objections shall if practicable, be submitted to the trial judge prior to commencement of the trial or hearing for the purpose of obtaining rulings on such objections. An audio copy of the sound track or the transcript may be submitted in lieu of the audio-visual recording for this purpose. For the purpose of ruling on the objections, the trial judge may view the entire audio-visual recording, or view only those parts of the audio-visual recording pertinent to the objections made, or he may listen to an audio recording submitted in lieu of the audio-visual recording, or he may read the transcript. 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 audio-visual deposition, with notice to all parties of his rulings and of his instructions as to editing. The editing shall reflect the rulings of the trial judge and shall then remove all references to the objections. After making a copy of the audio-visual recording, the officer shall cause said copy to be edited in accordance with the court's instructions. He shall then cause both the original audio-visual recording and the edited version thereof, each clearly identified, to be returned to the trial judge for use during the trial or hearing. The original audio-visual recording shall be preserved intact and unaltered.

(h) Transcribing of Audio Portion; Marking for Identification. At a trial or hearing, that part of the audio portion of an audio-visual 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 audio-visual recording and the edited version shall be marked for identification.

(i) Use of Audio-Visual Deposition and Responsibility for Assuring Necessary Equipment at Time of Use. An audio-visual 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 audio-visual deposition for any purpose shall be responsible for assuring that the necessary equipment for playing the audio-visual recording back is available when the audio-visual deposition is to be used. When an audio-visual deposition is used during a hearing, a trial, or any other court proceeding, the party first using such audio-visual deposition in whole or in part

shall assure the availability of the same or comparable audio-video playback equipment to any other party for such other party's use in further showing such audio-visual deposition during the hearing, the trial, or other court proceeding or at any rehearing, recess, or continuation thereof.

(j) Discrepancy Between Audio-Visual Recording and Stenographic

Transcript. Upon the claim of a party that a discrepancy exists between the audio-visual recording and the stenographic transcript, the trial judge shall determine: (i) whether such discrepancy reasonably appears; and (ii) whether the relevant part of the audio-visual recording is intelligible. If the relevant part of the audio-visual recording is not intelligible, the stenographic transcript controls. If the relevant part of the audio-visual recording is intelligible and the trial judge rules that a discrepancy reasonably appears, the jury, in a jury action, shall determine from the audio-visual recording the deponent's testimony. The trial judge, in his discretion, may permit the jury to be aided in its determination by the stenographic transcript.

(k) Evidence by Audio-Visual Recording.

(1) Authorization of Audio-Visual 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 motion, the court may order, 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 audio-visual means. The provisions of Rule 30A shall govern such audio-visual recordings.

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

(3) Objections. Before such audio-visual recording is admitted at trial, the trial judge shall rule upon any objection to any portion thereof and the recording shall be edited to reflect the rulings. The objections shall be presented to the trial

judge and the editing to reflect the rulings shall be accomplished, each in accordance with the provisions of Rule 30A(g).

(4) Part of the Record; Not an Exhibit. Any portion of the audio-visual recording so introduced shall be part of the record, and subject to the provisions of Rule 30A(h), but not an exhibit.

(l) 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) .

(m) Audio-Visual 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 audio-visual means for the purpose of its being used as evidence at trial in lieu of oral testimony. Such depositions shall be known as "audio-visual expert witness depositions for trial." 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 audio-visual 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 audio-visual expert witness deposition for trial, in accordance with Rule 26(b)(4)(A)(ii) .

(3) Notice; Opposition. In addition to the requirements of rule 30A(b), every notice for the taking of an audio-visual expert witness deposition for trial shall state that it is to be recorded by audio-visual 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 audio-visual 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 audio-visual expert witness deposition for trial, if such time is less than fourteen (14) days from receipt of the notice. The audio-visual expert witness deposition shall not occur until the court rules on the motion opposing the deposition.

(4) Ruling on Objections; Editing of Recording. When an audio-visual 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 audio-visual expert witness deposition for trial, or has any objections to such deposition which would otherwise be made at trial, pursuant to Rule 32(b) , such objections shall be filed with the trial judge or a motion judge, if the trial judge has not yet been designated, no later than twenty-one (21) days before the commencement of the trial. Objections not so submitted shall be deemed waived, except to the extent that events at the trial, which could not have reasonably been foreseen by the objecting party, necessitate an objection at trial. The nonobjecting party shall file a response to the submissions by the objecting party within fourteen (14) days of the receipt of the objecting party's submissions. Failure to respond to an objection shall constitute a waiver with respect thereto. The party making the objection shall be responsible for providing the judge with a stenographic record of the deposition, unless it is already on file at the court, and, if the judge requests, with the audio-visual recording or an audio copy of the sound track. For the purpose of ruling on the objections, the judge may utilize the entire stenographic record, audio-visual recording, or audio recording, or those portions that are pertinent to the objections made. The judge shall rule on the objections prior to the commencement of trial or hearing and give notice to all parties of the rulings and instructions as to editing. The editing shall reflect the rulings of the judge and shall remove all references to the objections. The operator shall cause a copy of the audio-visual recording to be edited in accordance with the court's instructions. The operator shall then cause copies of the edited version thereof to

be delivered to the parties who ordered them, and to the court, if so instructed by the court. The stenographic record, and the original audio-visual recording and the edited version thereof, if any, shall be preserved intact and unaltered.

(5) Use at Trial. Unless the court upon motion orders otherwise, an audio-visual 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.

(6) Applicability of Rule 30A(a)-(l). Except as altered by Rule 30(A)(m), the provisions of rule 30A(a)-(l) shall apply to audio-visual expert witness depositions for trial.

MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

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 30(b). Rule 30(b)(4) allows a party as a matter of right to record a deposition by stenographic and audio-visual means. Where a deposition is recorded by stenographic and audio-visual means, the parties must comply with both Rule 30 and Rule 30A. 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 30(e). The recording of an audio-visual deposition must be submitted to the witness for examination together with the transcript of the deposition, unless waived by the witness and the parties. This provides the deponent with the opportunity to view the video before signing the written transcript of the deposition. The rule does not set forth details regarding the manner of submission or location for the viewing of an audio-visual deposition, leaving these matters to be worked out by the parties.