

## WHEN DEPOSITION TESTIMONY IS READ OR SHOWN AT TRIAL

*<Note: The following limiting instructions may be appropriate during a civil trial if a party sought and obtained a limiting instruction at the time that prior deposition testimony was offered into evidence. If deposition testimony is used without any such request, then it is in evidence for all purposes. See generally Commonwealth v. Roberts, 433 Mass. 45, 48 (2000), which is discussed in the Note to Mass. G. Evid. § 105.>*

You heard some questions related to depositions in this case. As I explained, before a case is ready for trial, the attorneys were able to take the testimony of parties and witnesses under oath, and a transcript was created. At trial, the attorneys were allowed to ask questions of someone about their deposition testimony <or read portions of it to you>.

*<Optional Instruction if deponent was a **party**>*

If you heard deposition testimony of one of the **parties** in this case, then you may consider it to the same extent as any of the other testimony presented, just as if the witness testified here in person.<sup>1</sup>

*<If deponent was **not a party** and there was **no other applicable rule**, such as unavailability, testimony taken pursuant to Mass. R. Civ. P. 30(b)(6), or Mass. R. Civ. P. 30A(m)>*

If the deposition testimony came from someone who is **not** a party to this case – meaning someone **other than** PLF, PLF, DFT or DFT – then you may consider it only to decide whether the prior statement calls into question the believability of that witness.<sup>2</sup> It is up to you to decide how significant any difference is between the prior statement at deposition and the testimony in court, as you consider the believability of a witness.

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<sup>1</sup> Mass. G. Evid. § 801(d)(2). See also Notes to Mass. G. Evid. § 801 ("Use of Depositions at Trial).

<sup>2</sup> Mass. G. Evid. § 801(d)(1). See also Notes to Mass. G. Evid. § 801 ("Use of Depositions at Trial).

*<If both categories of depositions were used at trial – depositions of an adverse party as well as non-party/third-party depositions transcripts>*

You may consider deposition testimony in two different ways, depending on whether or not the person who gave the deposition testimony is a party to this case (i.e., one of the plaintiffs or one of the defendants).

*<Insert both instructions above here>*

*<Deposition taken pursuant to Mass. R. Civ. P. 30(b)(6)>*

Corporations may designate one or more people to answer deposition questions on various topics that are specified in advance., If the person testifying on behalf of the corporation answers questions on those topics, then you must consider those answers the corporation's testimony on that subject.<sup>3</sup> This means that you should give it the same weight as if the corporation testified to that information at trial.

*<Deposition of a third-party witness who is deemed unavailable>*

Sometimes a witness who testified before trial at a deposition is now unavailable to testify at trial for some reason., In this case, although [*insert witness name*] was unavailable to testify at trial, all parties had the right to question or cross-examine him/her/them at his/her/their deposition., Therefore, you may consider all portions of that deposition testimony that were <read to you/shown to you by videotape> and give it the same weight as if the person testified here in person.<sup>4</sup>

*<Deposition of a treating physician or expert witness taken pursuant to Mass. R. Civ. P. 30A(m)>*

There are special rules that apply to doctors [or expert witnesses] who give depositions that are intended to be used at trial in place of their live testimony.<sup>5</sup> In this case, you saw the audio-visual deposition of one or more

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<sup>3</sup> Mass. R. Civ. P. 30(b)(6). See also Notes to Mass. G. Evid. § 801 ("Use of Depositions at Trial).

<sup>4</sup> Mass. R. Civ. P. 32(a)(4). See also Notes to Mass. G. Evid. § 801 ("Use of Depositions at Trial).

<sup>5</sup> Mass. R. Civ. P. 30A(m). See also Notes to Mass. G. Evid. § 801 ("Use of Depositions at Trial).

doctors [or expert witnesses] You must consider their testimony to the same extent as if they had testified here in person, and you must not give it any more or any less weight simply because the person testified by audiovisual means.