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January 2004

# THE LAWYER DOTH PROTEST TOO MUCH, METHINKS: RECONSIDERING THE CONTEMPORANEOUS OBJECTION REQUIREMENT IN DEPOSITIONS

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## Recommended Citation

E. Stewart Moritz, "The Lawyer Doth Protest Too Much, Methinks: Reconsidering the Contemporaneous Objection Requirement in Depositions," 72 UNIVERSITY OF CINCINNATI LAW REVIEW 1353 (2004).

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**THE LAWYER DOTH PROTEST TOO MUCH, METHINKS:  
RECONSIDERING THE CONTEMPORANEOUS  
OBJECTION  
REQUIREMENT IN DEPOSITIONS**

*E. Stewart Moritz\**

I. INTRODUCTION

The time has come to eliminate the contemporaneous objection requirement for depositions.

From the original 1938 framing of the Federal Rules of Civil Procedure (Rules) to the present, no one has recognized that the theory behind the contemporaneous objection rule in depositions, as drawn from pre-Rules equity practice, does not match the function of depositions in our post-Rules system of open discovery. Pre-Rules depositions in the federal courts were exclusively testimony-preservation devices, and never discovery tools, and the common law and statutory procedural rules for pre-Rules depositions, including the contemporaneous objection rule, reflected this use.<sup>1</sup> But when the original Federal Rules of Civil Procedure converted depositions into primarily fact-discovery devices,<sup>2</sup> the older procedural rules were incorporated into the new Rules, nearly wholesale, and without consideration—and there they remain.

In the last ten years, perceived problems with deposition practice have resulted in a number of modifications to the discovery rules, as well as other proposals to curb aggressive use of objections in depositions.<sup>3</sup> Before 1993, in the federal civil system, the Rules did not specify the manner in which deposition objections were to be made, which led to a chorus of commentators decrying the prevalence of “speaking” and “coaching” objections.<sup>4</sup> Revisions in 1993 to the Federal Rules of Civil Procedure for the first time required deposition objections to be made “concisely and in a non-argumentative and non-suggestive manner.”<sup>5</sup> In

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1. *See infra* Part II.A.
2. *See infra* Part II.C.
3. *See generally infra* Part IV.
4. *See infra* Part IV.C.
5. FED. R. CIV. P. 32(d).

1999, the Texas state courts went so far as to limit all objections to deposition questions to two words, either “Objection, leading” or “Objection, form.”<sup>6</sup>

However, all of these modifications and proposals share the pathology of the original Rules: they fail to recognize the theoretical disconnect between antiquated testimony-preservation-focused procedural rules and the now-primary use of depositions as fact-discovery devices. Thus, the proposals have focused on treating “discovery abuse,” rather than addressing the real problem, which is a fundamental misconception of the proper, less-adversarial role of attorneys in depositions. Rather than issue prescriptions that treat the symptoms, surgical elimination of the contemporaneous objection rule will address the disease, and finally bring deposition practice into line with the theory of open discovery upon which its modern incarnation is based.

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A young civil litigator quickly learns that an objection to a question posed in a deposition usually will be waived unless the objection is raised prior to the time that the witness responds.<sup>7</sup> More colloquially, the rule of the deposition objection is simply “Use it, or lose it.”

Shortly after discovering this “contemporaneous objection rule,”<sup>8</sup> the new lawyer realizes, or is taught, that objections can be, and often are, used for more than ensuring the clarity of deposition questions. Rather, as part of the “hide the ball” mentality that many believe pervades modern civil litigation, deposition objections become another tool to be used in keeping information from the opposing party to the case. A basic admonition during any preparation of a witness for deposition follows the lines of: “Pause before you answer any question, in order to give me time to object. If I object, be extra careful in answering the question, which may be tricky or get at a particularly sensitive area.”<sup>9</sup>

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6. See *infra* Part V.A.

7. FED. R. CIV. P. 32(d).

8. The rule requiring objections to be made during a deposition upon penalty of waiver is the pretrial discovery analogue of the “contemporaneous objection rule” of trial practice, which holds that objections not made when grounds originally arise at trial may not be later raised on appeal. In this Article, I adopt the trial term for the rule, although I am only concerned with its use in the deposition context.

9. See, e.g., Kent Sinclair, *Sinclair on Federal Civil Practice* § 10.23 (PLI 2001) (“The witness should also be told about objections, and instructed not to answer questions so rapidly that there is not time to raise an objection.”); Laura W. Smalley, *Automobile Airbag Malfunction Litigation: Practice and Strategy*, 83 AM. JUR. *Trials* 1 § 68-69, at 102 (2003) (“Witnesses should be instructed to pause briefly after each question asked, wait for an objection, and seek clarification if the question is not clear.”). Indeed, many an attorney in litigation practice has a “war story” involving reminders administered to witness shin by lawyer foot. I include this “non-academic” example in the introductory section of this Article to make a point: something that is easily understood by a young litigator seems to have escaped the consideration of the framers of the Federal Rules of Civil Procedure. I argue here that the theory underlying the current function of depositions—which are primarily discovery, rather

The theory behind the imposition of the contemporaneous objection rule in depositions is not self-evident. The reasons that might be advanced for the rule are similar to those made for the contemporaneous objection rule in the trial context. For example, the contemporaneous objection rule in either the trial or deposition context seeks to: (1) preserve court resources and promote finality by eliminating from further consideration those objections that are not important enough to be made at the time they are raised; (2) allow the examining attorney to correct mistakes, thereby encouraging the discovery and use of all relevant facts and decreasing “trial by ambush” and later suppression of information “on technicalities;” (3) prevent an attorney who is unprepared or unaware at the time an error is made from profiting from his or her own failure by closely reading the examination transcript and raising the error subsequently; and (4) give primacy to the live event, where context can be more easily judged, over later second-guessing using only dry textual sources.<sup>10</sup> But in actual fact, the incorporation of the contemporaneous objection rule into the Federal Rules of Civil Procedure is not based on any reason; rather, it is an historical anomaly.

The contemporaneous objection rule for civil depositions comes directly from original Rule 32 of the Federal Rules of Civil Procedure, which took effect September 1, 1938.<sup>11</sup> The rule is now found in Rule 32(d), which mirrors the original language and in pertinent part states that

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.<sup>12</sup>

The perfunctory 1937 Advisory Committee note to Rule 32 points out only that “[t]his rule is in accordance with common practice.”<sup>13</sup>

As this Article details, however, the “common” deposition practice to which the Advisory Committee text refers was not particularly common

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than testimony-preservation tools—requires a different role for witness counsel.

10. *See, e.g.,* Bah. Agric. Indus. v. Riley Stoker Corp., 526 F.2d 1174, 1181 (6th Cir. 1975) (cited in notes to USCS Rule 32) (“The focus of [Rule 32] is on the necessity of making the objection at a point . . . where it will be of some value in curing the alleged error in the deposition. . . . It is important that objections be made during the process of taking the deposition, so that the deposition retains some use at . . . trial; otherwise counsel would be encouraged to wait until trial before making any objections, with the hope that the testimony, although relevant, would be excluded altogether because of the manner in which it was elicited.”).

11. FED. R. CIV. P. 86(a).

12. FED. R. CIV. P. 32(d)(3)(B). Objections that might be cured, and thus must be raised, most typically involve the form of the question—for example, that it is leading, ambiguous, compound, vague, or argumentative.

13. FED. R. CIV. P. 32 advisory committee’s note (1937).

at the time. Nor was pre-1938 practice at all similar to current deposition practice in federal civil cases. Because pretrial practice as it exists today is so far removed from the historical analogues on which it was based, and from any vision then of what pretrial practice might become, we have good reason to reexamine the basis and usefulness of the contemporaneous objection rule.

This Article begins by tracing the history of deposition procedure in the United States and showing the sea change that came with enactment of the Federal Rules in 1938, turning depositions into a front-line discovery tool. The Article shows that, despite this fundamental shift, the procedural rules for lawyer and witness conduct during depositions did not change, but rather followed the traditional rules more suited to trial testimony and the original and exclusive use of depositions as a means of preserving proof offered by witnesses who might become unavailable at trial. The Article then considers whether the early Rules' stated theory of broad discovery should have led to different procedural rules for the conduct of depositions, and compares depositions to other fact-finding fora, including grand juries, congressional and administrative agency hearings, and courts in the German civil-law system. In particular, the Article explores why many of these fora have significantly different rules for lawyer attendance and conduct in witness interviews and investigative hearings—where fact-gathering, rather than evidence preservation, is the acknowledged goal of the proceeding.

Finally, the Article makes a proposal for modifying the rules of deposition administration by eliminating the “contemporaneous obstruction rule” (as the contemporaneous objection rule might better be known), based on the frank recognition that in an age when only one in twenty federal cases is disposed of by trial, depositions are almost exclusively a discovery tool. Although the proposal is not offered to directly ameliorate abusive deposition conduct by lawyers, it might. In addition, it will help practitioners reconstruct their roles in the discovery process to advance the open discovery system upon which the Rules originally were predicated, in a way that does not contravene the “proportional discovery” trend of recent Rules revisions.

## II. EVOLUTION OF DEPOSITION PROCEDURE IN THE FEDERAL COURTS<sup>14</sup>

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14. The author adopts the academician's typical focus on federal, rather than state, procedural rules, primarily for the benefits gained from examining a uniform system but also with the knowledge that it is far more difficult to coherently trace the labyrinthine developments of multi-state civil procedure. Happily, as I explore below in Part II.B, in the case of deposition rules, innovative state discovery experiments of the nineteenth century were for the most part adopted in the Federal Rules of 1938, and most states have since

From the passage of the first Judiciary Act in 1789<sup>15</sup> to the enactment of the Federal Rules of Civil Procedure in 1938, provisions governing civil depositions in the federal courts remained essentially unchanged. Depositions were very rarely used, and then only to preserve testimony in certain narrow circumstances.<sup>16</sup>

With the coming of the Rules, however, deposition practice changed radically. Depositions became an essential tool—perhaps *the* essential tool—of pre-trial discovery.<sup>17</sup> The new deposition procedure far outstripped its traditional antecedents in availability, ease of use, and breadth of inquiry.

Despite the Rules' radical reconception of the deposition as a fact-discovery device—and in stark contrast to fundamental changes in the rules governing when depositions could be taken and how depositions subsequently might be used—the basic rules for the *administration* of the deposition proceeding itself did not change from pre-1938 practice.<sup>18</sup> Instead, the Rules incorporated then-existing statutory and common-law rules of deposition conduct, with little apparent consideration<sup>19</sup> that such rules might be more suited to the original and exclusive use of depositions—as a means of preserving proof offered by witnesses who might become unavailable at trial—than to the use of depositions as a discovery device.

Many of these traditional deposition conduct rules—for example, the swearing of the witness prior to taking testimony—seem to prefer neither

revised their discovery (and hence deposition) rules to conform with federal practice. See Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 35 (1988). Thus, except for the timing of the adoption of specific rules, which concededly has varied widely, state and federal deposition practices have largely tracked each other in their evolution.

On the importance, generally, of the study of pre-Rules history to the understanding of current procedural issues, see Linda S. Mullenix, *The Influence of History on Procedure: Volumes of Logic, Scant Pages of History*, 50 OHIO ST. L.J. 803, 803 (1989) (a “rumination on the importance of being historical for proceduralists”).

15. 1st Cong., Sess. 1, Ch. 20, § 30 (1789), 1 Stat. 88.

16. Pre-Rules federal deposition procedures are discussed in detail immediately *infra*.

17. Professor Edson R. Sunderland, a member of the first Advisory Committee on Civil Rules of the Judicial Conference (the “Committee” or “Advisory Committee”), and in that capacity the drafter of Rules 26 to 37 of the 1938 Federal Rules of Civil Procedure, set out his view of the importance of deposition discovery five years before the Rules' promulgation: “if discovery is to involve a thorough inquiry into the vital and highly controversial phases of the case, resort must be had to an oral examination.” Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 874-77 (1933).

18. One commentator at the time of the Rules' passage opined, “The new procedure introduces nothing new in the way of ‘procedural conceptions’ insofar as concerns the actual taking of depositions.” STANLEY F. BREWSTER, FEDERAL PROCEDURE § 607, at 346.

19. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 692 (1998) (“What is perhaps most surprising in the public debate among those who most vigorously fought for and against the Enabling Act is the insignificance of discovery issues.”). See generally *id.*

fact-gathering nor testimony-preserving,<sup>20</sup> which are the twin aims of post-Rules' deposition procedure.<sup>21</sup> However, other conduct rules may not be so neutral, at least in application. The contemporaneous objection rule, in particular, unquestionably favors the formality of testimony preservation over the practicality of fact gathering—the possibility, not to mention the requirement, of making non-privilege objections during a witness's testimony allows lawyers defending depositions to interrupt the flow of questioning and shape the witness's responses.<sup>22</sup> The detailed review below of the background of the current deposition rules starts us on the path to reconsidering the contemporaneous objection rule.

### A. Pre-Rules Procedure

Prior to the 1938 adoption of the Federal Rules of Civil Procedure, there was no comprehensive federal civil procedure. Instead, through the years, Congress adopted a variety of statutes that set forth the basic procedural rules for the federal courts.<sup>23</sup> Where Congress did not speak on a procedural issue, the federal courts were directed to follow local state rules.<sup>24</sup>

#### 1. Availability and Types of Depositions

Under this pre-Rules regime, deposition discovery was essentially unavailable in the federal system.<sup>25</sup> Depositions were allowed at law and

20. Swearing the witness largely provides a formality that reminds the witness of the legal nature of the proceeding. While derived directly from the deposition's testimony-preserving history and formally serving the preservation function, swearing does not enhance preservation at the expense of discovery. Indeed, reminding the witness of the formality of the proceeding should aid discovery for the same reasons that it is thought to aid the preservation of accurate testimony.

21. See FED. R. CIV. P. 26(a) (1938) (modified 1970) (stating that testimony of any person may be taken "for the purpose of discovery or for use as evidence in the action or for both purposes").

22. Cf. FED. R. CIV. P. 26 advisory committee's note (1983) (finding it unsurprising, given the "adversary tradition and the current discovery Rules," that "many opportunities, if not incentives" for discovery abuse are afforded by the Rules, and that the spirit of the Rules is violated when "advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by . . . unnecessary use of defensive weapons or evasive responses").

23. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1436-37 (1984) ("Even in the aggregate, however, the federal statutes did not provide complete federal rules of civil or criminal procedure. Instead, Congress directed the federal courts to follow local procedure and practice on most matters not addressed by specific federal legislation. Uniform federal rules of procedure existed only for cases in admiralty and equity, where conformity to state practice was not feasible. Pursuant to express statutory authority the Supreme Court adopted rules of equity in 1822 and rules of admiralty in 1844.").

24. *Id.* at 1437 & n.21.

25. Actually, not just deposition discovery, but all forms of discovery were unavailable on the law, as opposed to equity, side of the federal system. See Geoffrey C. Hazard, Jr., *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 633 (1988) (citation omitted) ("So far as pretrial discovery is

equity, in a few narrowly circumscribed situations virtually unchanged since the Judiciary Act of 1789,<sup>26</sup> but each of these early deposition forms were intended to allow parties, or prospective parties, to *preserve testimony* of potentially unavailable witnesses, rather than to allow litigants to *discover information* about their own or the opposing party's case.<sup>27</sup> Under the pre-Rules statutory procedural framework, the "mode of proof" in federal trial of civil actions was "by oral testimony and examination of witnesses in open court," except as otherwise provided by statute.<sup>28</sup> Depositions existed only as an exception to this rule requiring live-witness proof.

Four basic kinds of testimony-preservation depositions were statutorily authorized in pre-Rules federal law and equity courts:<sup>29</sup> depositions *de bene esse*, depositions under *dedimus potestatem*, depositions *in perpetuam rei memoriam*, and depositions "in the mode prescribed by state laws."<sup>30</sup> While these different deposition forms each evolved separately from English

concerned, the old regime's approach depended on whether the case was at law or was in equity. The policy of the common law concerning discovery, until statutory reforms beginning in the early 20th Century, was very clear: There was none. Hence, a party could prosecute an action at law only on the basis of what evidence she might have 'in the file' or which she could obtain by self-help investigation." See also Dan Downey & Lori Massey, *Discoverectomy II: The End of "Gotcha" Litigation*, 13 REV. LITIG. 183, 185 n.7 (1994) (quoting 1 WALTER JORDAN, MODERN TEXAS DISCOVERY § 1.01, at 2 (1974)) ("Before 1941, there were neither rules of civil procedure nor statutes specifically designed to provide litigants with the means of discovering pertinent information in the possession of their adversary or third parties.").

26. Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117, 117 n.1 (1949); Note, *Foreign Depositions Practice in American Civil Suits—A Judicial Stepchild*, 96 U. PA. L. REV. 241, 244 (1947) [hereinafter *Foreign Depositions*].

27. James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1181-83 (1938) ("The [pre-Rules] deposition procedure was so limited that it was not available to any appreciable extent for [discovery]."); *id.* at 1190. See also 3 GUSTAVUS OHLINGER, JURISDICTION AND PROCEDURE OF THE COURTS OF THE UNITED STATES IN CIVIL ACTIONS 415 (rev. ed. 1964) (depositions limited to obtaining evidence, as distinguished from discovery) (collecting cases).

28. Rev. Stat. § 861 (1875). The 1912 Equity Rules similarly required testimony to generally be taken orally in open court, FED. EQ. R. 46 (1912), 226 U.S. 631, 661 (1912), as did the Admiralty Rules. See P.S. DYER-SMITH, FEDERAL EXAMINATIONS BEFORE TRIAL AND DEPOSITION PRACTICE AT HOME AND ABROAD § 695, at 447 (1939).

29. The general deposition statutes, discussed *infra*, applied at common law, and, except for certain minor provisions concerning timing of the deposition, in equity proceedings. 3 GEORGE FOSTER LONGSDORF, CYCLOPEDIA OF FEDERAL PROCEDURE: CIVIL AND CRIMINAL §§ 985, 986, at 928-30 (1928); *Audiffren Refrigerating Mach. Co. v. Gen. Elec. Co.*, 245 F. 783 (D. N.J. 1917). See, e.g., FED. EQ. R. 54 (1912), 226 U.S. 631, 664 (1912) (providing that depositions "may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes"), replacing former FED. EQ. R. 68 (1842), 42 U.S. xli, lxi (1842). The Equity Rules also provided for non-statutory depositions, for "good and exceptional cause," see FED. EQ. R. 47 (1912) (when allowed by statute or for cause, depositions of witnesses allowed), replacing former FED. EQ. R. 67 (1842), but they were of the same forms as the statutory depositions, the only difference being that certain courts in equity were more flexible in allowing the depositions if both parties agreed. See Subrin, *supra* note 19, at 699-700. Even if allowed more frequently by some courts, Equity Rule 47 depositions were for preserving proof, not obtaining discovery. *Id.*

30. 2 LONGSDORF, *supra* note 29, § 544, at 746. Letters rogatory were also available to take testimony from witnesses abroad, *id.* at 746-47, but this transnational deposition device, still available in certain situations, is beyond the scope of this Article.



equity practice, in federal court practice of the early twentieth century they were in many ways similar in application.

*a. Depositions De Bene Esse*

The most common deposition device was the *de bene esse* deposition, or deposition by notice, available where either party was concerned that a given witness would not be available at trial.<sup>31</sup> The applicable federal statute listed the several specific instances, after the facts of a case were at issue, in which the *de bene esse* would obtain: when a witness, either a party to the case or a third party, lived or planned to travel more than 100 miles from the place of trial; was about to leave the United States; was bound on a voyage to sea; or was aged and infirm.<sup>32</sup> The *de bene esse* deposition did not require action by a court, but instead was initiated by the party proposing the deposition, by providing reasonable notice in writing to the opposing party or attorney. The deposition could be taken before one of the several types of neutral officers authorized by the statute,<sup>33</sup> and the subpoena power of the court was available to compel witness attendance.<sup>34</sup> If at the time of trial the judge or chancellor was not satisfied that the witness was absent or infirm, the deposition could not be used.<sup>35</sup>

*b. Depositions Under Dedimus Potestatem*

Depositions under *dedimus potestatem*, or by commission, unlike those *de bene esse*, required intervention of a court before they could be taken. For this reason, perhaps, the statutory grounds for taking a deposition under a *dedimus* were considerably less well-defined, allowing a commission to issue “[i]n any case where it is necessary, in order to prevent a failure or delay of justice.”<sup>36</sup> Nonetheless, in deciding when a *dedimus* was “neces-

31. *Foreign Depositions*, *supra* note 26, at 242. See also 2 LONGSDORF, *supra* note 29, § 534, at 747 (deposition *de bene esse* is one taken “conditionally or provisionally, where there is danger of losing the testimony of an important witness otherwise, but not to be used if he be alive and available at the trial”).

32. Rev. Stat. § 863 (1875), 28 U.S.C. § 639 (1934). For a comprehensive discussion of pre-Rules deposition practice, see generally 2 LONGSDORF, *supra* note 29, §§ 534–572, at 746–826.

33. 28 U.S.C. § 639 (1934) (specifying either a federal court judge or district court clerk, a state judge or chancellor, a city mayor or chief magistrate, or a notary public).

34. 2 LONGSDORF, *supra* note 29, § 544, at 764. A subpoena *duces tecum* could also be issued to require production of documents at the deposition, but required a court order and only applied to a narrow range of documents that could be said to be competent and material evidence in the case. *Id.* at 764–65; *United States v. Tilden*, 28 F. Cas. 174 (S.D.N.Y. 1879) (No. 16,522).

35. 28 U.S.C. § 641 (1934); *Whitford v. Clark County*, 119 U.S. 522 (1886).

36. Rev. Stat. § 866 (1875), 28 U.S.C. § 644 (1934). The *dedimus* was also available in equity. See 2 LONGSDORF, *supra* note 29, § 549, at 774; FED. EQ. R. 54 (1912).

sary,” courts generally looked to the same types of contingencies that conditioned the use of a *de bene esse*.<sup>37</sup>

Like a deposition by notice, a deposition by commission was not available prior to “the joining of issues” in a case, brought about by defendant’s filing of an answer to the complaint.<sup>38</sup> In addition, to receive a commission, a party needed to show that the witness was beyond the reach of the court’s process, that the testimony could not be taken pursuant to notice, and that the application was made in good faith and not merely for discovery purposes.<sup>39</sup> The main differences in depositions taken under notice or by commission, other than the greater discretion granted the trial court under the *dedimus* statute, were that a commission could be used to secure a deposition abroad, and that a deposition taken under a commission could be used at trial regardless of the availability of the witness.<sup>40</sup>

### c. Depositions In Perpetuum Rei Memoriam

Unlike either the *de bene esse* or *dedimus*, a deposition *in perpetuum rei memoriam* was available only *before* the accrual of a potential litigant’s right of action at law.<sup>41</sup> When it appeared that a witness would be unavailable to testify in a subsequently filed action, a separate action *in perpetuum* could be brought in equity to preserve the testimony,<sup>42</sup> such action to be

37. *Foreign Depositions*, *supra* note 26, at 242-43 & n.13 (“It would seem, therefore, that the difference between the grounds required for these two types of depositions lies in the greater discretion of the court in issuing a *dedimus*.”); Pike & Willis, *supra* note 27, at 1181.

38. 2 LONGSDORF, *supra* note 29, § 550, at 775 n.32.

39. Subrin, *supra* note 19, at 699.

40. *Foreign Depositions*, *supra* note 26, at 242-43. Indeed, the 1928 Longsdorf treatise has trouble distinguishing the uses of the devices at all. In one of the treatise’s more amusing, if not entirely helpful, passages, Longsdorf states: “In choosing whether to take depositions *de bene esse* or by commission, it should be remembered that the former method is in derogation of common law and therefore is construed accordingly, while the latter method has been pronounced cumbersome, dilatory and expensive.” 2 LONGSDORF, *supra* note 29, § 534, at 747. *But see* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 214, at 363-64 (Spencer W. Symons ed., 5th ed. 1941) (*dedimus* available where *de bene esse* did not apply because witness was outside the country).

41. The deposition *in perpetuum* is preserved in main part in Rule 27, which allows a prospective litigant to preserve testimony. FED. R. CIV. P. 27. Like the equity practice, Rule 27 is not intended to function as a discovery device, but instead requires that the petitioner set forth in some detail the substance of the testimony to be preserved. *See* 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 27.03 (2003) (“Insisting that a petitioner describe the testimony that is to be perpetuated deprives Rule 27 of practical utility as a general discovery device, thereby guarding against surrogate efforts to obtain discovery.”).

42. Rev. Stat. § 866 (1875), 28 U.S.C. § 644 (1934) (“any district court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuum rei memoriam*”). *See generally* 2 LONGSDORF, *supra* note 29, § 559, at 798-800. In addition, a federal court could admit into evidence “any deposition taken in *perpetuum rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof.” 28 U.S.C. § 645 (1934).

governed substantially by the practices of the English chancery courts.<sup>43</sup> The rarely-used device was allowed where a plaintiff was interested in certain subject matter, could not bring suit, and testimony of a certain witness might be lost if not taken promptly.<sup>44</sup>

*d. Depositions in the Mode Provided by State Law*

Finally, an 1892 federal statute provided that, in addition to the above-listed types of depositions, “it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held.”<sup>45</sup> While this language could have been interpreted to authorize broader grounds for taking depositions, and even the taking of party depositions as a matter of right and for discovery purposes, as was the rule in some states,<sup>46</sup> federal courts instead held that the act did not enlarge the *grounds* for taking depositions but merely permitted state *procedure* to be followed where the grounds for taking existed under the federal statutes.<sup>47</sup> Thus, for example, following state practice, a commission could be issued by a clerk (rather than the court) on notice to the opposite party, or a court could issue a *dedimus* where the circumstances would authorize a deposition *de bene esse* under the federal statutes.<sup>48</sup>

2. Unavailability of Depositions for Discovery

Under any of the prescribed types of pre-Rules federal depositions, the inquiry was strictly limited to preserving proof for trial, and not to be used as discovery.<sup>49</sup> The party taking the deposition could only seek testimony on allegations in that party’s own pleadings.<sup>50</sup> As explained by one pre-Rules commentator,

43. Pike & Willis, *supra* note 27, at 1183 (“usages” in statute refer to those of English chancery).

44. 2 LONGSDORF, *supra* note 29, § 559, at 798.

45. 27 Stat. 7, c. 14 (1892), 28 U.S.C. § 643 (1934). This “Act of March 9, 1892” was one of four nineteenth century acts that attempted “to simplify procedure by allowing or requiring local state practice to be followed in certain phases of actions in the federal courts.” *Foreign Depositions*, *supra* note 26, at 246. *See also* Rev. Stat. § 914 (1875) (“Conformity Act”); Rev. Stat. § 721 (1875), 28 U.S.C. § 725 (1940) (“Rules of Decision Act”); and Rev. Stat. § 858 (1875), 28 U.S.C. § 631 (1940) (“Competency of Witnesses Act”). For a good explanation of the conformity legislation, see DYER-SMITH, *supra* note 28, § 707, at 451.

46. *See* Pike & Willis, *supra* note 27, at 1185 (quite common in state law to allow deposition of party without showing of non-availability at trial; California use of party-deposition as discovery). *Id.* at 1189-90.

47. *Foreign Depositions*, *supra* note 26, at 247.

48. 2 LONGSDORF, *supra* note 29, § 558, at 798.

49. *See* 3 OHLINGER, *supra* note 27, at 415 (pre-Rules depositions were “limited to obtaining evidence,” and discovery depositions “never found [their] way into the procedure of the federal courts”) (collecting cases).

50. DYER-SMITH, *supra* note 28, § 731, at 465.

The pretense of taking a deposition cannot be employed merely to obtain an examination before trial of a witness whose deposition it is not intended to use. Nor can the examination be made infinite and boundless in its scope, as the statute only authorizes the taking of “testimony,” or such statements of the witness as are within the realm of evidence.<sup>51</sup>

While some *incidental* discovery might be obtained by deposition, the pre-1938 federal deposition statutes and rules “were not intended to produce information, in advance of the trial, but to insure the production of testimony, at the trial.”<sup>52</sup> Where a deposition, as applied for, was limited to a particular matter, it was within the trial court’s discretion to exclude testimony in the deposition as to other matters.<sup>53</sup>

### 3. Conduct of Depositions

Pre-Rules statutory provisions set forth few formalities for the administration of depositions. For a *de bene esse* deposition, the statutes specified only that the deposition be taken before a neutral officer,<sup>54</sup> that the witness be sworn to tell the truth and “carefully examined,” and that the testimony be reduced to writing and signed by the deponent.<sup>55</sup> As

51. 2 LONGSDORF, *supra* note 29, § 536, at 750-51 (citations omitted). See also *Ex parte Fisk*, 113 U.S. 713, 724 (1885) (“It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel to extract something which he may then use or not, as it suits his purpose.”); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 257 (1891) (federal court has no power to subject a party to discovery examination before trial); DYER-SMITH, *supra* note 28, § 713, at 453-54 (depositions not intended “to enable a party to ascertain in advance of trial what the testimony of a particular witness will be”) (collecting cases); *id.* § 727, at 464. At the time immediately prior to the passage of the Rules, of course, even written discovery, in the form of interrogatories and document requests propounded through a bill of discovery in equity, could only be directed towards information in support of the discoverer’s case and “could not be made in reference to matters relating solely to the ground of action or defense of the other party.” *Id.* § 718, at 456.

52. DYER-SMITH, *supra* note 28, § 976, at 574. See also *id.* § 879, at 528 (for depositions on commission, “the court will not sanction a merely inquisitorial proceeding,” as that procedure would not meet the central criterion for a *dedimus*—that the taking of the deposition was necessary in order to prevent a failure or delay of justice).

53. 2 LONGSDORF, *supra* note 29, § 566, at 818 (citing *Norma Mining Co. v. MacKay*, 241 F. 640 (9th Cir. 1917)).

54. “The deposition may be taken before any judge of any court of the United States, United States commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause.” 28 U.S.C. § 639 (1934).

55. 28 U.S.C. § 640 (1934). The full text reads:

Every person deposing as provided in section 639 of this title [the *de bene esse* provisions] shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer’s presence, and by no

detailed below, other important deposition conduct rules were left to common law.

Even the limited statutory rules for *de bene esse* depositions were not applicable directly to *dedimus* depositions.<sup>56</sup> Instead, under the *dedimus* statute, depositions on commission were to be taken simply “according to the common usage.” This standard applied to both the granting of the commission and the manner of taking the deposition under it.<sup>57</sup>

Finally, although authorized for eventual use in a court of law, depositions taken in equity to perpetuate testimony proceeded by statute “according to the usages of chancery.”<sup>58</sup> The usages of chancery were determined by reference to English equity practice and, later, to the 1912 Federal Equity Rules.<sup>59</sup>

With the few and limited statutory directives governing depositions at law in the pre-Rules system, a common law of rules governing the conduct

other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent.

*Id.* See also FED. EQ. R. 51 (1912) (Evidence Taken Before Examiners, Etc.).

56. 28 U.S.C. § 644, Rev. Stat. § 866 (specifying that provisions of *de bene esse* sections of the code do not apply to depositions taken under the *dedimus* sections).

57. DYER-SMITH, *supra* note 28, § 882, at 529. In the early twentieth century, “common usage” for *dedimus* depositions was generally measured from 1874, when the last version of the *dedimus* statute had been passed. *But see* 2 MOORE ET AL., *supra* note 41, § 26.02, at 2447 (detailing multiple district court interpretations of the meaning of “according to common usage”). Courts were to look first to local federal district court rules, then to other federal districts, then to the laws and usages of the state in which the federal court was located, with the understanding that new usages might be adopted and become common as needs arose. DYER-SMITH, *supra* note 28, §§ 888, 891, at 531-33. As an example of shifting “common usage,” it was generally understood in the late 1800s that a *dedimus* was taken under a “closed” commission, that is, taken through the use of pre-written interrogatories, rather than an “open” commission for an oral examination of the deponent. 2 LONGSDORF, *supra* note 29, § 554, at 785. However, by the time the Rules were enacted in 1938, open commissions were becoming more common. DYER-SMITH, *supra* note 28, §§ 910, 911; 2 LONGSDORF, *supra* note 29, § 554, at 785 (open commissions not available under new common usage except for complicated or unusual issues). Rules concerning depositions upon interrogatories, except insofar as they overlap with rules for depositions on open commission, are not particularly relevant to the issues considered in this Article. This is especially true for the rules relating to objections. In the main, objections to written interrogatories were required to be made at the time the interrogatories were “settled,” that is, at the time the opposing party sought the commission and before it issued. EDWARD P. WEEKS, TREATISE ON THE LAW OF DEPOSITIONS § 395, at 461-62 (1880); 2 LONGSDORF, *supra* note 29, § 554, at 785 (generally interrogatories were stipulated to by the parties). If the commission was issued *ex parte* and an opposing party was not present for the deposition’s taking, then the objection was to be presented to the court as soon as it was discovered. WEEKS, *supra*, §§ 405, 410, at 473-74, 478.

58. 28 U.S.C. § 644, Rev. Stat. § 866.

59. As with the *dedimus* rules, the “usages of chancery” also evolved. For example, while depositions in chancery were originally taken exclusively by written interrogatory, as was all testimony in equity proceedings, passage of the new Equity Rules in 1912 reversed the general rules and required live testimony in open court. This new preference for oral testimony at trial also opened up the availability of pre-trial oral examinations to perpetuate testimony where the court felt it was just. DYER-SMITH, *supra* note 28, § 955, at 563. The move of *dedimus* from closed to open commissions, and the developed preference of equity for oral examinations, undoubtedly contributed to the incorporation of a broad oral deposition rule in the 1938 Rules of Civil Procedure.

of depositions evolved, which applied without regard to whether a deposition was taken by notice or commission. In particular, those rules dealing with objections were left to the common law:

- Errors in the manner of taking the deposition, in the form of questions and answers, in the oath or affirmation, or in the conduct of the parties, and, more generally, errors of the kind that might be cured if promptly presented, were waived unless objected to at the deposition.<sup>60</sup>
- In contrast, objection as to matters such as admissibility, materiality, and relevancy were to be made for the first time at trial, when the deposition was offered to be read into evidence.<sup>61</sup>
- Formal objections, made at the deposition, needed to point out the ground for the objection with particularity.<sup>62</sup>
- The officer administering the deposition could not compel the deponent to answer a question, nor stop the examination to permit the filing of a motion to compel.<sup>63</sup>
- The deponent was required to answer all questions that might possibly be relevant, subject to the deponent's right to the protection of constitutional privileges.<sup>64</sup>

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60. *See id.* §§ 501, 960 (“The general rule has been expressed by the Supreme Court that all objections of a formal character, and such as might be removed if urged on the examination of the deponent, must be raised at such examination or upon a motion to suppress the deposition.”) (citing *York Mfg. Co. v. Ill. Cent. R.R. Co.*, 70 U.S. (3 Wall.) 107, 113 (1865)). *See also* *Order of United Commercial Travelers of Am. v. Tripp*, 63 F.2d 37 (10th Cir. 1933):

[T]he better rule is that where depositions are taken on oral interrogatories, with both parties represented, objections that go to the form of the question or the answer must be made while the deposition is being taken. A deposition is taken in furtherance of the object of the trial, to elicit the material facts bearing upon the issues; if a question or answer is objectionable only in form, the objection must be interposed while the opportunity exists to correct it; counsel may not lie in wait and exclude material evidence by an objection to form made at the trial, when it is too late to remedy the defect.

*Id.* at 39-40. *See also* WEEKS, *supra* note 57, § 392, at 458-59; 2 LONGSDORF, *supra* note 29, § 564, at 812-13. *See id.* § 565, at 815 (“[P]resence and participation waive irregularities attending the taking, at least if not objected to at the time.”). *See also* FED. EQ. R. 51 (1912) (requiring objections to be in short form, stating the grounds, without argument or debate).

61. DYER-SMITH, *supra* note 28, § 960, at 565.

62. *Id.* at § 961; 2 LONGSDORF, *supra* note 29, § 564, at 813 & n.99.

63. DYER-SMITH, *supra* note 28, §§ 492, 806, at 345-46, 496.

64. *Id.* § 811, at 498; 2 LONGSDORF, *supra* note 29, § 543, at 762-63 (footnotes omitted) (“The general rule is that witnesses should be required to answer all questions that may possibly be material, subject to their right to be protected in their constitutional privileges. The witness is not entitled to refuse to answer, because he or his counsel believe the questions to be immaterial or irrelevant; but he cannot be forced to make disclosures which he would not be compelled to make in court.”).

- The witness could be excused from answering on the bases of privilege, that the evidence sought could not possibly be competent, or that the evidence would be clearly outside of the issues in the case,<sup>65</sup> but advice of or instruction by counsel was not an excuse for failing to answer an examination question.<sup>66</sup>

The above list of common-law federal deposition rules will of course look familiar to those acquainted with the current Federal Rules of Civil Procedure, as many of the common-law guidelines were written into the 1938 Rules and continue to the present.

### B. Pre-1938 State Deposition Rules

The previous section explains the very narrow circumstances under which depositions could be taken and subsequently used in the federal courts of the early twentieth century. In contrast to this narrow federal procedure, which limited depositions to their original purpose of evidence preservation, many state courts and legislatures by the late 1800s and early 1900s had experimented with the use of depositions as a discovery device.<sup>67</sup> In doing so, the states set an example that strongly influenced the drafting of the first comprehensive federal rules of civil procedure.<sup>68</sup> In particular, Professor Edson R. Sunderland of the University of Michigan, drafter of the original discovery rules, which are set out in Federal Rules of Civil Procedure 26-37,<sup>69</sup> was on record in the 1930s as believing that oral deposition discovery would be the key to a new set of federal discovery rules that would eliminate the “trial by ambush” that characterized the pre-Rules federal lawsuit.<sup>70</sup>

65. DYER-SMITH, *supra* note 28, § 817, at 500-501.

66. *Id.* §§ 493, 818, at 346, 501.

67. See Note, *Legislation: Civil Deposition Acts*, 45 HARV. L. REV. 176, 176 (1931) (footnotes omitted) (stating that “[l]egislation which provides for the taking of depositions in pending causes may be found in every state” and collecting statutes, though failing to distinguish discovery and testimony-preserving functions of depositions); Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 744 (1925-1926) (“Although there can be no competition among individual lawyers, we have a very effective competition among systems and rules of practice. The whole country is a laboratory in which experiments are being actively conducted.”). *Cf.* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting importance of state government “laboratories of democracy” in a federal system).

68. See FED. R. CIV. P. 26, advisory committee notes to subdivisions (a) and (b) (1937) (collecting state statutes that allow depositions for discovery, deposition discovery of parties and ordinary witnesses, depositions on notice, and discovery of facts beyond those that support the case of the discovering party). See also 3 OHLINGER, *supra* note 27, at 417 (“It has been said that one of the purposes of the rules was to adopt the best of the modern English and state practices for discovery.”) (citing *Canuso v. Niagara Falls*, 4 F.R.D. 362 (W.D.N.Y. 1945)).

69. Subrin, *supra* note 19, at 710 n.126, 713 n.141; *id.* at 713-17 nn. 142-58 and text accompanying.

70. See generally Sunderland, *supra* note 17.

In 1930, George Ragland, a young graduate student researcher at the University of Michigan's Legal Research Institute during Sunderland's tenure there, set out to document exactly what sorts of discovery devices had been used by the states, and the relative merits of each device. The results of Ragland's survey were published in 1932 as *Discovery Before Trial*.<sup>71</sup>

While Ragland identified a tremendous variety in state-law discovery devices, particularly as compared to the federal system, he also showed that no broad, uniform discovery procedure had been adopted in its entirety by any state. To the contrary, where a state had opened up one area of discovery, it generally did so while leaving in place severe limits on other devices.<sup>72</sup>

Yet, even though no state had implemented an entire package of discovery reforms, Ragland concluded that the most desirable system would be one that incorporated *all* of the devices available in any of the states, with each device given the broadest possible construction, in order to promote "full and equal discovery before trial,"<sup>73</sup> viewed by some, including Ragland, as integral to a comprehensive new civil procedure that would eliminate perceived gamesmanship and unfairness under the old rules.<sup>74</sup> To that end, Ragland proposed a model set of discovery rules, providing for interrogatories, requests for admissions, physical inspections, document requests, and discovery depositions, even though no state had yet provided this full panoply of procedures to pre-trial practitioners.<sup>75</sup>

In the case of depositions, Ragland proposed that the restrictions on *taking* depositions, as expressed in the federal *de bene esse* statute and numerous state provisions, largely be removed, allowing parties to take depositions on notice to other parties for the purpose of discovering information that might prove relevant to any party's case-in-chief or defensive case. Restrictions would instead be placed on the subsequent *use* of the depositions at trial.<sup>76</sup> As for the actual conduct of the deposition, including the making of objections, Ragland proposed that the rules be the same as those existing currently for depositions solely used as testimony-preserving devices.<sup>77</sup>

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71. GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* (1932).

72. *See id.* app. at 272 ("Statutory Provisions on Discovery In the Various Jurisdictions," collecting pre-Rules state law discovery and deposition provisions).

73. *Id.* at 251.

74. *Id.* (citing lawyers and judges for the opinion that discovery has "a salutary effect upon the whole tenor of the litigious process," in part because "[l]itigation is no longer regarded as a game").

75. *Id.* at 247-50.

76. *Id.* at 23, 247-50.

77. *Id.* at 249 ("Procedural details can be left exactly as they are at present under the various statutes on depositions.").



Ragland proposed keeping the existing conduct rules for depositions in large part because lawyers already knew the rules, which would make adoption easier. He wanted to avoid any changes where “elaborate details [would be] provided by statute.”<sup>78</sup> Moreover, he did not think the rules for objections mattered much at all, because he did not believe that lawyers would make objections for matters other than privilege.<sup>79</sup> In fact, he cited empirical evidence from Canadian experiments with deposition discovery in which, for example, attorneys objected to only 83 out of 18,437 questions asked during 76 examinations.<sup>80</sup>

Upon review of Ragland’s work, Professor Sunderland was obviously taken with the solid evidence therein assembled,<sup>81</sup> and Sunderland drew heavily on Ragland’s ideas and arguments in framing the discovery provisions of the new Federal Rules.<sup>82</sup> The Rules incorporated all of the discovery devices detailed by Ragland, with a concomitant broadening of the permitted scope of discovery.<sup>83</sup>

### C. *Depositions Under the 1938 Rules*<sup>84</sup>

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78. *Id.* at 243 (“A primary requisite to the usefulness of any procedural device is that the lawyers know the details of the procedure.”). *Id.* at 249 (“While there are some defects in the deposition statutes of particular states, it is of greater moment in the initiation of the new use of the procedure that the lawyers be acquainted with the procedural details than that these latter be perfect. Glaring defects which become apparent during the actual use of the procedure may be remedied later by special statutes.”).

79. *Id.* at 151-53.

80. *Id.* at 152; *see also id.* at 81 (stating that the chief reason that deposition discovery is thorough is that “the attorney for the party who is being examined seldom makes objection to the form of the questions”).

81. *See id.* at iii-iv (Foreword by Edson R. Sunderland). Ragland’s work also impressed another key framer of the Rules, Professor Charles E. Clark. *See* Charles E. Clark, Book Review, 42 *YALE L.J.* 988 (1933) (enthusiastically reviewing Ragland, *supra* note 71).

82. *See* Subrin, *supra* note 19, at 713 (stating that Ragland’s “book was probably the most influential single source of support for the Federal Rules reformers”).

83. So far as I have been able to ascertain (by comparing his draft with Ragland’s book), his initial draft included every type of discovery that was known in the United States and probably England up to that time. The list is familiar to any American litigator, for almost every type of discovery he drafted became and remains part of the Federal Rules: oral and written depositions; written interrogatories; motions to inspect and copy documents and to inspect tangible and real property; physical and mental examination of persons; and requests for admissions. Sunderland also included a method for what we now call mandatory disclosure: a means to force the opponent to “furnish adequately descriptive lists of documents, books, accounts, letters or other papers, photographs, or tangible things, which are known to him and are relevant to the pending cause or to any designated part thereof”; but this did not become a part of the 1938 Rules.

Subrin, *supra* note 19, at 718-19 (citation omitted).

84. It is beyond the scope of this Article to fully detail the history of the drafting and eventual adoption in 1938 of the discovery provisions of the Rules. For a comprehensive background, see Professor Stephen Subrin’s excellent articles on the subject, especially *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, *supra* note 19, and *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. PA. L. REV.* 909 (1987).

With the adoption of the 1938 Rules of Federal Civil Procedure, the extreme limits on the taking and use of depositions that had theretofore existed in the federal system were lifted. No longer were depositions available only for preservation of testimony. Instead, the Rules “freely authorize[d] the taking of depositions under the same circumstances and by the same methods, whether for the purpose of discovery or for the purpose of obtaining evidence.”<sup>85</sup> Moreover, depositions could be taken of both parties and third-party witnesses, upon notice, and no order of court was necessary unless a deposition was sought within the first twenty days following commencement of the underlying action.<sup>86</sup> While discovery under the pre-1938 procedure was limited to evidence material to a petitioning party’s claim or defense, discovery under the Rules, including that by depositions, was allowed of evidence relating to a claim or defense of the examining party or any other party.<sup>87</sup> Finally, the Rules defined expansively the permissible scope of depositions, allowing examination regarding any non-privileged matter “relevant to the subject matter involved in the pending action.”<sup>88</sup> For the above reasons, the Advisory Committee notes characterized the new federal deposition rules as giving an “unlimited right of discovery.”<sup>89</sup>

Many commentators and courts echoed the advisory committee’s broad conception of the Rules,<sup>90</sup> and lauded the Rules as ushering in a new era of litigation, where cases would be decided on their merits, based on each party knowing all the relevant facts, with the element of surprise at trial no

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85. FED. R. CIV. P. 26, advisory committee note (1937); Rule 26(a) (1938) (modified 1970) (stating that testimony of any person may be taken “for the purpose of discovery or for use as evidence in the action or for both purposes”).

86. *See* FED. R. CIV. P. 26 (1938) (modified 1970).

87. 3 OHLINGER, *supra* note 27, at 425.

88. In 1946, Rule 26(b) was amended to clarify that objections could not be made on the ground that testimony discovered in the deposition would be inadmissible at trial, so long as “the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.”

89. FED. R. CIV. P. 30, advisory committee’s notes to subdivisions (b) and (d) (1937). *See also* Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 22 (1938) (“What the federal rules have done has been to remove practically all restrictions as to the right of discovery.”).

90. *See* Downey & Massey, *supra* note 25, at 184 (citations omitted) (“In 1939, the new procedural process known simply as ‘discovery’ was heralded as marking ‘the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial.’ Some foresaw that discovery would ‘stamp the entire federal judicial process with a character of frankness and fairness that [would] go far in aiding our legal system to overcome the effects of its rather crude heredity.’”); BREWSTER, *supra* note 18, § 583, at 335 (1940) (stating that the new federal procedure “proceeds on a theory that each party is entitled to know the evidentiary basis of the other’s case, and provides the means whereby all factual information may be developed before trial, thus eliminating the element of surprise at the time of trial”). *See also* *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (footnote omitted) (“[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

longer a factor.<sup>91</sup> But, although the new Rules completely altered federal discovery, and in particular provided for the use of depositions as a broad discovery tool, the specific rules governing the conduct of depositions were largely lifted from the pre-Rules *de bene esse* statutes and common law. Deposition conduct rules therefore changed very little:<sup>92</sup>

- Under the *de bene esse* deposition statutes, a deposition could be taken before any of an enumerated list of neutral officers, ranging from United States judges to notary publics.<sup>93</sup> Rule 28 generalized this requirement to allow depositions to be taken before “an officer authorized to administer oaths” by federal or state law.<sup>94</sup>
- The form of notice required under the new Rule 30(a) was essentially the same as that for *de bene esse* depositions.<sup>95</sup>
- The *de bene esse* statutes also required that the witness be sworn by the presiding officer and that the testimony be reduced to writing.<sup>96</sup> The

91. 3 OHLINGER, *supra* note 27, at 425 (noting court statements that the new discovery rules “were formulated with the intention of giving the widest latitude in ascertaining before trial facts concerning the real issue in dispute” and that when properly used the new rules “make surprise at trial impossible”) (collecting cases); E. M. Morgan, Book Review, 46 HARV. L. REV. 1350 (1932) (reviewing GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL (1932)); Buell McCash, *The Evolution of the Doctrine of Discovery and Its Present Status in the State of Iowa*, 20 IOWA L. REV. 68, 79-80 (1935). Modern commentators suggest that broad pre-trial discovery of all relevant evidence is still one of the core principles of the Rules. See, e.g., Hazard, *supra* note 25:

The second basic concept in the Federal Rules is that, in general, there should be full mutual access before trial to evidence that might be relevant to the issues, with a view to presentation at trial of all evidence relevant to any claim concerning the transaction. This concept is implemented by discovery mechanisms permitting a party to obtain from any other party “any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .”

*Id.* at 629 (citation omitted). Cf. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C.L. REV. 747, 766 (1998) (showing that discovery rule revisions since 1938 have narrowed original broad grant).

92. See 2 MOORE ET AL., *supra* note 41, § 26.02, at 2455:

Under the former procedure, both at law and in equity, the provisions for discovery before trial had failed to keep step with the liberal modern discovery provisions in many of the states. . . . But the procedure of examination before trial by the taking of depositions had long been in use and was well understood. Yet the conditions imposed upon the taking of depositions prevented their utilization for discovery purposes. The chief change made by

the Federal Rules is the removal of these conditions upon *the taking* and making them applicable *only upon the use* of depositions at the trial.

93. See *supra* Part II.A.3.

94. FED. R. CIV. P. 28 (1938) (modified 1963). FED. R. CIV. P. 28, Advisory committee’s note (1938) (“In effect this rule is substantially the same as U.S.C., Title 28, [former] § 639.”). Rule 28’s more general designation of officers before whom depositions could be taken did extend the territorial venue for depositions on notice to “the territories and insular possession subject to [the United States] sovereignty,” a broader reading than had been given to the former *de bene esse* deposition statute, 28 U.S.C. § 639. 3 OHLINGER, *supra* note 27, at 447-48 (citing authority).

95. 2 MOORE ET AL., *supra* note 41, § 30.02, at 2569.

96. See *supra* Part II.A.3.

new Rule 30 echoed these requirements: “The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise.”<sup>97</sup>

- At common law, an error in stating the place for taking the deposition was waived by the party’s presence and participation.<sup>98</sup> Similarly, under Rule 32(a), “errors and irregularities in the notice for taking a deposition” were waived unless promptly objected to in writing.
- At common law, errors in the manner of taking the deposition that might be cured if promptly raised were waived unless objected to at the deposition.<sup>99</sup> Rule 32(c)<sup>100</sup> spelled out this contemporaneous objection rule, which, according to the Rules Committee was “in accordance with common practice”:<sup>101</sup>

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

Under both common-law rules and the new Rules, the officer administering the deposition could not compel the deponent to answer a question.<sup>102</sup>

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97. FED. R. CIV. P. 30(c) (1938) (modified 1970). *See also* FED. R. CIV. P. 30, advisory committee notes to subdivisions (c) and (e) (1937) (citations omitted) (“These follow the general plan of Equity Rule 51 . . . and [the *de bene esse* statutes], but are more specific.”).

98. 3 OHLINGER, *supra* note 27, at 466 (collecting cases).

99. *See supra* Part II.A.3.

100. Original Rule 32(c) was moved to Rule 32(d)(3) in the 1970 revisions to the Federal Rules of Civil Procedure.

101. *See* FED. R. CIV. P. 32 advisory committee’s note (1937) (“This rule is in accordance with common practice.”); 3 OHLINGER, *supra* note 27, at 467 (collecting cases to effect that Rule 32(c) reflected pre-Rules procedure).

102. *See* FED. R. CIV. P. 37(a) (dealing with refusals to answer, but giving no authority to officer to compel testimony); 2 MOORE ET AL., *supra* note 41, § 28.01, at 2545 (1938) (stating that “the officer before whom a deposition is taken has no authority to rule on the admissibility of evidence or to compel answers to questions or to impose penalties by contempt or otherwise for a refusal to answer a question”). However, unlike under

Under common law, the deponent was required to answer all questions that might possibly be relevant,<sup>103</sup> subject to the deponent's right to the protection of constitutional privileges. Under new Rule 26, the scope of the examination was defined as "any matter, not privileged, that is . . . relevant to the subject matter involved in the action."<sup>104</sup>

A few important diversions from the pre-1938 statutory and common-law rules of depositions were made in the new Rules. For example, under Rule 30(e), a witness could read his deposition and, more importantly, change the form and substance of his testimony, prior to signing his deposition.<sup>105</sup> In addition, Rule 26(c) explicitly spelled out that examination and cross-examination during the deposition were to take place as at trial.<sup>106</sup> Finally, while "relevancy" was the standard for the permissible range of discovery under both the common law and the new Rules, the real issue is relevant *to what?* The new Rules broadened the concept of relevancy to include any matter

relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.<sup>107</sup>

Still, the conduct of the deposition itself looked very much the same under the new Rules as it did in the years immediately preceding. As one contemporaneous commentator noted: "The new procedure introduces nothing new in the way of 'procedural conceptions' insofar as concerns the actual taking of depositions."<sup>108</sup>

Yet the whole theory of depositions had changed. Pre-Rules, depositions were authorized in very narrow circumstances, only to preserve

the common law, the new Rules *did* allow the questioner to adjourn the examination and file a motion to compel if a witness refused to answer. FED. R. CIV. P. 37(a).

103. Of course, the definition of "relevant" was much narrower, confined to issues in the questioner's case, for example. See discussion immediately *infra*.

104. FED. R. CIV. P. 26(b) (1938) (modified 1970).

105. See 2 MOORE ET AL., *supra* note 41, at 2587.

106. This clarified old law, but with an important change in effect. If an examination is just like trial, cross-examination would be limited in scope to that of the direct examination. Under the new Rules, at deposition one could simply take direct testimony of a witness, even if one did not notice the deposition. So, cross-examination might be limited (thus, no leading questions if the witness is not hostile), but one could directly examine the witness to the full limit of relevancy, without making the witness "one's own"—*i.e.*, without limiting later cross-examination of the witness at trial. This was a big pro-discovery change to the Rules, removing formalism from old procedure. See *id.* at 2483.

107. FED. R. CIV. P. 26(b) (1938) (modified 1970). This was also a big change—see 2 MOORE ET AL., *supra* note 41, § 26.14, at 2479.

108. BREWSTER, *supra* note 18, § 607, at 346.

testimony, and only to preserve evidence, already known to the examining party, that supported the party's case. Post-Rules, depositions were given the centerpiece role in the new open discovery procedure, which aimed to let all parties find out all relevant facts prior to trial.<sup>109</sup>

But post-1938 rules of deposition conduct changed little to reflect this new paradigm of broad discovery. Many rules carried over from pre-rules law, *e.g.*, rules regarding the form of notice and errors in form, the qualification of officers before whom depositions could be taken, and the swearing of the witness and reduction of testimony to writing likely preference neither fact-gathering nor testimony-preservation. Nor probably does the rule allowing a witness to correct his or her testimony prior to signing—even if new facts are produced or old facts disclaimed, the original transcript remains for reference, so the effect on facts or proffered testimony is small.<sup>110</sup> But the contemporaneous objection rule also was adopted, without apparent consideration, with its complete focus on preservation of testimony.

An interesting question, then, especially given that depositions are now nearly exclusively used as a discovery device, and almost never used as a testimony-preserving device,<sup>111</sup> is whether the rules of deposition conduct should reflect this overwhelming trend in deposition usage. In other words, are there possible rules of conduct for depositions that would better promote broad discovery (if considerations relating to testimony preservation are given less weight or ignored altogether)? This Article argues that other rules would be better, and in particular that the contemporaneous objection rule should be abandoned in depositions as an unnecessary impediment to getting at the facts. An examination of non-deposition fora that ostensibly are devised primarily for fact-gathering, and less—if at all—for testimony-preservation, sheds light on this question.

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109. Prior to the 1970 revisions to the Federal Rules, Rule 26, the main discovery provision, which introduced the new, broader definition of relevance into federal civil practice, was explicitly a deposition rule. Because the definition of relevance was not given with respect to other discovery devices, such as interrogatories, requests for admission, and requests for production, early interpretations of those rules relied on a deposition rule, Rule 26, for determining the scope of all permissible discovery. The 1970 revisions to the Rules recognized this by removing the deposition provisions from Rule 26 and dedicating that rule to overall discovery scope. The 1993 and 2000 revisions to the Rules further modified Rule 26 by including in it the provisions for mandatory disclosure.

110. The rule providing a new, much broader definition of relevance of course favors fact-gathering, but probably is better seen as a change in the substantive, rather than conduct, rules of depositions.

111. *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 531 & n.12 (E.D. Pa. 1993) (stating that there “usually is not” a trial in civil cases and citing Administrative Office of the United States Courts study from 1992 showing that only 3.8% of civil cases terminated in the Eastern District of Pennsylvania went to trial); Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994) (citing evidence that “the portion of cases that terminated in trials dropped from 11 percent in 1961 to 4 percent in 1991”).

### III. DIVINING DISCOVERY DOCTRINE: LESSONS FROM OTHER FORA

Given that all legal proceedings are concerned—and usually to a great extent—with development of the facts giving rise to the dispute at issue, any number of fact-gathering fora could be examined for comparison to our current civil deposition. For this Article, I have chosen what I hope represents a broad range of possible procedural fact-gathering models, with particular focus on the range of possible roles for attorneys during oral discovery.

At one extreme of attorney involvement in discovery is the criminal law grand jury, in which a witness, outside of the presence of his attorney (if he has one), is questioned by a partisan advocate with few, if any, restrictions as to scope of inquiry. Next on the spectrum, involving more protection of the witness's interest by her attorney, particularly in the area of limiting inquiry into areas of privilege, would lie congressional hearings and investigations by governmental agencies. Adding even more procedural rights for a witness—for example, provisions allowing her attorney to object to questions as misleading, compound, or otherwise ill-formed—brings us to the current state of civil discovery. Somewhere beyond current civil practice, and at the opposite end of the spectrum from the criminal grand jury when it comes to partisan questioning, falls the Continental, civil-law system of fact discovery, in which a neutral judge is given the sole authority to question witnesses and develop a factual background for a case.

#### A. *The Grand Jury*<sup>112</sup>

In theory, the grand jury is supposed to serve as both a “sword” and a “shield” in criminal pretrial procedure.<sup>113</sup> Its sword function is its use as

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112. On the usefulness of considering criminal procedure when studying civil procedure, see Judith Resnick, *The Domain Of Courts*, 137 U. PA. L. REV. 2219, 2222 (1989) (much can be learned by studying criminal and civil procedural rules together because, though analogous criminal and civil rules neither are, nor should be, the same, “the theoretical questions addressed by the two sets of rules are the same and [the] different resolutions merit analysis”) (citing generally ROBERT COVER ET AL. PROCEDURE (1988)).

113. 1 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 101, at 196 (2d ed. 1982) (citing *In re Grand Jury* January, 315 F. Supp. 662, 671 (D. Md. 1970)); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect The Accused*, 80 CORNELL L. REV. 260, 262-63 (1995) (citations omitted) (“[G]rand juries perform only two tasks, neither of which is terribly complex. First, grand juries are supposed to serve a ‘screening function’: they review the prosecutor’s case and decide if the government has presented enough evidence to justify an indictment. In forcing the government to present its case to a panel of citizens at an early stage in the process, and in giving these citizens the ultimate charging power, the institution

a broad-reaching investigatory body—not subject to the probable-cause limit of the other major tool of criminal investigation, the warrant, and also not subject to formal evidentiary limits.<sup>114</sup> The grand jury, in theory, also operates as a shield, by requiring a confidential, citizen-led review of a prosecutor's evidence prior to issuance of an indictment.<sup>115</sup> While a great deal has been written about the failure of the grand jury to serve as a useful shield against government overreaching,<sup>116</sup> the grand jury has proved an excellent sword—a far reaching and effective investigative tool.<sup>117</sup>

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has been likened to a 'shield' against ill-conceived or malicious prosecutions. Second, the grand jury acts as an investigative arm of the government. It helps the prosecutor gather evidence by calling witnesses and issuing subpoenas to compel production of documents. When acting in its investigative capacity, the grand jury has been called a 'sword' in the hands of the prosecution in the fight against crime.”)

114. Leipold, *supra* note 113, at 267 (citations omitted) (“By traditional trial standards, a grand jury is allowed to consider a surprising, even shocking, mix of evidence. The prosecutor is not required to inform the grand jury of evidence that favors the suspect, even if that evidence is exculpatory. Jurors are allowed to consider hearsay, illegally obtained evidence, tips, rumors, or their own knowledge of the alleged crime. The Rules of Evidence do not apply, so the prosecutor can ask leading questions and pursue matters that would be considered irrelevant if presented at trial.”); Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 576 (1994) (citations omitted) (“In federal criminal cases, these problems with search warrants are somewhat alleviated by the presence of an alternative procedure—the use of a grand jury subpoena to compel either testimony or the production of documents. Grand jury subpoenas need not be supported by probable cause; they may be used to compel testimony as well as the production of documents; and they present a polite and discreet way of obtaining documents from third parties. In the federal jurisdiction in particular, the grand jury has become an indispensable engine of information-gathering and case-building in complex criminal cases.”); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 104 (3d ed. 1999) (collecting authority).

115. Michael Vitiello & J. Clark Kelso, *Reform of California's Grand Jury System*, 35 LOY. L.A. L. REV. 513, 516-17 (2002) (citation omitted) (“Popular perception of the grand jury as serving to protect citizens against oppression originated in the late seventeenth century with the refusal by two rogue grand juries to indict two prominent Protestant enemies of King Charles II. Indeed, that perception may account for the widespread adoption of the grand jury system in the colonies.”); *id.* at 518 (giving examples of refusals by colonial American grand juries to indict). *Cf.* Leipold, *supra* note 113, at 280 (citations omitted) (“While it is clear that the drafters and ratifiers of the Bill of Rights viewed the grand jury as a source of protection for the accused, it is difficult to find the factual basis for that belief. Historical evidence that the grand jury was once an effective screen is at best inconclusive, and at worst supports the view that the institution never served as much of a shield.”).

116. *See, e.g.*, Leipold, *supra* note 113, at 269 (citation omitted) (“The notion that grand juries do not eliminate weak cases is now so well accepted that it is difficult to find any recent scholarly support to the contrary.”); William L. Osterhoudt, *Representing a Grand Jury Witness*, LITIG., Winter 1990, at 6 (“Some people harbor romantic notions of the grand jury as a fair, independent tribunal. The fact, however, is that the modern grand jury is firmly under the government's control. The prosecutor decides what cases to present, who to call as witnesses, who should receive immunity, and who should be targeted for prosecution. The prosecutor draws up the charge and presents it to the grand jury, which routinely votes to return an indictment.”); Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 67 (1995) (“rubber stamp”); Vitiello & Kelso, *supra* note 115, at 578 (footnotes omitted) (“The California Supreme Court has called the grand jury a prosecutor's 'Eden' because it is 'the total captive of the prosecutor.' That is consistent with the frequent criticism that grand juries serve as a rubber stamp of the prosecutor who presents evidence to the grand jury. Statistical evidence suggests that grand juries seldom exercise independent judgment.”).

117. 38 AM. JUR. *Trials* § 651 (“In recent years, the focus of the grand jury has shifted from indicting a potential defendant to providing a data-gathering windfall for the prosecution.”); Leipold, *supra* note 113, at 263 (footnotes omitted) (“The fundamental criticism of grand juries can be stated simply. Many believe that the



One of the reasons for the grand jury's effectiveness for investigation undoubtedly lies in the fact that, at the federal level at least, a witness is not allowed representation by counsel in the grand jury room. Instead, by custom, witnesses are allowed to leave the presence of the grand jury in order to consult with an attorney who is physically absent from the grand jury room, for example, in the hallway or ante-chamber directly outside the grand jury room.<sup>118</sup> The custom varies somewhat across federal jurisdictions in the frequency of allowed witness-counsel conferences. In some jurisdictions a witness may be excused from the presence of the grand jury to consult with counsel after each question, while in other jurisdictions a witness may leave only after several questions are asked, or even less frequently.<sup>119</sup>

Without the presence of witness counsel, a grand jury examination is less likely to be interrupted, for good or ill, over matters regarding the form of questions posed. Of course, neither the grand jury prosecutor nor witness counsel is concerned over the ultimate admissibility of witness testimony at trial—the testimony is sealed, and may not be later used at trial absent significant extenuating circumstances.<sup>120</sup> Whether a question is compound or without foundation only matters insofar as the answer

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'shield' works poorly and the 'sword' works only too well. The grand jury is frequently criticized for failing to act as a meaningful check on the prosecutor's charging decisions; according to the clichés it is a 'rubber stamp,' perfectly willing to 'indict a ham sandwich' if asked to do so by the government. In contrast, few doubt the effectiveness of the grand jury's investigative power. Here the concern is that prosecutors and grand juries abuse this authority by harassing unpopular individuals and groups."); *id.* at 314 ("Grand juries are undeniably effective in helping the government investigate crimes.").

118. Osterhoudt, *supra* note 116, at 10 ("Although not in the grand jury room, counsel is almost always just outside. Therefore, if the witness is uncertain about the meaning or propriety of a question, she should ask to be excused to consult with the lawyer. There is nothing wrong with such a request, and it will almost always be granted, although the prosecutor may try to discourage the interruption."); WRIGHT & MILLER, *supra* note 114, § 104 (collecting authority); 38A C.J.S. Grand Juries § 101 ("Counsel for Accused or Witness") (collecting authority); Vitiello & Kelso, *supra* note 115, at 554 (footnotes omitted) ("Current practice in the federal system demonstrates a strange tension. A target has a right to consult with counsel, necessary to protect the target's privilege to be free from self-incrimination. However, the target does not have the right to have counsel present in the grand jury proceedings during questioning of the target. To assure that the target does not waive his or her Fifth Amendment right, counsel for a grand jury target who agrees to testify must wait in the hallway outside the grand jury room. Periodically, the target leaves the grand jury room to consult with counsel."); Cox, 38 AM. JUR. *Trials* § 651 ("The attorney should accompany the client to the very door of the hearing room, or as close as possible, so that the client's last contact with counsel leaves him with the assurance that his lawyer is right there, available as needed.").

119. WRIGHT & MILLER, *supra* note 114, § 104 (collecting examples of different jurisdictional practices); Kathryn E. White, *What Have You Done with My Lawyer?: The Grand Jury Witness's Right To Consult with Counsel*, 32 LOY. L.A. L. REV. 907, 934-35 (1999) (also collecting examples); 38A C.J.S. Grand Juries § 101 ("Counsel for Accused or Witness") (also collecting examples); LaFave, Israel & King, 3 Crim. Proc. § 8.15(c) (also collecting examples). See also SUSAN W. BRENNER & GREGORY G. LOCKHART, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 13.9 (1996).

120. FED. R. CRIM. P. 6(e); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983).

solicited by the question does not produce facts understandable to the grand jury and prosecutor.

Are there any lessons that civil deposition procedure can take from grand jury practice? Perhaps. The federal grand jury model is not one that could, or likely even should, be grafted onto civil discovery,<sup>121</sup> but its theoretical basis—as an inquisitory tribunal, lacking in the procedural formality of trial and with a vastly curtailed role for witness counsel<sup>122</sup>—more closely matches the actual use of depositions in civil discovery today than do the procedures on which Rules deposition theory is grounded. That theoretical basis recognizes that a strong role for witness counsel can interfere with discovery of the facts.

Interestingly, there have been proposals for reform of the federal grand jury proceeding that would make it look like a modified civil deposition procedure without a contemporaneous objection rule.<sup>123</sup> Like the grand jury procedure currently used in at least twenty states, under the several model federal proposals that have been advanced, counsel could be present in the grand jury room. Importantly, though, and also in accordance with most of the state-law provisions, counsel would be prohibited from directly addressing the grand jury or making objections.<sup>124</sup>

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121. See, e.g., Hughes, *supra* note 114, at 634 (“The intimidating atmosphere of an inquisition without the assistance of counsel may be justifiable only by the great public interest in solving and prosecuting crimes.”).

122. 2 LEWIS R. KATZ & PAUL C. GIANNELLI, *BALDWIN'S OHIO PRACTICE: CRIMINAL LAW* § 41.8 (“This rule [that no counsel is allowed] is justified on several rationales. Grand jury proceedings are investigative and not prosecutive, and thus the presence of counsel is deemed unnecessary. Moreover, counsel, if present, might delay the proceedings and detract from the ex parte nature of the hearing and would also, it is argued, breach the secrecy of the proceeding. Finally, witnesses who believe that they have been wronged have the opportunity to exonerate themselves at trial.”); 38 AM. JUR. *Trials* § 651 (grand jury is “essentially an accusatory body, not a judicial tribunal, charged primarily with the duty of investigating infractions of the criminal law within the jurisdiction”).

123. White, *supra* note 119, at 919-20 (discussing The Grand Jury Reform Act of 1985 and the Assistance of Counsel Before Grand Juries Act of 1987, both based on the American Bar Association's Model Grand Jury Act); Vitiello & Kelso, *supra* note 115, at 562-63 (detailing the features of the ABA proposal, the “first principle” of which being that counsel for grand jury witnesses should be allowed in the grand jury room). See also Hughes, *supra* note 114, at 669 (arguing that the federal grand jury process should be made more like the procedures used in agency investigative hearings. “The processes can be further assimilated by recognizing the right of a witness (or at least a target) to be accompanied by counsel when appearing before a federal grand jury. If different government agencies are charged with substantially identical tasks of criminal investigation, a compelling reason must be given to explain why our system should tolerate sharply different procedures affecting important rights.”).

124. Vitiello & Kelso, *supra* note 115, at 565 (citations omitted) (“Only one of the twenty states that allow counsel to be present does not limit counsel's role. The remaining nineteen states vary in terminology. For example, some statutes state simply that counsel ‘shall not participate’ in the proceedings. Others state ‘counsel may not communicate with anyone other than his client.’ Still others are more specific in that counsel ‘shall not make objections, arguments, or address the grand jury.’ The most explicit statute states that counsel shall not ‘[s]peak in such a manner as to be heard by [other] members of the grand jury.’ That is, most of the statutes limit the role of counsel consistent with the underlying justification for counsel's presence: advising the client in order to protect the client's rights.”); 3 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 8.15(b) (2000) (“In one of the major developments in grand jury reform, roughly twenty states today have statutes permitting at least

*B. Congressional Hearings: Counsel as “Potted-Plant”*

During the 1987 hearings before the House and Senate select committees on the Iran-Contra scandal,<sup>125</sup> Senate committee chairman Sen. Daniel K. Inouye admonished Brendan V. Sullivan, Jr., counsel for witness Lieut. Col. Oliver L. North, for repeatedly interrupting questioning with objections and told him to “Let the witness object if he wishes to.”

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certain witnesses to be assisted by counsel located within the grand jury room. About half of these provisions apply to all witnesses, but several are limited to either targets, witnesses who have not been granted immunity, or witnesses who have waived immunity . . . . The statutes commonly contain provisions limiting the role of counsel while before the grand jury. Several state that the lawyer may ‘advise the witness,’ but ‘may not otherwise take any part in the proceeding.’ One jurisdiction also allows counsel to ‘interpose objections on behalf of the witness.’ Another provides for such participation upon agreement of the prosecutor and the foreperson.”). Because of the possibility of criminal liability, and the need to preserve the Fifth Amendment claim of privilege against self-incrimination, which is probably more important than any privilege claim commonly raised in civil-only litigation, counsel would have somewhat more free range to consult with the witness prior to the witness answering questions. See White, *supra* note 119, at 928 (“Witnesses before a grand jury may not know, and therefore must figure out when and how to claim the privilege against self-incrimination. This is a daunting task for lay witnesses or anyone who might find the grand jury proceeding somewhat strange, invasive, or unsettling. Witnesses may not only be unclear about what is incriminating, they may also be reluctant to assert the privilege in a room dominated by grand jurors and the prosecution. As such, the advice of counsel is critical in preserving and defining the witness’s privilege against self-incrimination.”); United States v. Mandujano, 425 U.S. 564, 603-04 (1976) (Brennan, J., concurring). Not all states, of course, have adopted procedures allowing for counsel presence in the grand jury room, and opponents of such a procedure present myriad counter-arguments. See 3 LAFAVE ET AL., *supra*, § 8.15(b) (opponents “argue that, notwithstanding statutory prohibitions, counsel accompanying witnesses will find techniques, such as stage whispers and objections presented through the witness, for challenging the prosecutor’s questions or conveying arguments to the jurors. They argue further that, with counsel at the witness’ side, more witnesses will reply to questions by merely parroting responses formulated by counsel—responses that too often give away as little information as possible or are purposely ambiguous so as to avoid potential perjury charges. The critics draw an analogy to the trial, where the defendant, once taking the stand, is not allowed to interrupt his testimony for further discussions with counsel.”).

Some would argue that the grand jury actually allows a far more disruptive practice than lawyer objections, by allowing the witness to leave the grand jury room to consult with an attorney in ante-room, perhaps as often as every question. One commentator, himself a criminal defense attorney, considers this to be better than having a “potted plant” role for the attorney in the grand jury room, because the attorney can do much more advising in the ante-room, out of view of the grand jury. Osterhoudt, *supra* note 116, at 10-11 (“The role an attorney *can* play during a grand jury session should be underscored. Normally there is much emphasis on how an attorney *cannot* go into the grand jury room. That is surely undesirable, but in fact a witness who has the resolve to leave when necessary can get plenty of advice. What an attorney can do on the outside is more than he would be able to do if he were in the grand jury room, but had his status reduced to that of the now-famous ‘potted plant.’”). See also 38 AM. JUR. *Trials* § 651 (“It is important that the witness understand that he has the right to leave the room at any time to consult with counsel, and may do so after a question has been asked and before it is answered; he should be prepared to exercise this right when he has any doubt as to the legal significance of a question or possible answer. The witness again must ‘stick to his guns’ and refuse to answer further questions until given the right to confer with counsel. This may involve a trip to the judge or magistrate if the prosecutor feels the privilege is being abused, but the goal will be achieved—counsel will again be in personal touch with his client.”).

125. *Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran*, 100th Cong. 7 (1987) (testimony of Oliver L. North). The House committee was chaired by Rep. Lee H. Hamilton.

Sullivan famously replied, “Well, sir, I’m not a potted plant. I’m here as the lawyer. That’s my job.”<sup>126</sup> While Sullivan’s clever riposte garnered much publicity, and while his aggressive tactics surely served to deflect some congressional attention from his client, it is not at all clear that he correctly evaluated the proper role for counsel in congressional hearings.

Assuming some basic constitutional right to counsel in congressional hearings—for example, a right to be advised as to a witness’s exercise of the privilege against self-incrimination<sup>127</sup>—the more pertinent question for this inquiry is what rights beyond this basic representation are given to witnesses by the procedural rules of the House or Senate, or committees of those bodies.

The short answer is: not many. House rules provide only a baseline, stating that “[w]itnesses at [investigative] hearings may be accompanied by

126. The full colloquy was as follows:

Mr. Sullivan: Objection. It’s a hypothetical question. Pure speculation.

Mr. [Arthur] Liman [ , committee counsel]: You say that you were not sure whether the Attorney General was conducting this inquiry at the request of the President or at the request of the admiral. That’s what I heard you say.

Mr. North: No. What I said was, I don’t know that the admiral told me on the 21st that the President, at least I don’t recall knowing at the time that the admiral told me that this was being done at the request of the President. He may well have told me that.

Mr. Liman: Would you have shredded less documents on the 22[n]d if you had been told that the Attorney General was acting at the specific request of the President, your Commander in Chief?

Mr. Sullivan: Objection.

Chairman Inouye: What is the basis of your objection?

Mr. Sullivan: It is pure speculation. Dreamland. It has two “ifs” in it, and Mr. Liman knows better than most, that those kinds of questions, Mr. Chairman, are wholly inappropriate not just because of rules of evidence, not because you couldn’t say it in a court, but because it’s just dreamland. It is speculation. He says if you had done this and if you had done that, what about this? Come on, let’s have, Mr. Chairman, plain fairness. Plain fairness, that’s all we are asking for.

Chairman Inouye: May I speak?

Mr. Sullivan: Yes, sir.

Chairman Inouye: I’m certain counsel realizes this is not a court of law.

Mr. Sullivan: Believe me, I know that.

Chairman Inouye: I’m certain you realize the rules of evidence do not apply in this inquiry.

Mr. Sullivan: That I know as well. I’m just asking for fairness. Fairness. I know the rules don’t apply. I know the Congress doesn’t recognize attorney-client privilege, a husband-and-wife privilege, priest-penitent privilege. I know these things are all out the window. We rely on just fairness, Mr. Chairman, fairness.

Chairman Inouye: We have attempted to be as fair as we can. Let the witness object if he wishes to.

Mr. Sullivan: I’m not a potted plant. I’m here as a lawyer. That’s my job.

*Id.* See also *Note of Braggadocio Resounds at Hearing*, N.Y. TIMES, July 10, 1987, at A7.

127. Much has been written about the rights of witnesses in congressional hearings, all well beyond the scope of what I am considering here, which is the ideal procedural rules for witness counsel in hearings. We can assume that the witness has basic rights without answering the question of what his counsel is allowed to do in defending the witness.

their own counsel for the purpose of advising them concerning their constitutional rights.”<sup>128</sup> Only seven of the nineteen standing committees of the House in the 108th Congress have rules relating to counsel for witnesses. These committees generally provide the same right to counsel as does the House rule, either by incorporating the rule by reference or using its language.<sup>129</sup> Perhaps unsurprisingly, the one House committee that gives greater rights than the basic House rule is the Committee on Standards of Official Conduct, which oversees the conduct of congressmen, officers, and employees of the House. The rules of that Committee require that a witness be informed of the right to counsel, give the witness time to obtain counsel, provide that a represented witness is not to be questioned in the absence of counsel, and give the witness’s

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128. RULES OF THE HOUSE OF REPRESENTATIVES, 108th Congress (Jan. 7, 2003), Rule XI.2(k)(3), *available at* [http://www.houses.gov/rules/house\\_rules.htm](http://www.houses.gov/rules/house_rules.htm). *See also id.* at Rule XI.2(k)(4) (“The chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt.”). The draft model committee rules for House committees in the 108th Congress make no mention of counsel for witnesses. *See* U.S. House of Representatives Committee on Rules, *Draft Model Committee Rules*, [http://www.house.gov/rules/comm\\_rules\\_draft.htm](http://www.house.gov/rules/comm_rules_draft.htm) (last visited July 28, 2003). Historically, according to Jefferson’s Manual:

Where witnesses and others have been arraigned at the bar of the House for contempt, the House has usually permitted counsel, sometimes under conditions; but in a few cases has declined the request. In investigations before committees counsel usually have been admitted, sometimes even to assist a witness, and clause 2(k)(3) of rule XI now provides that witnesses at hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

*See* CHARLES W. JOHNSON, CONSTITUTION, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 107-284, at 168-69 (2003), GPO Access, *available at* [http://www.gpoaccess.gov/hrm/browse\\_108.html](http://www.gpoaccess.gov/hrm/browse_108.html) (citing ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES (1907), GPO Access, *available at* <http://www.gpoaccess.gov/precedents/hinds/index.html>) (citations omitted). *See* 3 HINDS, *supra*, § 1772 (footnote omitted) (“Instance wherein a witness summoned before an investigating committee was accompanied by counsel.—On June 4, 1878, James E. Anderson, a witness before the select committee appointed to investigate the Presidential election of 1876, was accompanied by counsel, who sat behind him and consulted with him during the examination.”). *See also* WM. HOLMES BROWN, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE § 25, at 261 (GPO 1996) § 25 at 261 (“Although the applicable rule permits witnesses to have counsel at investigative hearings, it is the witness, not counsel, who has ultimate responsibility for protecting his rights and invoking the procedural safeguards guaranteed under the rules of the House. The attorney for the witness may not, as a matter of right, present argument or make demands on the committee. *See* [Congressional Record] 89–2, Oct. 18, 1966, pp 27486–95.”); LEWIS DESCHLER, DESCHLER’S PRECEDENTS ch. 15 § 14, H.R. DOC. NO. 94-661 at 2385-89 (Thomas Nicola ed., 1986), GPO Access, *available at* <http://www.gpoaccess.gov/precedents/deschler/browse.html>.

129. Committees adopting the House Rule or its language are Agriculture, Government Reform, House Administration, Science, and Transportation and Infrastructure. The Committee on Resources has no provision with respect to witness counsel (though it incorporates House Rule XI “to the extent applicable”), but does have a specific provision for witness claims of privilege: “Claims of common-law privileges made by witnesses in hearings, or by interviewees or deponents in investigations or inquiries, are applicable only at the discretion of the Chairman, subject to appeal to the Committee.” RULES FOR THE COMMITTEE ON RESOURCES, 108th Congress, Rule 4(i) (2003), *available at* <http://www.house.gov/resources/108cong/rules.htm#rule6>.

counsel the right of examination and cross-examination of witnesses who appear before the Committee.<sup>130</sup>

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130. Applicable Rules for the Committee on Standards of Official Conduct, *available at* <http://www.access.gpo.gov/congress/house/house16.html> (last visited Feb. 14, 2004), are as follows:

Rule 20 (Investigative Subcommittee):

(a)(2) The Chairman of the investigative subcommittee shall ask respondent and all witnesses whether they intend to be represented by counsel. If so, respondent or witnesses or their legal representatives shall provide written designation of counsel. A respondent or witness who is represented by counsel shall not be questioned in the absence of counsel unless an explicit waiver is obtained.

...

(b) During the inquiry, the procedure respecting the admissibility of evidence and rulings shall be as follows:

(1) Any relevant evidence shall be admissible unless the evidence is privileged under the precedents of the House of Representatives.

(2) The Chairman of the subcommittee or other presiding member at any investigative subcommittee proceeding shall rule upon any question of admissibility or pertinency of evidence, motion, procedure or any other matter, and may direct any witness to answer any question under penalty of contempt. A witness, witness's counsel, or a member of the subcommittee may appeal any evidentiary rulings to the members present at that proceeding. The majority vote of the members present at such proceeding on such appeal shall govern the question of admissibility, and no appeal shall lie to the Committee.

Rule 24 (Adjudicatory Hearings):

(i) During the hearing, the procedures regarding the admissibility of evidence and rulings shall be as follows:

(1) Any relevant evidence shall be admissible unless the evidence is privileged under the precedents of the House of Representatives.

(2) The Chairman of the subcommittee or other presiding member at an adjudicatory subcommittee hearing shall rule upon any question of admissibility or pertinency of evidence, motion, procedure, or any other matter, and may direct any witness to answer any question under penalty of contempt. A witness, witness's counsel, or a member of the subcommittee may appeal any evidentiary ruling to the members present at that proceeding. The majority vote of the members present at such proceeding on such an appeal shall govern the question of admissibility and no appeal shall lie to the Committee.

...

(j)(4) Witnesses at a hearing shall be examined first by counsel calling such witness. The opposing counsel may then cross-examine the witness. Redirect examination and recross examination may be permitted at the Chairman's discretion. Subcommittee members may then question witnesses. Unless otherwise directed by the Chairman, such questions shall be conducted under the five-minute rule.

(k) A subpoena to a witness to appear at a hearing shall be served sufficiently in advance of that witness' scheduled appearance to allow the witness a reasonable period of time, as determined by the Chairman of the adjudicatory subcommittee, to prepare for the hearing and to employ counsel.

Rule 27 (Rights of Respondents and Witnesses):

(a) A respondent shall be informed of the right to be represented by counsel, to be provided at his or her own expense.

...

(k) Witnesses shall be afforded a reasonable period of time, as determined by the Committee or subcommittee, to prepare for an adjudicatory hearing or for an appearance before an investigative subcommittee, and to obtain counsel.

(n) Witnesses may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights. The Chairman may punish breaches of order and

The overall lesson of the House rules? Except for when members themselves might be the subject of inquiry, the House recognizes that investigation will be more effective where witness counsel is given fewer opportunities to disrupt the proceedings. Of course, testimony given before a House committee will not normally be admissible at trial, so the rules do not have to take that contingency into account.

The general Senate rule on committee procedure, Rule XXVI, does not touch upon the issue of representation of witnesses at hearings, but only directs each committee of the Senate to adopt rules of procedure for hearings that are not inconsistent with the Rules of the Senate.<sup>131</sup> Only nine of the twenty Senate standing, select, and special committees of the 107th Congress had rules dealing with witness counsel.<sup>132</sup> The basic rule

decorum, and of professional responsibility on the part of counsel, by censure and exclusion from the hearings; and the Committee may cite the offender to the House of Representatives for contempt.

131. AUTHORITY AND RULES OF SENATE COMMITTEES, 2001–2002, S. DOC. NO. 107-3 (2001).

132. *See id.* The rules were: Special Committee on Aging, Rule 5(4)(a), *id.* at 6 (“A witness’s counsel shall be permitted to be present during his testimony at any public or closed hearing or depositions or staff interview to advise such witness of his rights . . .”), and Rule (5)8, *id.* at 7 (“If, during public or executive sessions, a witness, his counsel, or any spectator conducts himself in such a manner as to prevent, impede, disrupt, obstruct, or interfere with the orderly administration of such hearing the Chairman or presiding Member of the Committee present during such hearing may request the Sergeant at Arms of the Senate, his representative or any law enforcement official to eject said person from the hearing room.”); Committee on Armed Services, Rule 10(g), *id.* at 26 (“Any witness summoned to give testimony or evidence at a public or closed hearing of the Committee or subcommittee may be accompanied by counsel of his own choosing who shall be permitted at all times during such hearing to advise such witness of his legal rights.”); Committee on Banking, Housing, and Urban Affairs, Rule 4(e), *id.* at 33 (“Any witness subpoenaed by the Committee or Subcommittee to a public or executive hearing may be accompanied by counsel of his or her own choosing who shall be permitted, while the witness is testifying, to advise him or her of his or her legal rights.”); Committee on Energy and Natural Resources Investigations, Rule 10(b), *id.* at 51 (“A witness called to testify in an investigation shall be . . . permitted to have counsel of his or her choosing present during his or her testimony at any public or closed hearing, or at any unsworn interview, to advise the witness of his or her legal rights.”); Select Committee on Ethics, Rule 5(j)(4), *id.* at 77 (“Any witness at an adjudicatory hearing may be accompanied by counsel of his or her own choosing, who shall be permitted to advise the witness of his or her legal rights during the testimony.”); Committee on Governmental Affairs, Rule 5(D), *id.* at 119 (“Counsel retained by any witness and accompanying such witness shall be permitted to be present during the testimony of such witness at any public or executive hearing or deposition to advise such witness while he or she is testifying of his or her legal rights . . . . This subsection shall not be construed to excuse a witness from testifying in the event his counsel is ejected for conducting himself in such manner so as to prevent, impede, disrupt, obstruct or interfere with the orderly administration of the hearings; nor shall this subsection be construed as authorizing counsel to coach the witness or answer for the witness.”); Committee on Health, Education, Labor, and Pensions, Rule 17(d), *id.* at 135 (“Any witness summoned to testify at a hearing, or any witness giving sworn testimony, may be accompanied by counsel of his own choosing who shall be permitted, while the witness is testifying, to advise him of his legal rights.”); Select Committee on Intelligence, Rule 8.4, *id.* at 154 (“(a) Any witness may be accompanied by counsel . . . . (b) Counsel shall conduct themselves in an ethical and professional manner. Failure to do so shall, upon a finding to that effect by a majority of the members present, subject such counsel to disciplinary action which may include warning, censure, removal, or a recommendation of contempt proceedings. (c) There shall be no direct or cross-examination by counsel. However, counsel may submit in writing any question he wishes propounded to his client or to any other witness and may, at the conclusion of his client’s testimony, suggest the presentation of other evidence or the calling of other witnesses. The

regarding counsel is that counsel may be present during testimony “to advise the witness of his or her legal rights.” The Committee on Governmental Affairs, while granting the right of counsel to be present to advise the witness of legal rights, specifically notes:

This subsection shall not be construed to excuse a witness from testifying in the event his counsel is ejected for conducting himself in such manner so as to prevent, impede, disrupt, obstruct or interfere with the orderly administration of the hearings; nor shall this subsection be construed as authorizing counsel to coach the witness or answer for the witness.<sup>133</sup>

For congressional hearings, then, witness counsel is not permitted the intrusive behavior that marks civil deposition procedure. Many reasons for the differences in procedure can be advanced—strong governmental interest in congressional hearings, ability of Congress to grant immunity to witnesses, inconvenience to members of Congress in allowing intrusive objections—but a fundamental argument is that, when one is constructing rules for investigation, rather than preservation of testimony, the role of witness counsel is greatly diminished.

### *C. Agency Investigations*<sup>134</sup>

The rules of conduct for witnesses’ attorneys in administrative agency proceedings vary among the agencies, and even within a given agency based on the type of proceeding and the status of the witness as a potential target. For our purposes, the following rough outline will suffice: the Constitution does not require assistance of counsel for a witness in an administrative proceeding,<sup>135</sup> except where a hearing is required by due

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Committee may use such questions and dispose of such suggestions as it deems appropriate.”), and Rule 8.6, *id.* (“Any objection raised by a witness or counsel shall be ruled upon by the Chairman or other presiding member, and such ruling shall be the ruling of the Committee unless a majority of the Committee present overrules the ruling of the chair.”); Committee on Small Business, Rule 3(d), *id.* at 171 (“Any witness summoned to a public or closed hearing may be accompanied by counsel of his own choosing, who shall be permitted while the witness is testifying to advise him of his legal rights.”).

133. Committee on Governmental Affairs, Rule 5(D), *id.* at 119.

134. My focus here is on agency fact-finding investigations, rather than agency adjudications, which are more trial-like in nature, or agency depositions, which are more limited. See CHARLES H. KOCK, JR., ADMINISTRATIVE LAW AND PRACTICE § 5.40 (2d ed. 1997) (citations omitted) (“The great majority of agencies have rules providing for deposition. These rules, however, almost always provide for deposition to preserve testimony only and they rarely provide for discovery deposition. While depositions prove to be useful, if also expensive and slow, discovery tools in the Federal Rules of Civil Procedure, experience in agency proceedings have not been so positive.”).

135. See *In re Groban*, 352 U.S. 330, 332-33, (1957) (citation omitted) (“The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses



process—generally adjudicative, not investigatory, proceedings.<sup>136</sup> Instead, any right to counsel in an investigation must arise out of statute or agency rule. The Administrative Procedure Act (APA) affords parties appearing before agencies the right to be “accompanied, represented, and advised by counsel,”<sup>137</sup> but this right only applies to adjudicative proceedings, and only where witnesses have been compelled to appear.<sup>138</sup> In investigatory proceedings, or in voluntary appearances at adjudicative proceedings, the agency under the APA may restrict or eliminate the role of witness attorney in order to make the investigation more efficient.<sup>139</sup>

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from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies.”). Even the dissenting Justices in *Groban*, who would have found a constitutional right to some counsel in administrative investigations, recognized that the right might be highly circumscribed and still meet constitutional muster. *See id.* at 349 n.28 (Black, J., dissenting) (“Perhaps, if a real need could be shown, counsel could be restricted to advising his client and prohibited from making statements or asking questions. And there are other alternatives, much less drastic and prejudicial to the witness than the complete exclusion of his counsel, which might provide satisfactory protection for the witness without unduly impairing the efficiency of the examination.”); *see also* Anonymous Nos. 6 and 7 v. Baker, 360 U.S. 287 (1959) (approving state investigatory procedure against due process challenge where witness counsel was not allowed in the hearing room while witness was being questioned, but witness was free to consult with counsel outside of the examination room at any time during the interrogation); *Kanterman v. Attorney General*, 350 N.Y.S.2d 516, 519-20 (N.Y. Sup. Ct. 1973) (holding that, in securities fraud investigation of witness under subpoena, state attorney general could limit the participation of the witness’s attorney to advising the witness of his constitutional rights).

136. Ernest H. Schopler, *Comment Note—Right To Assistance By Counsel In Administrative Proceedings*, 33 A.L.R.3d 229 (1970) (citations omitted) (“Whether due process requires representation by counsel in administrative proceedings depends upon a variety of factors. As a general proposition, which, however, is subject to limitations, the right to employ counsel exists where due process requires a hearing. A hearing is ordinarily required by due process in proceedings in which an administrative agency exercises its adjudicatory or determinative, as distinguished from its investigatory, powers.”). *See Hannah v. Larche*, 363 U.S. 420, 442 (1960) (“‘Due process’ is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.”).

137. The Administrative Procedure Act provides that “[a] person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.” 5 U.S.C. § 555(b) (1988).

138. Schopler, *supra* note 136, at 229 (“Questions as to the right to representation by counsel in investigatory administrative proceedings may arise not only as a matter of constitutional law, but also as a matter of statutory construction. In the absence of a statute or administrative regulation specifically otherwise providing, the courts are reluctant to construe statutes authorizing representation by counsel in a specific administrative proceeding as extending to the investigatory stage of the administrative process.”).

139. *Id.* (“As emphasized in *Backer v. Commissioner* (1960, CA5 Ga) 275 F2d 141, a person’s right to counsel guaranteed under the Administrative Procedure Act is much broader than the right to have an attorney to advise him relative to his rights under the Fifth Amendment; the Act says, without any limitation, that such counsel may accompany, represent, and advise one compelled to appear before an administrative agency.”). *Cf. Groban*, 352 U.S. at 334 (“The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy.”).

Most agencies, however, give more rights to witnesses than either the Constitution or the APA require.<sup>140</sup> Typical of agency regulations is language that allows “[a]ny person compelled or requested to provide testimony as a witness” to be represented in agency investigatory proceedings by counsel, who may: “(1) Advise the witness before, during, and after such testimony; (2) Briefly question the witness at the conclusion of such testimony for clarification purposes; and (3) Make summary notes during such testimony solely for the use and benefit of the witness.”<sup>141</sup> Other agencies provide a similar right to counsel in investigatory proceedings, but only for witnesses appearing under compulsion of process.<sup>142</sup> For these agencies, then, procedure is not so different than our present civil practice.

However, one group of agencies, including the Federal Trade Commission, the Consumer Product Safety Commission, and the Chemical Safety and Hazard Investigation Board, provides far more detailed regulations governing a witness’s right to counsel in investigatory proceedings. In particular, the regulations of these agencies constrain counsel’s ability to disrupt investigations by limiting counsel’s opportunity and mode of making objections.

For example, under FTC regulations, objections are limited to claims that evidence sought from a witness is “outside the scope of the investigation” or that the witness need not answer a question on grounds of privilege. Either of these types of objections may be made on the record, and the witness’s attorney “may state briefly and precisely the ground therefor,” but the “witness and his counsel . . . shall not otherwise

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140. See 2 KOCK, *supra* note 134, § 6.23(5), at 353-54.

141. 12 C.F.R. § 308.148 (Federal Deposit Insurance Corporation rules of procedure for investigations: “Rights of Witnesses”). See also 12 C.F.R. § 622.105 (Farm Credit Administration rules of procedure for formal investigations: “Conduct of investigation”) (to same effect); 17 C.F.R. § 11.7 (Commodity Futures Trading Commission rules for investigations: “Rights of witnesses”) (same); 17 C.F.R. § 203.7 (Securities and Exchange Commission rules for formal investigative proceedings: “Rights of witnesses”) (same); 42 C.F.R. § 1006.4 (Department of Health and Human Services, Office of Inspector General for Health Care “procedures for investigational inquiries”) (witness entitled to be “accompanied, represented and advised by an attorney;” witness has “opportunity to clarify his or her answers on the record.”).

142. See, e.g., 47 C.F.R. § 1.27 (Federal Communications Commission rules of practice and procedure for all Commission proceedings: “Witnesses; right to counsel”) (for any “individual compelled to appear in person:” right to counsel; right to advice before, during, and after the proceeding; right for counsel to object and state basis therefore; in judgment of presiding officer, permission for counsel to ask clarifying questions of witness); 49 C.F.R. § 510.5 (National Highway Traffic Safety Administration rules for “information gathering hearings”) (for any “person who is required by subpoena . . . to provide information at an information gathering hearing;” right to confer in confidence with counsel concerning any questions asked; right to object and state basis); see also 14 C.F.R. § 305.9 (Department of Transportation procedural regulations for informal nonpublic investigations in aviation proceedings: “Rights of witnesses”) (“Any person compelled to testify . . . may be accompanied, represented, and advised by counsel.”).

interrupt the oral examination.”<sup>143</sup> This prohibition against interruption by counsel is repeated in the FTC regulations: “Counsel for a witness may not, for any purpose or to any extent not allowed by [the above-cited sections], interrupt the examination of the witness by making any objections or statements on the record.”<sup>144</sup>

Moreover, objections are treated as continuing and preserved throughout the hearing without the necessity for repeating them. “Cumulative objections are unnecessary,” and “[r]epetition of the grounds for any objection” is not allowed.<sup>145</sup> Finally, the person conducting the hearing is directed to “take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language,” with possible penalties for disorderly conduct including exclusion from additional participation in the particular investigation, or even suspension or disbarment from any further FTC practice.<sup>146</sup>

In sum, attorneys representing a witness in these agency proceedings are given almost no tools for impeding the examiner through obstructive tactics. The scope of objections is vastly confined, to not much more than protection of privilege; objections must be briefly phrased, and may not be repeated; all other interruptions by counsel are prohibited; and dilatory conduct is expressly punishable.

Of course, as with transcripts of congressional hearings, transcripts from a proceeding conducted under these agency rules generally would not be admissible at trial, without regard to the availability of the witness.<sup>147</sup> But the Rules are not set up with such an eventuality in mind—they are expressly devised to increase the effectiveness of an investigation. In these agency investigatory proceedings, witnesses are protected if a privilege is threatened, but non-privileged information is hard to hide.<sup>148</sup> While the Federal Rules of Civil Procedure as they relate to depositions have been amended in the last decade to limit lengthy objections, and to more

143. 16 C.F.R. § 2.9 (“Rights of witnesses in investigations”); *id.* at § 2.9(b)(1), (b)(2). Similar regulations can be found for other agencies at 16 C.F.R. § 1605.8 (Consumer Product Safety Commission regulations under the Flammable Fabrics Act); 40 C.F.R. § 1610.1 (Chemical Safety and Hazard Investigation Board rules for administrative hearings); 24 C.F.R. § 3800.50 (Department of Housing and Urban Development regulations for investigations in consumer regulatory programs).

144. 16 C.F.R. § 2.9(b)(4).

145. *Id.* § 2.9(b)(3).

146. *Id.* § 2.9(b)(6).

147. An exception to inadmissibility at trial would be for a party to a civil case, whose prior agency testimony could come in as a statement of a party opponent. Another exception would be for admissions against interest.

148. Of course, if a witness is determined to be evasive, or to perjure himself to hide information, no set of procedural rules will be effective at getting the information.

expressly prohibit obstructionist conduct by witness counsel,<sup>149</sup> the fact that the Rules spring from a background of testimony preservation means that they are not as good for discovery as they might otherwise be.

*D. Neutral Inquisitors: A German Advantage?*

Professor John Langbein's seminal article, *The German Advantage in Civil Procedure*,<sup>150</sup> laid the foundation for comparing the Federal Rules of Civil Procedure's adversarial discovery processes and Continental civil procedure, which features judicial conduct of fact-gathering.<sup>151</sup> While the article has been criticized descriptively, for its failure to accurately present German procedures,<sup>152</sup> and normatively, for not exploring the many complexities of adopting the system in the United States,<sup>153</sup> it remains the most accepted account of the advantages that civil-law fact-finding might bring to our own civil discovery system.

Langbein's main argument is that U.S. discovery process, because it is lawyer-driven and adversarial, is needlessly expensive and complex, and presents great opportunities for lawyers to distort the evidence upon which a case is ultimately decided. In contrast, the German system, where judges, not lawyers, are assigned the task of factual investigation, avoids many of our problems, Langbein argues.<sup>154</sup> Among the specific problems Langbein identifies in the American system is lawyer over-preparation and coaching of witnesses.<sup>155</sup> While Langbein largely focuses on the distorting effects of

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149. See *supra* Part IV.B.

150. John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

151. Professor Langbein takes care to point out that the German civil system, as a whole, is adversarial, with lawyers there playing "major and broadly comparable" roles to their American counterparts in most of the litigation process. The important distinction for Professor Langbein, and for us, is in the non-adversarial nature of fact-finding. *Id.* at 824 n.4 ("When writers take the shortcut and speak of German or other Continental civil procedure as 'nonadversarial' (a usage that I think should be avoided although I confess to having been guilty of it in the past), the description is correct only insofar as it refers to that distinctive trait of Continental civil procedure, judicial conduct of fact-gathering."). See also *id.* at 841-42 ("Outside the realm of fact-gathering, German civil procedure is about as adversarial as our own. Both systems welcome the lawyerly contribution to identifying legal issues and sharpening legal analysis. German civil procedure is materially less adversarial than our own only in the fact-gathering function, where partisanship has such potential to pollute the sources of truth.").

152. See Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988).

153. John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990); see also Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 60 (1997) ("[T]he civil law example is one to be followed only with the greatest caution.") (citing differences in civil and common law systems).

154. Langbein, *supra* note 150, at 824.

155. *Id.* at 862 ("For example, we might have the judge (or a surrogate such as a master or a magistrate) depose witnesses and assemble the rest of the proofs, working in response to adversary nomination and under adversary oversight as in German procedure. We might then be able to forbid the adversaries from contact with

witness coaching on subsequent trial testimony, the argument has perhaps even greater strength when applied to witness coaching and obstruction in the deposition setting, where no fact-finder is present to temper the lawyers' adversarial behavior.

Langbein's ultimate conclusion is that an extension of the United States' already growing use of managerial judging, to encompass the fact-finding function, might be a way to bring the American system closer to the German one.<sup>156</sup> It is this final conclusion, that judges might be charged with fact-finding duties, not the underlying analysis of American problems and German advantages, which has drawn the most criticism of Langbein's paper.<sup>157</sup> Because Germany has an entrenched and specifically educated judiciary, and because America has a long-established system of adversary civil litigation, the systems may not ever be compatible on this point.<sup>158</sup>

But we need not accept Langbein's conclusions, nor need we fully delve into the intricacies of German law, or any other system, to draw out the important point here: that some successful models of fact-finding are not predicated on any sort of adversarial model. Langbein makes the point most clearly:

A]dversary theory was misapplied to fact-gathering in the first place. Nothing but inertia and vested interests justify the waste and distortion of adversary fact-gathering. The success of German civil procedure stands as an enduring reproach to those who say that we must continue to suffer adversary tricksters in the proof of fact.<sup>159</sup>

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witnesses—in other words, we could abolish the coaching that disgraces our civil justice.”).

156. See also William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 717 (1989) (citations omitted) (“But for the pretrial stages of litigation, the practice under the continental system bears sympathetic examination, if not emulation. That practice involves the staged development of the case under the direction of the judge, with a gradual narrowing of issues as the facts are marshalled. The process is deliberate and controlled, not competitive or confrontational.”).

157. See, e.g., Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 153 nn.188, 201 (1999) and accompanying text; Reitz, *supra* note 153, at 988 (“My interest lies with Langbein's claim that we could adopt the central aspect of German civil procedure, judicially dominated fact-finding, without changing many other fundamental characteristics of our modern civil procedure. I believe we could not.”); see also *id.* at 992 (“After considering the ways in which German-style judicial control over witness examination might be introduced into the American system—including, but not limited to, Alschuler's proposal for a two-tier trial system—I come to the conclusion that judicially led fact production is incompatible with a number of fundamental features of our contemporary legal system.”).

158. For another interesting proposal, see Albert W. Alschuler, *Mediation with a Mugging: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1836-57 (1986).

159. Langbein, *supra* note 150, at 866. See also Janeen Kerper & Gary L. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103, 122 (1997/98) (terming non-adversarial discovery an aspect of a growing “court first, client second doctrine” in American law) (citing W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 895 (1996) (“Lawyers have an obligation to be advocates for their clients, but . . . this duty does not apply with full force to discovery. The function of discovery within the litigation system requires that lawyers assist the court in adjudicating the dispute on the merits by disclosing the facts necessary for the court to make an informed decision. With limited exceptions, advocacy comes into play only after the facts are fully disclosed . . . . Courts are beginning to recognize that the discovery system is designed

While one solution, à la Langbein, might be to remove the adversaries from the fact-gathering process, another might be to remove the opportunities and incentives for “adversarialness” from the process.

#### IV. POST-1938 REVISIONS TO THE DEPOSITION RULES

So far, this Article has shown that, while with the passage of the Rules in 1938 depositions changed radically from being a somewhat rare testimony-preservation device into an important discovery tool, the standards of deposition conduct changed very little. Moreover, it has illustrated that many other legal fora which focus on fact discovery rather than testimony preservation have adopted more constricted rules for lawyer conduct in those proceedings. This Part will examine post-1938 amendments to the Federal Rules, and other more localized responses to the Rules such as court standing orders and rulings, for evidence of changes that reflect an attempt to better balance the fact-gathering and testimony-preserving aspects of oral discovery, turning it towards a more discovery-biased procedure.

This Part concludes that the numerous changes that have been proposed and adopted for deposition procedure have been focused on symptoms—such as lawyer misconduct, delay, and obstruction—while failing to address what is perhaps the underlying disease, the attempt to mesh open fact-finding with an adversarial system of representation. This failure to get at the basic problem in the case of oral discovery contrasts with recent Rules revisions providing for mandatory disclosure of certain facts and documents. The mandatory initial disclosure rules more directly attempt to reconstruct the role of the lawyer in the discovery process. The failure to similarly revise the deposition rules is especially notable given the fact that many lawyers consider depositions the most important discovery tool and that depositions also often are a crucible for lawyer conflict, bringing adverse parties into direct and spontaneous confrontations generally far from the calming influence of judicial oversight.<sup>160</sup>

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to facilitate truth-finding, and they are involving lawyers in this search for the truth. They are imposing public duties upon lawyers in discovery that are not merely rhetorical fluff, but have content and carry severe sanctions for their violation.”)).

160. *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 53-54 (Del. 1994) (court noted “extraordinarily rude, uncivil, and vulgar” behavior by deponent’s counsel, including repeatedly telling examining attorney to “shut up” and to stop “asking stupid questions”); *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993) (citation omitted) (“Depositions are the factual battleground where the vast majority of litigation actually takes place. It may safely be said that Rule 30 has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial— assuming there is a trial, which there usually is not. The pretrial tail now wags the trial dog.”); *Castillo v. St. Paul Fire & Marine Ins. Co.*, 828 F. Supp. 594, 597 (C.D. Ill. 1992) (suspending attorney for threatening opposing counsel with the statement, “You can write

Throughout the debate on deposition procedure modifications, the tension between testimony-preservation-preferenced procedural deposition rules and the Federal Rules' stated goal of near-untrammelled discovery has not been explored.

#### A. Rule 26<sup>161</sup>

Although Rule 26 now contains "General Provisions Governing Discovery" and mandatory disclosure provisions, in 1938 it set forth only rules relating to depositions. As discussed above,<sup>162</sup> several provisions were notable in the new Rule, among them those stating that the new deposition procedure would serve dual purpose as a means of discovery and preservation of evidence,<sup>163</sup> and that the scope of the examination could include the "claim or defense of the examining party or to the claim or defense of any other party."<sup>164</sup> In 1948, the Advisory Committee added to the provision on scope that: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>165</sup>

your threatening letters to me. But, you step outside this room and touch the telephone, and I'll take care of that in the way one does who has possessory rights."); A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 279 (1998); A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 GEO. J. LEGAL ETHICS 1, 1-4 (1998) ("Depositions are an extensively used and rampantly abused discovery tool.") (collecting authority); Kerper & Stuart, *supra* note 159, at 104; Dan Downey, *Discoverectomy*, 11 REV. LITIG. 475, 484 (1992) ("[D]epositions create the most fertile opportunity for lawyers to learn to despise each other . . ."). *But cf.* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2239 (1989) (arguing that discovery rule controversy centers on document production); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998) (discussing a study of cases likely to have discovery, in which 67% had at least one deposition, but problems with depositions were only reported in 26% of those cases that had them, a lower percentage than problems with document discovery (44%), initial disclosure (37%), or expert disclosure (27%).

161. The contemporaneous objection rule of Rule 32 reads now as it did when introduced in 1938, save for renumbering required by the 1970 reorganization of the discovery provisions of the Rules. However, other important changes have been made to discovery rules in the years since their promulgation that bear on depositions. These changes are the subject of the immediately following sections.

162. *See* discussion at Part II.C, *supra*.

163. FED. R. CIV. P. 26 (1938) (modified 1970) ("Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes.").

164. *Id.* ("[I]f the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.").

165. FED. R. CIV. P. 26(b) (1948) (modified 1970). FED. R. CIV. P. 26, advisory committee's note to subdivision (b) (1946) (citations omitted):

The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves

Substantial reorganization of the discovery rules took place in 1970. Rule 26 was converted into “a rule concerned with discovery generally,” by moving from Rule 26 provisions addressed exclusively to depositions.<sup>166</sup> Thus, provisions in Rule 26 relating to when depositions could be taken and the method of examination and cross-examination of deponents were moved to Rule 30, while sections on the admissibility of depositions at trial and in motion practice, and the grounds for objecting to such admissibility, were moved to Rule 32.<sup>167</sup>

A new section was added to Rule 26 in 1980, in response to “widespread criticism of abuse of discovery.”<sup>168</sup> Rejecting proposals to limit the scope of discovery, the Advisory Committee instead created a provision allowing “counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery” to seek intervention of the court through a discovery conference.<sup>169</sup>

Discovery misuse remained on the Advisory Committee’s agenda, and in 1983, the Committee made further revisions to Rule 26. The Committee for the first time recognized the tension between our adversary system and the goal of “[m]utual knowledge of all the relevant facts gathered by both parties.”<sup>170</sup> While recognizing that both excessive

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inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible . . . . Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word “relevant” in effect meant “material and competent under the rules of evidence.” Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. The contrary and better view, however, has often been stated.

The 1948 amendments were adopted December 27, 1946, and took effect on March 19, 1948.

166. FED. R. CIV. P. 26 advisory committee’s notes (1970).

167. *Id.*

168. FED. R. CIV. P. 26 advisory committee’s note (1980).

169. *Id.*

170. FED. R. CIV. P. 26 advisory committee’s note (1983) (“Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay.”). See also JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE, § 30App.100 (3d ed. 1997) (“The most significant amendments occurred in 1970 and 1993 and can be viewed as reflecting the tension inherent in Rule 30, the discovery rules, and modern American civil litigation. The civil adjudication system is an adversary one that permits substantial latitude to lawyers and seeks to permit maximum factfinding and attempts to get at ‘the truth.’ Simultaneously, the system strives for efficiency and to ensure that litigation is not a war of attrition won by excessively bellicose lawyering irrespective of the merits of the dispute.”) (further arguing that the 1970 changes opened up discovery while the 1993 changes were a “backlash” response that placed limits on



discovery and overly evasive responses were problems,<sup>171</sup> the Committee struck back at only the former, encouraging judges “to be more aggressive in identifying and discouraging discovery overuse.”<sup>172</sup> It deleted a presumption that “the frequency of use” of the various discovery methods was not to be limited, added provisions encouraging courts and parties to consider the value of discovery in proportion to its cost,<sup>173</sup> and added a requirement that an attorney of record sign every “request, response, or objection” to certify that it is consistent with the Rules, not interposed for an improper purpose, and not “unreasonably or unduly burdensome or expensive” given the needs of the case.<sup>174</sup>

Still, discovery abuse raged. And a constant undercurrent in proposals for discovery reform was a perceived decrease in civility, and increase in adversarial behavior, among members of the practicing bar. Several commentators pointed out that an essential tension exists in a system that requires from lawyers zealous advocacy of their clients, even during the discovery phase of a case, while at the same time purporting to make all non-privileged, relevant material available to all parties well before trial.<sup>175</sup>

Attempts to address this conflict between adversarial representation and open discovery have made their furthest advance in the passage of the 1993, and later the 2000, amendments to Rule 26, requiring automatic disclosure of certain documents and evidence in the initial stages of civil litigation.<sup>176</sup> For the first time, the Advisory Committee has taken steps to

discovery).

171. FED. R. CIV. P. 26 advisory committee’s notes (1983) (stating: “Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems,” and “the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses.”).

172. *Id.*

173. These “proportionality” provisions are now found in FED. R. CIV. P. 26(b)(2):

By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

174. FED. R. CIV. P. 26(g).

175. Among the many good articles on this topic, see, e.g., Subrin, *supra* note 19; Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 485 (1995); Schwarzer, *supra* note 156; Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

176. FED. R. CIV. P. 26(a). *But see* Marcus, *supra* note 91, at 766 (arguing that the limit on initial disclosure

change the adversarial nature of the discovery process, by imposing on the parties a duty to disclose certain information without awaiting formal discovery requests.<sup>177</sup>

The type of rule revision embodied by the automatic disclosure provisions of Rule 26 strikes at the problem of adversarial behavior at its root, by attempting to change the nature of the attorney's relationship to the case in the early stages of discovery. The new Rule 26 takes away one opportunity for obstruction by making certain facts virtually impervious to concealment, or at least to concealment that was formerly allowed under the rules and encouraged by the culture of adversary representation in discovery. Of course, no rule change can prevent outright fraudulent suppression of information. But the current Rule 26 requires lawyers to forgo a round of potential discovery fights and make certain basic information available immediately.

### B. Rule 30

As detailed above,<sup>178</sup> in its 1938 promulgation, Rule 30 contained provisions on notice, oaths, objections, and signing of depositions. It also included sections on protective orders and motions to terminate examinations.<sup>179</sup> Provisions on when depositions could be taken and the method of examination and cross-examination of deponents were moved from Rule 26 to Rule 30 in 1970.

In 1993, the Committee, as part of its overall revisions to the discovery rules in response to perceived discovery abuse problems, for the first time addressed the manner in which objections should be raised at depositions.<sup>180</sup> Stating that depositions "frequently have been unduly

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to material that "bears significantly on any claim or defense" is an attempt to narrow the general scope of discovery, and pointing out how the other 1993 amendments to the Rules also seek "discovery containment").

177. FED. R. CIV. P. 26, 1993 advisory committee's note (1993). Much has been written about the 1993 revisions to Rule 26, and further revisions to mandatory disclosure made in 2000, that is interesting but too far removed from our present project to include here.

178. See discussion at Part II.C, *supra*.

179. The motion to terminate is one of the few instances where the proposal set forth in this Article would approve of witness's counsel interrupting a deposition. The original language of Rule 30(d) is well-stated: "At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition . . ." FED. R. CIV. P. 30(d) (1938) (modified 1993).

180. See Dickerson, *The Law and Ethics of Civil Depositions*, *supra* note 160, at 279-80 ("Before the 1993 amendments, Rule 30 was silent about how or what type of objections could be made, when a defending attorney could instruct the witness not to answer, and the consequences if one side delayed or impeded the examination. Instead, the rule provided only that the court could terminate or limit the deposition when a party

prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond,”<sup>181</sup> the Committee drafted a new requirement that: “Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion.”<sup>182</sup> The 1993 revisions to Rule 30 also put a limit of ten on the number of depositions parties may take, absent leave of court or stipulation with the other parties, and made clear that courts have the authority to establish limits on the length of depositions.<sup>183</sup>

Revisions to Rule 30 in 2000 established a presumptive durational limitation of one day (of seven hours) for any deposition, and strengthened the provisions dealing with the manner in which objections are to be raised, stating that “[i]f the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney’s fees incurred by any parties as a result thereof.”<sup>184</sup>

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or deponent showed that the deposition was “being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.”).

181. FED. R. CIV. P. 30 advisory committee’s note to subdivision (d) (1993).

182. FED. R. CIV. P. 30(d)(1) (1993) (modified 2000).

183. FED. R. CIV. P. 30(a)(2) (1993) (modified 2000).

184. The full text of current Rule 30(d) reads:

Schedule and Duration; Motion to Terminate or Limit Examination.

(1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney’s fees incurred by any parties as a result thereof.

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

Unlike the 1993 and 2000 revisions to Rule 26, revisions to Rule 30 during the same years did nothing to fundamentally change the relationships between counsel during the discovery phase of civil litigation. The Rule 30 changes “tweak” the system without altering it, still supporting a fully adversarial role for attorneys during discovery.

### C. Local Court Rules

During the post-1970 period of Rule revision, many federal courts also were active in attempting to deal with perceived problems of deposition abuse.<sup>185</sup> A favorite target was attorney conduct during depositions, particularly the conduct of the attorney representing the witness.<sup>186</sup>

One of the most widely reported cases from this era is *Hall v. Clifton Precision*.<sup>187</sup> In *Clifton Precision*, the court considered, among other issues, to what extent a lawyer may “confer with a client, off the record and outside earshot of the other lawyers, during a deposition of the client,” as well as the proper manner of making objections and instructing a witness not to answer a question.<sup>188</sup> Citing the then-proposed 1993 amendments to Rule 30, along with the court’s authority under the Rules to control the pretrial process, the court issued a broad-ranging order governing the behavior of witness counsel at depositions and sharply limiting the ability of the defending attorney to interrupt proceedings. Among other things, the order required that the witness “ask deposing counsel, rather than the witness’s own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition;” that witness counsel “not make objections or statements which might suggest an answer to a witness;” and that counsel “not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a [court-ordered] limitation.”<sup>189</sup> More controversially, the

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FED. R. CIV. P. 30(d).

185. See Marcus, *supra* note 91, at 771-72 (discussing “Balkanization” of discovery rules through district court experimentation); see generally Kerper & Stuart, *supra* note 159, at 114-15 (collecting examples).

186. See Dickerson, *The Law and Ethics of Civil Depositions*, *supra* note 160, at 282-83 (collecting local rules addressed at control deposition conduct); see generally David H. Taylor, *Rambo As Potted Plant: Local Rulemaking’s Preemptive Strike Against Witness-Coaching During Depositions*, 40 VILL. L. REV. 1057, 1057 (1995).

187. 150 F.R.D. 525 (E.D. Pa. 1993).

188. *Id.* at 526.

189. The full order reads:

AND NOW, this 29th day of July, 1993, upon consideration of the oral arguments and letter briefs of the parties regarding the dispute over the conduct of counsel at depositions, it is ORDERED that the following guidelines for discovery depositions are hereby imposed:

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness’s own counsel, for clarifications, definitions, or

court prohibited “private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege,” and ruled that the attorney-client privilege did not apply to any such conferences conducted in violation of the order.<sup>190</sup>

Like the 1993 revisions to Rule 30, the *Clifton Precision* standing order, and the many similar orders adopted by district courts around the country following the *Clifton Precision* case, attempt to micromanage attorney conduct. But the cases stop short of recognizing that in a purely investigatory proceeding, as civil depositions have essentially become, witness counsel might fairly have no role beyond providing only the most basic protection of witness privileges.

#### V. FIRST, DO NO HARM: CONSIDERING DEPOSITIONS TAKEN WITHOUT THE “CONTEMPORANEOUS OBSTRUCTION” RULE

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explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions.

2. All objections, except those which would be waived if not made at the deposition under Federal Rule of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Federal Rule of Civil Procedure 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.

3. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

4. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel’s statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.

5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege.

6. Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.

7. Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.

8. Deposing counsel shall provide to the witness’s counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness’s counsel do not have the right to discuss documents privately before the witness answers questions about them.

9. Depositions shall otherwise be conducted in compliance with the Opinion which accompanies this Order.

*Id.* at 531-32.

190. See Dickerson, *The Law and Ethics of Civil Depositions*, *supra* note 160, at 292 (collecting responses to the *Hall* case and noting that the opinion “is controversial due to its strictness, and it is not followed in all jurisdictions”). For detailed criticism of the ruling, and similar rulings by other courts, see generally Taylor, *supra* note 186.

Finally, a proposal: eliminate the contemporaneous objection rule in depositions. Rather than requiring that objections as to form be made during the deposition or else be waived, as per current Rule 32(d), and allowing non-form objections to be made at deposition, despite the fact that they are not waived, under Rule 30, we should preserve all objections as to questions made during depositions and prohibit any objections from being made at that time. In the main, turn the defending attorney into a potted plant.<sup>191</sup>

The deponent's attorney would still have an important role, of course. Not only during preparation of the witness, which is perhaps the most important job of witness counsel even under present Rules, but also in preserving privileges and protecting the witness from harassment. These would be the only proper times for deponent's counsel to interrupt the proceeding, which would become almost completely a colloquy between witness and examining counsel.

For that is the role of the deposition in modern litigation: finding out what facts the witness knows, both to allow all parties to the case to have the same information, preventing surprise in the event of trial, and to "freeze" the witness's testimony at an early point in the proceedings, "before that witness's recollection of the events at issue either has faded or has been altered by intervening events, other discovery, or the helpful suggestions of lawyers."<sup>192</sup> As discussed above, the chances of the testimony ever being used at trial are small. The proposed changes would make the conduct of depositions more closely match the theory of oral examination under the Rules.

Of course, there will be criticisms, several of which I anticipate below, without attempting to be exhaustive.

#### *A. Protection of Deponents*

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191. Professor Paul D. Carrington, former Reporter for the Advisory Committee on Civil Rules, suggested a similar revision in a 1997 article proposing possible revisions to the discovery rules, grounding the proposed revision on practical rather than theoretical bases:

Rule 30 should be revised to create a presumptive limit on the number of depositions, and in three other respects. For one, it should be explicit that all objections to questions asked at a deposition are automatically reserved, unless examining counsel otherwise directs. The purpose of this revision is to save the time of lawyers and deponents presently devoted to bickering over the form of questions. Absent such a non-waiver provision, the time limits on depositions will be made inappropriate in a particular instance by prolonged bickering. Counsel for the deponent should, of course, be expected to assert applicable evidentiary privileges, but should otherwise remain silent during the examination by other parties, unless the examining counsel wishes assurance that a particular question and answer are in a form allowing them to be used at trial.

Carrington, *supra* note 153, at 66-68.

192. *Clifton Precision*, 150 F.R.D. at 528.

In 1999, the Texas Supreme Court Advisory Committee undertook a revision of the Texas rules of civil procedure, including the rules for depositions. One of the rules adopted as part of the revisions limits objections during a deposition to “Objection, leading,” “Objection, form,” and “Objection, nonresponsive;” objections are waived if not made in conformity with this rule.<sup>193</sup> A lawyer making an objection can give a broader reason for the objection only if opposing counsel requests an explanation, and even then the explanation of the grounds for the objection must be made clearly and concisely, in a non-argumentative and non-suggestive manner.<sup>194</sup>

After publishing early drafts of this rule, the Texas Supreme Court Advisory Committee, which drafted the rule, received complaints that the proposed rule would not give deponent’s counsel the ability to protect a witness from abusive conduct and misleading questions.<sup>195</sup> In response, the final rule was amended to allow deponent’s counsel to instruct the witness not to answer a question in order “to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling [on a motion to suspend the deposition].”<sup>196</sup>

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193. See TEX. R. CIV. P. 199.

194. *Id.*

195. See Kenneth E. Shore, *A History of the 1999 Discovery Rules: The Debates & Compromises*, 20 REV. LITIG. 89 (2000) (citation omitted) (quoting criticism, including “there are far more tricky questions than speaking objections” and “the questioning attorney can sometimes phrase questions which mischaracterize testimony or contort facts in such a way that any response to the question would be inaccurate or misleading . . . [T]hese provisions unfairly empower the questioning attorney in a deposition”). See similar criticism of the *Clifton Precision* decision in Dickerson, *The Law and Ethics of Civil Depositions*, *supra* note 160, at 292 n.98 (quoting *Acri v. Golden Triangle Mgmt. Acceptance Co.*, 142 Pitt. Legal J. 225 (Pa. Ct. C.P., Allegheny County 1994) (citations omitted) (“[T]he court chose not to follow the Hall guidelines for a number of reasons: (1) they prohibit counsel for a party being deposed from raising objections that our discovery rules specifically allow; (2) they provide insufficient protection to the deponent; (3) they can produce results that could not have been intended; (4) they fail to recognize the proper role of counsel; (5) they increase the burden and expense of litigation; and (6) they are not necessary to curb the discovery abuses which are described in the Hall v. Clifton Precision opinion. The court further expounded: ‘It is my experience that more often than not intervention by counsel for the deponent shortens the deposition by requiring the deposing counsel to focus on relevant matters and to allow the witness to fully respond in the witness’s own language. Depositions taken by certain attorneys would never end if other counsel could not raise objections that the questions are repetitive or argumentative. We need not turn the lawyer for the deponent into a fly on the wall in order to protect litigants’ rights to obtain information from a witness in a witness’s own language through depositions by oral examination. If the misbehavior of the deponent’s counsel becomes a recurring and serious problem, counsel for the deposing party can discontinue the deposition and request judicial intervention. As a discovery judge, I will review a transcript of the discontinued deposition and if I agree with counsel for the deposing party that counsel for the deponent was attempting to sabotage proper efforts to obtain discovery, I will tailor an order that will protect the interests of the deposing party.’”).

196. TEX. R. CIV. P. 199.5(f).

As for the Texas rules that allow only bare objections as to form, leading questions, and non-responsiveness: why bother? The opposing attorney still gets to inject herself into the flow of examination, albeit in a starkly worded fashion, and the objections themselves do little to preserve cleaner testimony, if that is their purpose. More importantly, while instructions not to answer in the case of privilege, protective order, or abusive conduct make sense, allowing instructions not to answer for a question “for which any answer would be misleading” opens up an opportunity for a far more disruptive practice than prior rules that arguably allowed “long-winded” objections.

The solution, for our proposed rules and the Texas concerns, is the same: prohibit all objections, but preserve all of them for later proceedings. Allow instructions not to answer in the case of privilege, protective order, or abusive conduct. And for questions that are potentially misleading, do nothing. A solution for such questions is already in place: the deponent’s counsel may either rely on the ability to challenge the misleading question at a later time, or may simply examine the deponent following opposing counsel’s examination in order to clear up any misleading statements.

The ramifications of this treatment of misleading questions are important. Encouraging direct examination by witness counsel to clear up confused testimony will require witnesses, especially parties to the case, to “put more cards on the table” than deponents normally wish to reveal. For “friendly” witnesses, anyway, unless the witness is infirm or otherwise likely to miss a potential trial, and a party thus needs the witness’s testimony preserved, the party that intends to use the witness is generally loath to examine that witness in deposition.<sup>197</sup> Rather, the party will rely on informal interviews to get a clear picture of the witness’s possible testimony at trial. Information gleaned through such interviews is, of course, protected from discovery by opposing parties under the work product doctrine.<sup>198</sup> Should such information be needed prior to trial, for example, to present or oppose a motion, the party can get the witness to execute an affidavit containing the information.

Thus, under the current rules, a significant amount of information can be legitimately and strategically concealed, while answers to allegedly misleading questions are marked by contemporaneous objection but not otherwise corrected. Encouraging clarifying questions during the

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197. See, e.g., WILLIAM A. BROCKETT & JOHN W. KEKER, EFFECTIVE DIRECT & CROSS EXAMINATION § 9.19, at 192-93 (Calif. CEB 1986) (stating that “[t]he attorney defending a deposition should *rarely* conduct direct examination of his own witness,” and listing exceptions).

198. FED. R. CIV. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947).



deposition itself, by eliminating the contemporaneous objection rule, could lead to more extensive discovery.

If questions are intentionally misleading, at some point you reach “abusive” conduct, and deponent’s counsel can terminate and move for a protective order.<sup>199</sup> But for routine misunderstandings, there is already a corrective, one that does not require interruption of the flow of examination.

### *B. Use of Testimony in Dispositive Motions*

Whether or not deposition testimony will be admissible to support or oppose summary judgment motions is an important issue, especially for defendants’ attorneys. Still, a proposed elimination of the contemporaneous objection rule does not greatly affect current practice. Important issues of admissibility of testimony and other evidence will still be briefed and argued in motion practice, as under the current rules. By not automatically waiving curable objections that are not raised during the examination, our proposal will perhaps create more possibility for later “kitchen sink” challenges to deposition testimony, but in cases that present the economic incentive for such thorough motion practice, voluminous objections are likely already being raised in depositions.

In fact, deponent’s counsel gets some positive tradeoff here for losing the ability to interrupt the flow of examination: she no longer need worry about fixing opposing counsel’s questions in the deposition. Rather, she can let confusing, compound, and misleading questions stand on the record. If she is confident that the answers are inadmissible due to infirmities in the original questions, then she need not clear up the confusion with her own deposition examination of the witness. Instead, she can simply move to strike the answers if and when they are used to support the opposing party’s summary judgment motion or opposition. If the witness’s attorney is not confident that the answers will eventually be stricken, then she may examine her own witness during the deposition and clear up the error.

### *C. Preservation of Testimony in Event of Trial*

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199. See FED. R. CIV. P. 30(d)(4) (“At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court . . . may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c).”).

The framers of the Rules intended to create a *dual*-use deposition procedure: one that kept the original use of depositions as testimony-preservation devices, and added a use as fact-discovery mechanisms. Because so few cases go to trial, particularly of the discovery-intensive commercial type that often settle or are disposed of in the pretrial stages, the preservation of testimony is no longer as important as when the Rules were drafted. But some trials do happen, of course, and deposition testimony might need to be offered at trial due to unavailability of a witness.

But consider upon whom the burden should rest for preserving this evidence—the deposing attorney, who is most likely to need the testimony later, or the defending attorney, who has the ability to secure evidence from the witness through informal avenues? Should not the burden be on the proponent of using the evidence to collect admissible information by asking proper questions? It is his burden in all other aspects of litigation. For example, an attorney who will eventually challenge the admission of a certain document produced in discovery is not required to argue at the time of production that the document is not going to be admissible at trial.<sup>200</sup> So why should witness counsel be responsible for policing the subsequent admissibility of deposition testimony?

Of course, witness counsel always has the right to examine her own witness at deposition to insure that certain testimony will be preserved in admissible form. While this is a departure from current common practice, in that information might be revealed at an earlier stage of litigation, such a result is perfectly consistent with a discovery procedure that aspires to full knowledge for all parties of all relevant facts.<sup>201</sup>

As with summary judgment motions, there will be post-deposition, pre-trial motion practice to resolve evidentiary issues, including the admissi-

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200. In fact, the rule precludes making the argument against production of evidence in discovery on the grounds that it might later be inadmissible at trial. See FED. R. CIV. P. 26(b)(1) (“Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”).

201. Compare Jean M. Cary, *Rambo Depositions: Controlling An Ethical Cancer In Civil Litigation*, 25 HOFSTRA L. REV. 561, 587 (1996) (“Although these blanket pretrial orders may restrict Rambo behavior, they may also restrict effective and necessary representation of clients at a deposition. For example, when a court prohibits all objections except as to the form of the question and matters of privilege, attorneys who need to explain an objection cannot do so. If an individual and a corporation have both been sued, the attorney representing the individual may want to object to the question, ‘When did you first learn of the discriminating act?’ in order to clarify whether the question refers to the individual or the corporation. However, under the wording of the blanket pretrial order, his or her only option is to say, ‘Objection, vague.’ The opposing attorney and the deponent may not understand the problem with the question. Needless time will be wasted by all concerned, pursuing a line of questions about which the client may have no knowledge, when a simple explanation by the defending attorney would have clarified the situation.”). The solution to Professor Cary’s quandary is to require direct examination by witness counsel to clear up misunderstandings.

bility of deposition testimony.<sup>202</sup> As discussed above, witness counsel gets a tradeoff here for no longer being able to interrupt examinations with objections: she now has the ability to subsequently challenge the admissibility of deposition testimony without regard to whether objections were preserved during the examination.

## VI. CONCLUSION

This Article has shown that the contemporaneous objection rule for depositions is a vestige of pre-Rules common law, more suited to the use of depositions as a testimony-preservation, rather than a fact-discovery, device. Given that the rule can be used to impede examinations, and that the testimony-preservation function for depositions is nearly irrelevant in current civil practice, it should be discarded. This conclusion is supported by considering alternative investigatory fora, many of which have far more restricted roles for witness counsel than does our current civil system.

In rejecting the “contemporaneous obstruction” rule, and bringing examination practice under the Rules into conformity with the open-discovery theory underlying them, the proposal envisions a less adversarial role for attorneys in the discovery process. Such a role has been embraced, somewhat, under the current Rules’ mandatory initial disclosure provisions, but not yet for deposition practice. In directly addressing the disconnect that has given obstructionist attorneys a tool for impeding discovery, this proposal provides theoretical underpinnings, and a push forward, to the efforts of the last decade to decrease adversarialness in the pretrial process.

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202. The final pretrial conference currently authorized by Rule 16 specifies that the parties “shall formulate a plan for trial, including a program for facilitating the admission of evidence.” FED. R. CIV. P. 16(d).