## LITIGATORS CORNER:

# Bring Your Egg Timer

BY JOSEPH N. HOSTENY, OF NIRO, SCAVONE, HALLER & NIRO

*Regular* IP Today *columnist Joseph N. Hosteny is an intellectual property litigation attorney with the Chicago law firm of Niro, Scavone, Haller & Niro. A Registered Professional Engineer and former Assistant US Attorney, his articles have also appeared in* Corporate Counsel Magazine, The Docket *(American Corporate Counsel Association)*, American Medical News, Inventors' Digest, Litigation Magazine *and* Assembly Engineering Magazine. *Listed in* Who's Who, *Mr. Hosteny was recently named to the Board of Editors of* Patent Strategy & Management *(a monthly publication of* American Lawyer Media*), for which he will also be writing periodic guest columns. In addition, an article quoting him appeared in the November, 1999 issue of* Entrepreneur Magazine. *Mr. Hosteny can be reached at (312) 236-0733, or by e-mail at jhosteny@hosteny.com, or by visiting his web site at http://www.hosteny.com.*

With the advent of the recent amendments to the Federal Rules of Civil Procedure, you will need to bring an egg timer to depositions. In yet another step intended to cut back on the broad discovery that was one of the original goals of the Federal Rules of Civil Procedure, depositions are now not only limited in number. They are now limited in duration, as well. The amendments to Rule 30 made several changes, and the most interesting is the limitation of any deposition "to one day of seven hours." As we all know, depositions tend to expand to fill the time available.

So now, a deponent may behave like a defendant in "Night Court," the situation comedy starring Harry Anderson, Markie Post, Richard Moll and John Larroquette. In a memorable episode, they were all rushing through their court call in the Manhattan Night Court to get to the end, so they could leave for a New Year's Eve party. They had to be done before midnight. Naturally, the courtroom was packed with petty criminals and misdemeanants. Judge Stone, Bailiff Bull Shannon, prosecutor Dan Fielding and defense attorney Christine Sullivan rammed through deal after deal, dismissing cases, and negotiating sentences and fines. With only minutes left until midnight, they reached the last defendant on the call. They were on the verge of escaping to their party. This fellow, however, was different. He... spoke... like... this, reluctantly surrendering each word as though it were a pearl, and one of a very limited supply at that. Everyone was frantic to finish; everyone, that is, except the defendant. He just kept... telling... his... story... very... very... slowly.

After reading the new version of Rule 30(d) of the Federal Rules of Civil Procedure, I can see some sly attorney telling his client now: "The transcript of the deposition doesn't show how long it took you to answer the question, so take... your... time..., and... take… plenty... of… it. All we have to do is get through in seven hours, and we're home free."

Of course, this isn't the only variant of this trick. I am sure there will be an increased need for trips to the restroom, a bit more delay in getting back from lunch, more spilled glasses of water or coffee, and more fumbling for exhibits.

How does the examiner deal with these delaying tactics? There are several ways. One is to escalate directly to strategic nuclear weapons: Call in the videotaper, so that any excruciatingly long pauses by the witness are reflected on a video that a jury can watch at the trial. Despite my daughter's remark that too many of my solutions to problems involve radioactivity, I don't recommend using this particular nuclear weapon, except on special occasions. There are several reasons that suggest its use be carefully thought out. First, it is very expensive. Even worse, it can be cumbersome and may contribute to delays rather than solve them. We've all sat around while a videotape is changed, or while microphones are adjusted. And whose time is charged with these delays? If I am representing a witness who is in the chair on time and ready to proceed, my view is that the party taking the deposition is using its allotted time even if it is not questioning the witness. Videotaping in an effort to prevent your questioning time from being reduced may aggravate the problem, not alleviate it.

So, unless the witness is an important one who is not expected to be available at trial, I tend not to videotape. It adds an extra level of complexity to preparation of pretrial orders, too. And this additional organizational effort comes at a time when everyone is heavily burdened with trial preparation, and requires advance planning and some additional technical skills. I remember one experienced East Coast law firm that videotaped all witnesses. During trial preparations, we provided our designations of testimony for the videotaped witnesses. Our opponents prepared videotapes that included only their designations, and not ours. The tapes were excluded. All the expense was for naught.

Videotaping, therefore, has to be used carefully and thoughtfully. There are other simpler and less expensive solutions that deal effectively with delaying tactics in the average deposition. The first curative measure is completely within your control as the examiner: *Cut your questions to the ones that really matter*. One example of useless questioning that should be eliminated when time is scarce are the typical questions that begin most depositions. We've all seen many questioners go through a boring version of "This is Your Life" at the beginning of a deposition, collecting biographical data including lots of extraneous information, like home addresses. The witness is here; who cares what his or her home address is? Similarly, we spend too much time on educational backgrounds with the average witness. (This might be a lot more important with an expert). Eliminate from your deposition outline these kinds of questions, unless they are

genuinely pertinent. Ask yourself if you will read these questions and answers at trial, if you will use them to impeach a witness, or if the answers will be used to exclude a witness's testimony or support a summary judgment motion. This is one reason I don't like deposition checklists and don't use them: they encourage you to ask questions that are not necessary, and which may waste time, which is now more valuable than ever.

There is another corrective measure that is in your control, but this one is tougher because it requires skill and experience to question this way. The trick is to *keep your question short, and not change it*. If the witness evades it, you must be able to repeat it precisely, so that the transcript shows the witness is evading. You cannot do that if your question is more than a few words long, or if you modify it in midstream, or if you include two or more questions in the guise of one. Here is an example of a question that is too long and was asked before the examiner had decided what question he really wanted to ask:

> I'm not looking for the inference. We'll jump back to that, but I want to get specifically at your discussions and the knowledge that you had at the time you signed. Had you given or had you – strike that. Had you asked outside counsel, either Mr. Smith or Mr. Jones, as to whether they had reached an opinion that claim 15 was invalid in view of Adams?

This question has almost seventy words, four sentences, and one direction change in the middle.

Next, you should *use read-backs by the reporter*; unfortunately, lots of questioners tend to repeat, and then modify, their question. Why is a read-back better? Three reasons. One, it preserves the question exactly as asked; that cuts down the witness's ability to evade by "misunderstanding." Two, it eliminates the need for the witness's attorney to restate objections. Many attorneys will repeat their objections anyway; if so, a short reminder that it isn't necessary to do so may be appropriate. Three, if the witness still persists in not understanding a simple question that has been read back exactly as asked, or if the witness's attorney repeats objections, you have a much better basis to charge the witness with wasting the allotted time.

There is another way to use your time efficiently. Don't be a stack-turner with a big pile of useless documents. *Keep the number of exhibits small*. Pre-mark them. Have copies ready. Consider doing what the Advisory Committee Notes to the amended Rule 30(d) suggest: sending documents to the witness ahead of time, or to the witness' attorney, so they can be reviewed before the deposition.

There is yet another measure you can employ. We would like to think that long objections are gone from depositions, but they are not. There are a number of people -- lawyers and judges -- who act as though they haven't heard of the limitations on discovery or, if they have, regard these rules as advisory opinions from a non-binding body. The enforcement of the rules is erratic. Some judges do not wish to be involved in discovery issues; some attorneys take advantage of the fact that the football game is being played without a line judge, and there is plenty of extra crack-back blocking, eye-gouging, and trash talk in such cases. When one side starts it, the other side often relaxes its standards, too. The kindergarten runs amok, with Johnny pulling Sarah's pigtails and Sarah retaliating with a kick to Johnny's shins, all while the teacher is out of the room.

You probably cannot eliminate these long objections. But one way to frustrate them is to *stipulate and agree that all of your opponent's objections, whatever they may be, are preserved without stating them*. That lays the groundwork for charging the witness with the delays that result. You can also burn the witness if the attorney persists in lengthy speaking objections:

Mr. Witness, you are represented by Mr. Blah-blah, aren't you?

Yes.

And you listened carefully to Mr. Blah-blah a moment ago, didn't you?

Yes.

Because you don't want to ignore your own lawyer, right?

That's right.

So you heard Mr. Blah-blah's objection to my question, didn't you?

Yes.

So when you answer my question, you've got Mr. Blah-blah's words in your mind now, don't you?

(Huff huff huff) Well, no.

Ah. So you are telling me that you did ignore Mr. Blah-blah?

I really have fun doing this!

Next, what do you do with the smart-aleck witness who wants you to define simple words? I had a witness ask me what I meant by "work." I stifled a laugh, and told him to use it exactly as he understood it. There are ways to be tougher on such a witness. Some of them could have been used on President Clinton, who suddenly thought "is" was a poorly-defined word. Here are some possible questions:

Let's see, English is your native language, right?

You are now 50 years old, and you've spoken English all your life, right?

You're the President, right?

You are the "Leader of the Free World," right?

You went to Yale, right?

That's one of those Ivy League places?

Then you went to Oxford in England?

You went there because you were a Rhodes Scholar?

And you are telling me that you don't understand the word "is"?

You get the drift. I am sure others can think of more and better, or nastier, ways to pound a witness who tries this stunt. Oh, I wish I could have been there.

The bottom line is to *use your time well*, and to put the witness and his or her attorney in the position of being blamed for any delays that do occur. Be prepared with your documents. Limit the ones you use and have them marked and copied. Give the witness and his lawyer the whole stack right away, or possibly before the deposition. Keep your questions short and simple. Use read-backs. Stipulate to objections. Don't spend any time arguing or responding to gibes. Focus exclusively on the witness. Last but not least, bring your egg timer, or use a timed transcript. You can't eliminate the nonsense, but you can reduce it and portray it for what it is. IPT