USE OF DEPOSITIONS

{See P. Niemeyer and L. Schuett, *Maryland Rules Commentary*, (Third Edition, 2003), pp. 314-319; and P. Grimm, *Taking and Defending Depositions: A Handbook for Maryland Lawyers*, MICPEL (1991), Chapter 6, pp. 63-72.}

Maryland Rule 2-419. Deposition – Use.

(a) **When may be used**.

(1) Contradiction and impeachment. – A party may use a deposition transcript and any correction sheets[1] to contradict or impeach the testimony of the deponent as a witness.

- ❖ Attorney conducting cross-examination of witness reads the deposition being used to impeach a witness.

- ❖ If the cross-examining attorney refers to part of the deposition in impeachment, references to rehabilitating parts usually are presented on redirect examination. However, the other parts may be brought in at the time of the impeachment when the deposition use to impeach is unfair or improper. Rulings in this regard are within the discretion of the trial judge.

- ❖ P. Grimm, p. 63: "Importantly, when a deposition is used for the purpose of impeachment, the substantive content of a deposition is not admitted into evidence. Instead, the deposition testimony is used only to demonstrate that the trial testimony differs in a material fashion from the testimony previously given during the deposition."

(2) By adverse party. – The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, managing agent, or a person designated under Rule 2-412 (d) to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is a party may be used by an adverse party for any purpose.

- ❖ A party may introduce an adverse party's deposition testimony, even if the deponent is present in court and irrespective whether the deponent is available to testify or has testified or will testify in court.

- ❖ Some most common methods of presenting deposition testimony as substantive evidence:

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[1] Note Rule 2-415(d) regarding the procedure for signature and changes to deposition transcripts and use of correction sheets.

a. Offer written transcript – can be cumbersome and less effective; presenter loses benefit of context, timing and effect of presentation; Note also Rule 2-521(b): "a deposition may not be taken into the jury room without the agreement of all parties and consent of the court." This is intended to prevent a jury from giving undue weight to the testimony of a witness that is preserved in written form, as contrasted with testimony from live witnesses which jurors ordinarily must recall without the aid of a transcript. *Maryland Deposit Ins. Fund Corp. v. Billman*, 321 Md. 3, 580 A. 2d 1044 (1990), cert. denied, 502 U.S. 909, 112 S. Ct. 304, 116 L. Ed. 2d 247 (1991).

b. attorney reads questions/answers;

c. a "stand-in" on the witness stand reads deponent's answers in response to questions read by attorney who is offering the deposition;

d. use videotape deposition.

(3) Witness not available or exceptional circumstances – The deposition of a witness, whether or not a party, may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had due notice thereof, if the court finds:

(A) that the witness is dead; or

(B) that the witness is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, mental incapacity, sickness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon motion and reasonable notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

❖ Note that even an expert may be "unavailable" under the provisions of this rule, even if the deposition was taken in a "discovery-like" manner. See *Shives v. Furst*, 70 Md. App. 328, 521 A.2d 332, *cert. denied*, 309 Md. 521, 525 a.2d 636 (1987). The rules require only advance notice of

intention to use a videotape deposition of an expert at trial when the expert is available. See Rule 2-419(a)(4).

(4) Videotape deposition of expert. – A videotape deposition of a treating or consulting physician or of any expert witness may be used for any purpose even though the witness is available to testify if the notice of that deposition specified that it was to be taken for use at trial.

- ❖ Rule 2-412(b) provides that "[i]f a videotape deposition is to be taken for use at trial pursuant to Rule 2-419(a)(4), the notice shall so specify."

- ❖ If the notice of deposition specifies its intended use at trial, the videotape deposition of an expert may be used for any purpose, whether or not the expert is available to testify in court.

(b) **Use of part of deposition**. – If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce at that time any other part that in fairness ought to be considered with the part offered and any party may introduce any other part in accordance with this Rule.

- ❖ Orders Directing Filing of Pretrial Statements require the Pretrial Statement to include, *inter alia*, "Deposition Testimony: A designation by page and line of deposition testimony to be offered as substantive evidence, not impeachment." The advance notice of designated parts by the offering party provides the opportunity for appropriate counter-designations, and the offering party would then read or present all the designated parts at the same time in context.

(c) **Deposition taken in another action**. - A deposition lawfully taken in another action may be used like any other deposition if the other action was brought in any court of this State, of any other state, or of the United States, involved the same subject matter, and was brought between the same parties or their representatives or predecessors in interest.

- ❖ Niemeyer asserts that this is intended to govern the use of a deposition from the other action as substantive evidence; this should not be interpreted to preclude use of a deposition taken in another case for impeachment purposes in the pending case. Thus, the requirement of identity of subject matter and parties would apply only to a deposition offered as substantive evidence. The testimony of a deponent taken in another case may be used to impeach the deponent's testimony as a trial witness just as any other prior statement from any source, subject to any limitations provided in the rules of evidence. See, for example, in "Title 5. Evidence," Rule 5-613 regarding prior statements of witness, (a) examining witness concerning prior statement, and (b) extrinsic evidence of prior inconsistent statement of witness; Rule 5-616 concerning impeachment (e.g. prior inconsistent statement) and rehabilitation (e.g. prior consistent statement); Rule 5-802.1 regarding hearsay exceptions for prior statements by a witness who testifies

at trial and is subject to cross examination concerning the statement; and Rule 5-803 hearsay exceptions where unavailability of declarant not required.

(d) **Objection to admissibility**. - Subject to Rules 2-412 (e)[2], 2-415(g)[3] and (j)[4], 2-416 (g)[5], and 2-417(c)[6], an objection may be made at a hearing or trial to receiving in evidence all or part of a deposition for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

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[2] **Depositon – Notice** Rule 2-412(e): "**Objections to form**. Any objection to the form of the notice for taking a deposition is waived unless promptly served in writing."

[3] **Deposition – Procedure**. Rule 2-415(g): "**Objections**. All objections made during a deposition shall be recorded with the testimony. An objection to the manner of taking a deposition, to the form of questions or answers, to the oath or affirmation, to the conduct of the parties, or to any other kind of error or irregularity that might be obviated or removed if objected to at the time of its occurrence is waived unless a timely objection is made during the deposition. An objection to the competency of a witness or to the competency, relevancy, or materiality of testimony is not waived by failure to make it before or during a deposition unless the ground of the objection is one that might have been obviated or removed if presented at that time. The grounds of an objection need not be stated unless requested by a party. If the ground of an objection is stated, it shall be stated specifically, concisely, and in a non-argumentative and non-suggestive manner. If a party desires to make an objection for the record during the taking of a deposition that reasonably could have the effect of coaching or suggesting to the deponent how to answer, then the deponent, at the request of any party, shall be excused from the deposition during the making of the objection." {**Committee note**. – During the taking of a deposition, it is presumptively improper for an attorney to make objections that are not consistent Rule 2-415(g). Objections should be stated as simply, concisely, and non-argumentatively as possible to avoid coaching or making suggestions to the deponent and to minimize interruptions in the questioning of the deponent. Examples include "objection, leading;" "objection, asked and answered;" and "objection, compound question."}

[4] **Deposition – Procedure.** Rule 2-415(j): "**Motions to suppress**. An objection to the manner in which testimony is transcribed, videotaped, or audiotaped, or to the manner in which a transcript is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer is waived unless a motion to suppress all or part of the deposition is made promptly after the defect is or with due diligence might have been ascertained. An objection to corrections made to the transcript by the deponent is waived unless a motion to suppress all or part of the corrections is filed within sufficient time before trial to allow for a ruling by the court and, if appropriate, further deposition. In ruling on a motion to suppress, the court may grant leave to any party to depose the deponent further on terms and conditions the court deems appropriate."

[5] **Deposition – Videotape and audiotape**. Rule 2-416(g): "**Objections**. The officer shall keep a log of all objections made during the deposition and shall reference them to the time shown on the clock on camera or to the videotape or audiotape indicator. Evidence objected to shall be taken subject to the objection. A party intending to offer a videotape or audiotape deposition in evidence shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered within sufficient time to allow for objections to be made and acted upon before the trial or hearing. Objections to all or part of the deposition shall be made in writing within sufficient time to allow for rulings on them and for editing of the tape before the trial or hearing. The court may permit further designations and objections as justice may require. In excluding objectionable testimony or comments or objections of counsel, the court may order that an edited copy of the videotape or audiotape be made or that the person playing the tape at trial suppress the objectionable portions of the tape. In no event, however, shall the original videotape or audiotape be affected by any editing process."

[6] **Deposition – Written questions.** Rule 2-417(c): "**Objection to form**. Any objection to the form of written questions submitted under section (a) of this Rule is waived unless served within the time allowed for the serving the succeeding questions or, if the objection is to recross questions, within seven days after service of the recross questions. The grounds for an objection shall be stated."

(e) **Effect of deposition**. – A party does not make a person that party's own witness by taking the person's deposition. The introduction in evidence of all or part of a deposition for any purpose other than as permitted by subsections (a) (1) and (a) (2) of this Rule makes the deponent the witness of the party introducing the deposition. At a hearing or trial, a party may rebut any relevant evidence contained in a deposition, whether introduced by that party or by any other party.

- ❖ Niemeyer: "The fact that a party notices and takes the deposition of a person does not mean that the person thereby becomes that party's witness. That question is decided at the point when a party decides to introduce all or part of the deposition. If the deposition is used to impeach, for example, the party introducing all or part of the deposition does not make the witness his or her own. However, a deposition introduced for substantive purposes may make the deponent the witness of the party introducing the deposition. As a result of the abolition of the common-law voucher rule, however, the issue is of little, if any, practical significance. Rule 5-607 provides that the credibility of a witness may be attacked by any party, including the party calling the witness." The Committee note to Rule 5-607 states: "This Rule eliminates the common law "voucher" rule. It does not permit a party to call a witness solely as a subterfuge to place an otherwise substantively inadmissible statement before the jury. It is not intended to otherwise affect existing law concerning the court's discretion to control direct and cross-examination."