



PROGRAM MATERIALS

Program #36189

July 1, 2026

Tactical Trial Strategies - The Overlooked, Forgotten, and Subtle Rules that Win Trials

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Tactical Trial Strategies

The Overlooked, Forgotten, and Subtle Rules that
Win Trials



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Agenda

- Initial Disclosures
- Damages (Spoliation v Duty to Mitigate)
- Excluding Attorney-Client Communication
- Using Video Recorded Depositions
- 30B(6) Depositions
- Counter Designations
- Integrated Business Records
- Striking Portions of the Errata
- Proffers



Any Questions?

Initial Disclosures

Initial Disclosures are not...

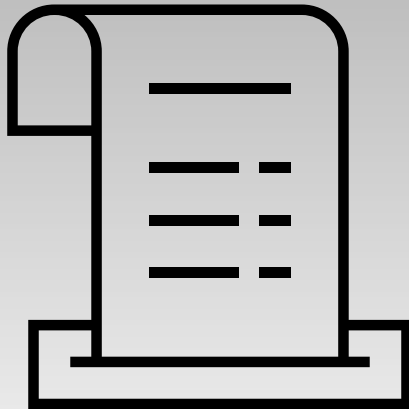
- Just a procedural box to check.
- Something you do before discovery and forget about.

Initial Disclosures...

- Are important all the way up to trial.
- Can have a major impact on the outcome of your case.

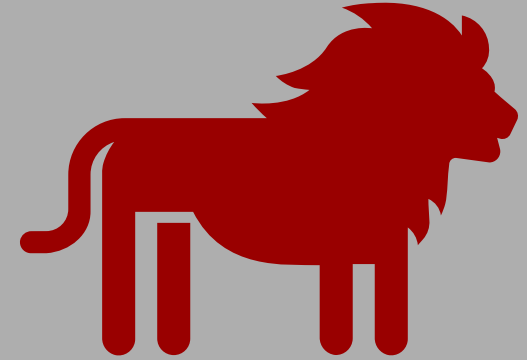
Initial Disclosures

Under Rule 26, parties must provide a list of potential witnesses, a computation of the categories of damages claimed and the materials on which each computation is based. Fed. R. Civ. P. 26(a)(1).



If a key **witness**, a valuable piece of **evidence**, or a category of **damages** is not disclosed according to rule 26, a judge can **exclude** it from trial under Rule 37.

Initial Disclosures



Rule 37 gives **teeth** to Rule 26's requirements.

Deque Systems Inc. v. Browserstack, Inc., 2026 WL 1615177 at *6
(4th Cir. 2026).

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is **not allowed to use** that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Fed. R. Civ. P. 37.

Initial Disclosures cont.

How to Use Rule 37...

If you notice a deficiency in opposing counsel's initial disclosures under Rule 26, you can move to have it excluded from trial under Rule 37.

Courts have held that opposing counsel's ability to infer is **no substitute** for proper disclosure, nor does opposing counsel bear the responsibility of pursuing the required information on its own. *Hudson-RPM Distribs., LLC v. Bowditch & Dewey, LLP*, No. 19-cv-40095, 2022 WL 22902243, at *4 (D. Mass. Mar. 29, 2022); *Burnett v. Ocean Props. LTD*, 987 F.3d 57, 74 (1st Cir. 2021).

A court **dismissed** the argument that opposing counsel's **knowledge** of the methodology used for calculating damages is a defense to deficient computations in initial disclosures. *City of Rome v. Hotels.com, L.P.*, 549 Fed. Appx. 896, 905 (11th Cir. 2013).

A court held that a party cannot expect opposing counsel to **piece together a damage theory** from financial documents disclosed during discovery. *Chicago Joe's Tea Room, LLC v. Village of Broadview*, 94 F.4th 588, 605 (7th Cir. 2024).

Initial Disclosures cont.

How to Survive Rule 37 Sanctions:

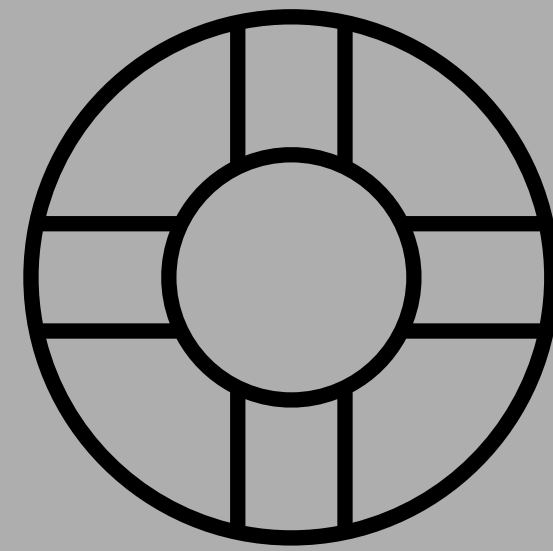
If opposing counsel moves to exclude your evidence, witnesses, or damages under Rule 37- there are exceptions. Rule 37 does not apply if the deficiency is **harmless** or **substantially justified**. Fed. R. Civ. P. 37.

Most circuits apply a **multifactor test** to decide Rule 37 sanctions rather than strict construction of the exceptions.

First Circuit applies these factors: “(1) the history of the litigation; (2) the sanctioned party's need for the precluded evidence; (3) the sanctioned party's justification (or lack of one) for its late disclosure; (4) the opponent-party's ability to overcome the late disclosure's adverse effects—e.g., the surprise and prejudice associated with the late disclosure; and (5) the late disclosure's impact on the district court's docket. *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 78 (1st Cir. 2009).

Courts in the Eighth Circuit consider, “(1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness.” *Rodrick v. Wal-Mart Stores E., L.P.*, 666 F.3d 1093, 1096-1097 (8th Cir. 2012).

Initial Disclosures cont.



Rule 26 requires initial disclosures to be **supplemented** whenever a party learns that their disclosure was incomplete or incorrect.

Fed. R. Civ. P. 26(e)(1).

Rule 37 sanctions can be **easily avoided** by supplementing initial disclosures as soon as any insufficiency is noticed.

Always make it your habit to check your initial disclosures **throughout discovery** and especially as **trial draws near**.

Opposing counsel may be waiting to file their motion until the eve of trial to gain a strategic advantage!

Damages

Spoliation v Duty to Mitigate

“**Spoliation** is ‘the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.’” *Orbit One Commun., Inc. v. Numerex Corp.*, 271 F.R.D. 429, 435 (S.D.N.Y. 2010) Quoting *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 107 (2d Cir.2001).

Sanctions for spoliation may include, **preclusion** of the introduction of evidence, imposing an adverse inference, assessing attorneys' fees and costs, or even **dismissal of the complaint** or entering judgment by default. *Orbit One Commun., Inc. v. Numerex Corp.*, 271 F.R.D. 429, 435 (S.D.N.Y. 2010).

The ‘duty to mitigate’ is “a method of apportioning damages between the parties where the injured party has, *subsequent to infliction of the harm*, **failed to exercise that degree of care** society demands of the reasonable person.” *Pennzoil Producing Co. v. Offshore Exp., Inc.*, 943 F.2d 1465, 1457 (5th Cir. 1991).

“The consequences of such post-injury negligence—as *distinguished from negligence contributing to the harm and acting as a bar to recovery*—is to deny to the negligent victim damages ‘for so much of the losses as are shown to have resulted from failure on his part to use reasonable efforts to avoid or prevent them.’” *Id.*



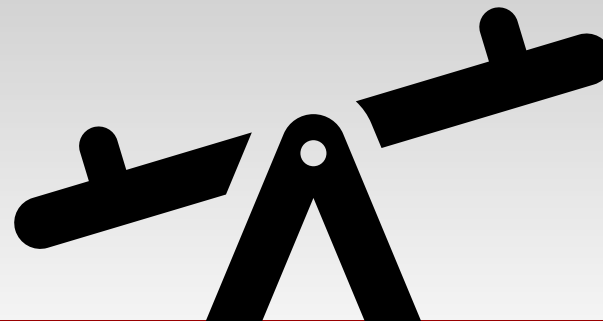
Damages

Spoliation v Duty to Mitigate

For example, if a suit centers around a plaintiff's purchase of a defective item (such as machines, systems, and vehicles), the duty to mitigate may require them to **promptly sell, fix, or destroy** the purchase.

However, the plaintiff **maintains the duty to preserve** evidence for trial.

Violations of either can have a **serious impact** on the outcome for their client.



Damages

Spoliation v Duty to Mitigate

Spoliation where gambling machine that caused injury was **destroyed** to make way for additional machines. *Mahiques v. County of Niagara*, 137 A.D.3d 1649, 28 N.Y.S.3d 171 (4th Dep't 2016).

Court ordered spoliation sanctions when the plaintiff **altered and repaired** the milking system that was the subject of the lawsuit. *Mariposa Farms v. Westfalia-Surge* No. CV 03-0779 JC/LAM, 2005 WL 8164175, at *2 (D.N.M. Feb. 3, 2005).

Plaintiff knew that the milking system was relevant evidence in this litigation at the time the alterations were made, yet Plaintiff **proceeded to alter the system without notice** to Defendant Rota-Tech and without giving Rota-Tech the opportunity to inspect and test the system prior to the alterations being made. *Id.*

The court held that the duty to mitigate **did not overcome** the duty to preserve evidence and make the leased engine available for inspection. *Aviation Lease Fin., LLC v. Vision Airlines, Inc.*, No. 07CIV2025RMBKNF, 2007 WL 9819243, at *2 (S.D.N.Y. Nov. 21, 2007).

Best Practice: If faced with balancing these two requirements, give opposing counsel **ample notice** of your client's decision to sell, repair, or destroy.

Excluding Attorney-Client Comms

During discovery you, a third party, or opposing counsel may accidentally share a document which should be protected by attorney-client privilege.

What do you do and who's duty is it to notify the court and move for a determination?



Excluding Attorney-Client Comms

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. **After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.** The producing party must preserve the information until the claim is resolved.

Fed. R. Civ. P. 26(b)(5).

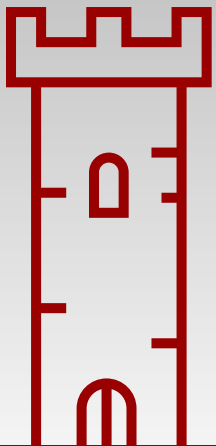


Excluding Attorney-Client Comms cont.

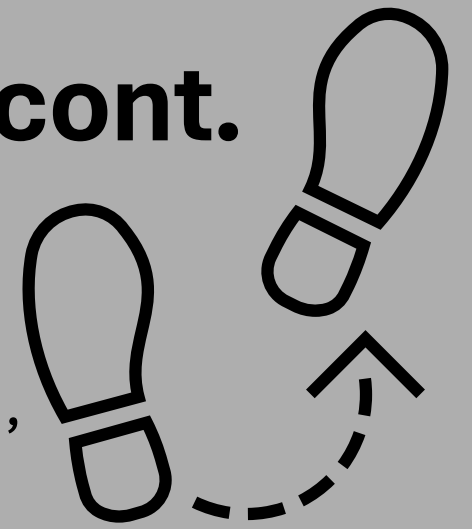
If you believe communication you presented is protected, take these steps...

1. Promptly notify opposing counsel of your claim of privilege.
2. And either
 - A. Notify the court and move for a determination, or
 - B. Stay silent and know that opposing is **prohibited from any use** or public filing of the document until the matter is resolved. *Lin v. CGIT Sys., Inc.*, No. CV 20-11051-JGD, 2023 WL 12023448, at *3 (D. Mass. Sept. 29, 2023); *See Bank of Camden v. State Bank & Tr. Co.*, No. 5:13-CV-21 MTT, 2014 WL 991782 at *2 (M.D. Ga. Mar. 13, 2014); *Doe v. Lahey Health Sys., Inc.*, No. 19-CV-11014-PBS, 2020 WL 13561721, at *1–2 (D. Mass. Aug. 12, 2020).

If opposing counsel wishes to use the document, the Rule provides that the duty to move for a determination is on them!



Excluding Attorney-Client Comms cont.



If your opponent attempts to claw-back attorney-client communication, take these steps...

1. Immediately present the information to the court for determination; do this even if you believe their claim is meritless. This is your duty.
2. Apply this formulation when you move for determination: (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived. *See, e.g., Reed v. Baxter*, 134 F.3d 351, 355–56 (6th Cir. 1998); *see also U.S. v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (quoting 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2292 at 554 (McNaughton rev. 1961)).
3. Do not rely on the judge agreeing with your determination of the communication.

Recorded Depositions

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony **may be recorded by audio, audiovisual, or stenographic means.** The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

Fed. R. Civ. P. 30.



Recorded Depositions

Video recording depositions has become popular among litigators because of how powerful they can be during trial. Some have their **clerk or paralegals record** and some use **Zoom or Team's record feature**.

However, this video **may be precluded** by the judge according to their interpretation of Rules 30 and 28.

“Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted **before an officer** appointed or designated under Rule 28.” Fed. R. Civ. P. 30(B)(5).

Rule 28 states, “...a deposition must be taken before: (A) **an officer authorized to administer oaths** either by federal law or by the law in the place of examination; or (B) a person **appointed by the court** where the action is pending to administer oaths and take testimony. Fed. R. Civ. P. 28.



Recorded Depositions

Courts are increasingly requiring that only certified video recordings be used at trial, excluding attorney-made recordings, including those captured through Zoom's built-in record function, and in some instances rejecting uncertified video even where a court-appointed stenographer was simultaneously present. *Alcorn v. City of Chicago*, 336 F.R.D. 440, 442-445 (N.D. Ill. 2020).

This can mean attorneys have to **real aloud** important segments of depositions instead of simply showing the recording.

Where a court-certified videographer is impractical, it is the best practice to ask opposing counsel before the deposition to **wave any objection** to the lack of a court-appointed videographer.



Recorded Depositions cont.

Surviving a Challenge:

“There was an authorized officer to **stenographically** record the examination present at the deposition. This provided both an **assurance of an accurate record** of the deposition, as well as a benchmark upon which the video record could be challenged if that was necessary.” *Pioneer Drive, LLC v. Nissan Diesel Am., Inc.*, 262 F.R.D. 552, 556 (D. Mont. 2009).

“On the other hand, Defendant does not point to anything in the video that gives rise to the tiniest glimmer that the videotape is not authentic. Instead, Defendant stands on a **strict procedural objection.**” *Carpenter v. Forest Meadows Owners Ass’n*, No. 1:09-CV-01918-JLT, 2011 WL 3207778, at *8 (E.D. Cal. July 27, 2011).

Members of the bar can be **trusted to handle technology** and not modify recordings. *Marlboro Prod. Corp. v. N. Am. Philips Corp.*, 55 F.R.D. 487, 489-91 (S.D.N.Y. 1972).

“Similarly, because an officer will be recording the depositions stenographically and the rules specifically contemplate videotaped depositions, the court concludes that **Plaintiff's counsel may videotape the depositions.**” *Maranville v. Utah Valley Univ.*, No. 2:11CV958, 2012 WL 1493888, at *2 (D. Utah Apr. 27, 2012).

Rule 30(b)(6)

Rule 30(b)(6) lets a party depose an entire organization rather than a specific individual. The deposing party identifies topics, and the organization must produce a witness **prepared to speak on its behalf** using the company's collective knowledge. Those answers count as the corporation's own statements and are admissible at trial as party admissions.

Many litigators treat a strong Rule 30(b)(6) deposition as **locking the opposing entity** into a version of events before trial. Many litigators think a Rule 30(b)(6) deposition binds the company to its testimony. This is not correct, the company can contradict but it is **subject to impeachment** if it does. A poorly prepared or inconsistent corporate designee can haunt the organization all the way to verdict.

Some courts preclude these depositions when the witness is **available during trial** or if the appointed 30(b)(6) witness **lacks personal knowledge** about their testimony.



Rule 30(b)(6)

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to **testify on its behalf**; and it may set out the matters on which each person designated will testify.

Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information **known or reasonably available to the organization**.

This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Fed. R. Civ. P. 30(b)(6).

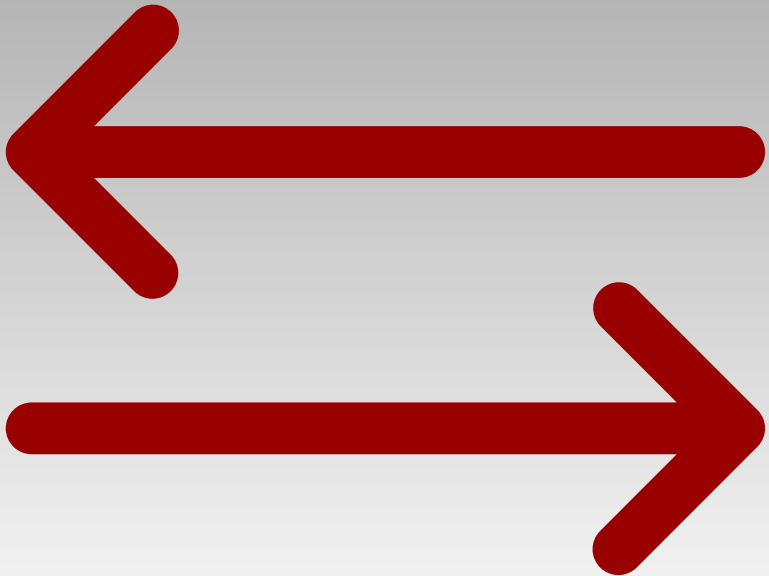


Rule 30(b)(6) cont.

- Rule 30(b)(6) testimony is admissible against the corporation but is not a judicial admission, it is an evidentiary admission that can be contradicted at trial, **with inconsistencies going to credibility** rather than precluding the evidence entirely. *Echavarria v. Roach*, No. 16-CV-11118-ADB, 2022 WL 1473604, at *8–9 (D. Mass. May 10, 2022); *Johnson v. Big Lots Stores, Inc.*, No. 04-3201, 2008 WL 6928161, at *2–4 (E.D. La. May 2, 2008).
- Where the designee or a subsequent corporate witness testifies inconsistently at trial, the prior deposition testimony is **admissible for impeachment** and is properly explored on cross-examination. *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *R & B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783, 786 (8th Cir. 2001); *Echavarria v. Roach*, No. 16-CV-11118-ADB, 2022 WL 1473604, at *8–9 (D. Mass. May 10, 2022).
- An adverse party may use a 30(b)(6) deposition "for any purpose" at trial under Rule 32(a)(3), but there is a split of authority as to whether this includes when the **witness is available to testify live**. *Gonzalez Prod. Sys., Inc. v. Martinrea Int'l Inc.*, 310 F.R.D. 341, 343–44 (E.D. Mich. 2015).
- The majority of courts hold that **Rule 602's personal knowledge requirement** applies to all trial testimony, including 30(b)(6) testimony, Rule 30(b)(6) governs the taking of depositions, but Rule 32(a)(1)(B) requires that any deposition used at trial satisfy the Federal Rules of Evidence, and Rule 602 makes no exception for corporate representatives. *Kraft Foods Glob., Inc. v. United Egg Producers, Inc.*, No. 11-CV-8808, 2023 WL 5647204, at *11–13 (N.D. Ill. Aug. 31, 2023); *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F. App'x 899, 907–08 (5th Cir. 2010).

Counter Designations

When a party designates portions of a deposition for use at trial, the opposing party may submit counter-designations, additional excerpts they want included alongside the original. The purpose of this rule of evidence is **fairness and context**: if one party pulls a passage that reads differently in isolation, the other party can ensure the **surrounding testimony** is also before the jury.



Courts typically require both parties to exchange designations and counter-designations on a set schedule before trial, and judges rule on objections to specific excerpts.

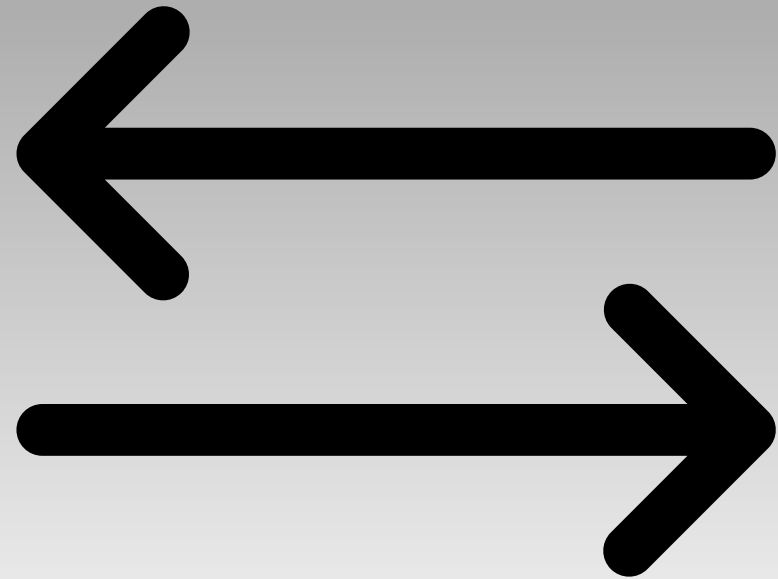
There are **misuses** of counter-designations which, if caught, can make a big difference at trial.

Counter Designations

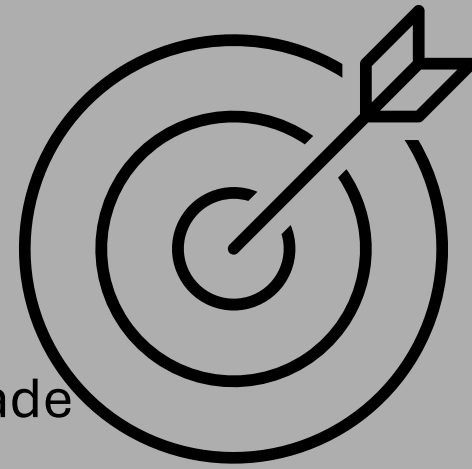
“If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.”

Fed. R. Civ. P. 32(a)(6).

Thus, the purpose of counter-designations is solely to admit parts of deposition testimony that are necessary to complete designations so as **to avoid misimpressions**. *Westinghouse Elec. Corp. v. Wray Equip. Corp.*, 286 F.2d 491, 494 (1st Cir. 1961).



Counter-Designations cont.



Counter-designations...

- must respond to opposing counsel’s designations.
- are not opportunities to complete designations which should have been made originally.
- are not for introducing new designations that are unrelated, repetitive, excessively lengthy, or widely separated from the designations introduced by opposing counsel.
- must be targeted.

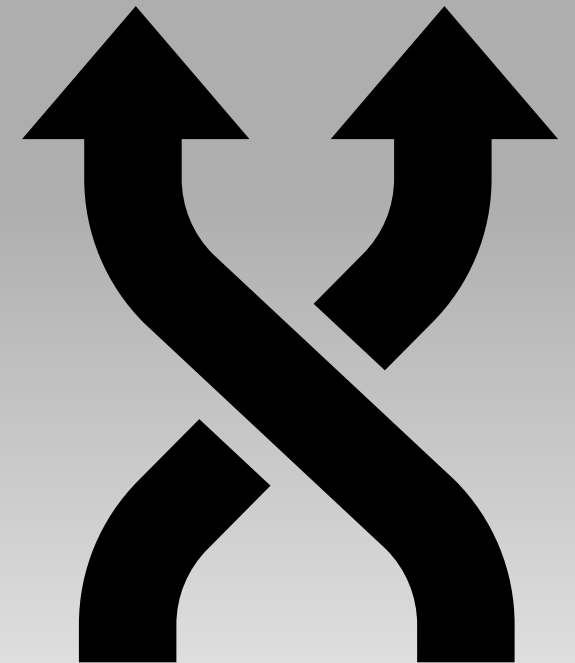
Courts have excluded counter-designations that were “**not necessary** to complete Defendant’s designations, were largely **repetitive** of previous testimony...” *Baker v. Goldman Sachs & Co.*, No. CIV.A. 09-10053-PBS, 2013 WL 4812486 at *1 (D. Mass. Sept. 6, 2013).

Courts will not allow counter-designations to be used to admit **entire deposition testimony**. *Paul Arpin Van Lines, Inc.*, 988 F.2d 288, 294 (1st Cir. 1993).

Integrated Business Records

Integrated Business Records are records produced **by another entity** that an offering party has **adopted**. *U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust v. Jones*, 925 F.3d 534, 537 (1st Cir. 2019).

Integrated business records are documents created by an outside entity that a company has **incorporated into its own recordkeeping**. Because the receiving company relies on and treats those records as its own, courts may **admit them** under the business records exception to the hearsay rule, even though the company did not originally create them.



Integrated Business Records

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

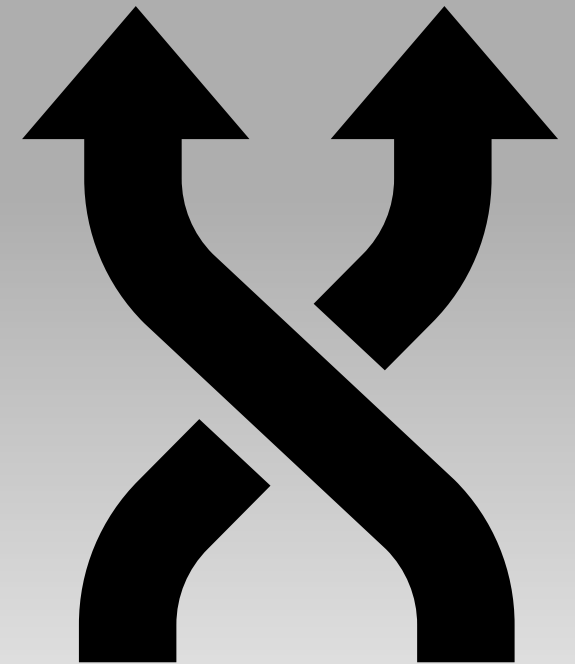
(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with [Rule 902\(11\)](#) or [\(12\)](#) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

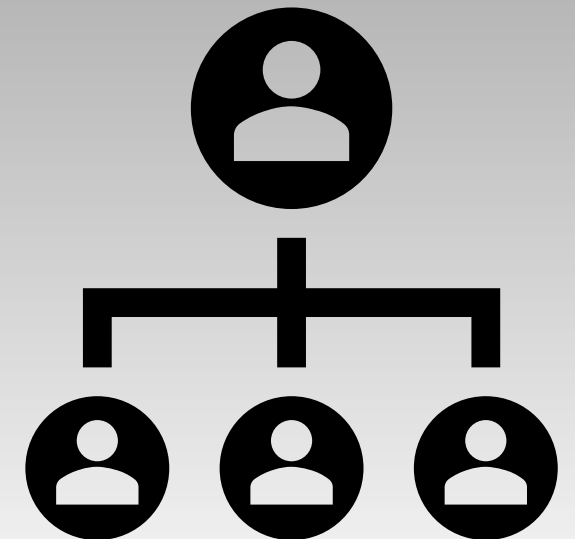
Fed. R. Evid. 803(6).



Integrated Business Records cont.

Many circuits share the view that a “business record made (in whole or in part) by a third party, but **incorporated** into the records of another entity, **is thereby ‘made’** by the entity, and thus is admissible.” *U.S. v. Savarese*, 686 F.3d 1, 13 n. 8 (1st Cir. 2012) (citing *Adefehinti*, 510 F.3d at 326; *United States v. Petrie*, 302 F.3d 1280, 1287-88 (11th Cir. 2002); *United States v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993); *Matter of Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2nd Cir. 1981); *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir. 1977)).

The First Circuit has also expressly held that invoices generated by one entity can be business records of another because they have been **relied on and thus incorporated** by the business. *See U.S. v. Doe*, 960 F.2d 221 (1st Cir. 1992) (Breyer, J.).



Striking Portions of the Errata

An errata is a document a deponent submits after reviewing the deposition transcript to correct or change testimony. Any changes must be listed along with the **reasons** for making them.

The process is **not automatic**. Not every deponent uses it, and if they do, the changes **can be struck** if not done according to the rule.



Striking Portions of the Errata

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the **reasons for making them**. Fed. R. Civ. P. 30.

Courts have found that the **failure to provide a statement** of reasons alone suffices to **strike** a proposed change. *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253 (3d Cir. 2010).

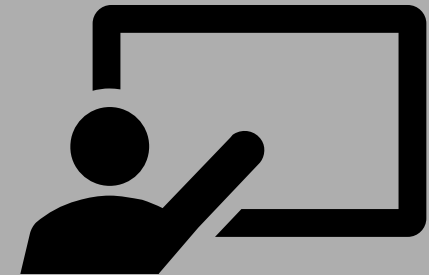


Striking Portions of the Errata cont.

Contradicting Holdings on Contradictory Statements...

- “A change of substance which actually **contradicts** the transcript is impermissible unless it can plausibly be represented as the **correction of an error** in transcription, such as dropping a ‘not.’” *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).
- Changes may even contradict the original answers given during the deposition. *Acevedo-Sullivan v. Smithfield Packaged Meats Corp.*, No. CV 22-40134-MRG, 2024 WL 6111539, at *2 (D. Mass. Oct. 16, 2024) (quoting *Allen v. Durham Sch. Servs., L.P.*, 340 F.R.D. 531, 534 (D.N.H. 2021)).
- Flexible approach: No requirement to strike contradictory errata “if **sufficiently persuasive reasons** are given.” *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 270 (3d Cir. 2010).
- “Although neither the United States Court of Appeals for the Eighth Circuit nor the United States District Court for the District of Minnesota have affirmatively decided the issue of whether contradictory substantive changes must be struck, **analogous rules** in those jurisdictions support the conclusion that they must.” *Jackson v. Navitaire, Inc.*, No. 0:04-CV-1557 RHK/AJB, 2005 WL 8164346 at *2 (D. Minn. Nov. 9, 2005) (Applying the sham affidavit rule).

Proffers



(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved. Fed. R. Evid. 103.

When a Judge Excludes Evidence, always move to make a proffer. This preserves the issue and can make or break an appeal.

Questions?

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