

Deposition Skills – Video Stop

Wednesday, February 19, 2020

1 NY CLE: Skills CLE Credit

PARTICIPANTS BIOS

Patrice Jean, Ph.D.

(Panelist; Hughes Hubbard & Reed)

Patrice P. Jean is Co-Chair of Hughes Hubbard's Life Sciences group. She has over a decade of experience counseling leading and startup pharmaceutical, chemical and biotechnology companies in all areas of patent law. In particular, she is adept at asserting and defending the patent rights underlying the core technologies and innovations of leading high-tech and pharmaceutical companies. She also defends her clients against claims asserted by competitors, sparing them billions of dollars in damages. Additionally, her patent prosecution practice strengthens her litigation abilities, allowing her to argue the validity of her clients' patents while challenging the validity of third-party patents. Patrice regularly calls on her technical background in biology to offer her clients an in-depth understanding of the complex science relative to each prosecution and litigation matter that she handles. This vantage point leaves her well-positioned to understand the complex science behind her clients' innovations as well as the broader market implications. Prior to law school, Patrice earned her Ph.D. in molecular biology. She conducted research in various areas of biology and biochemistry including virology, oncology, kidney disease, x-ray crystallography and narcotics addiction. Her doctoral thesis is titled "tissue, strain, gender and age variation in the induction of p53 activated transcripts in response to cellular stress."

Kimberly Maynard

(Panelist; Frankfurt Kurnit Klein & Selz)

Kimberly M. Maynard is a partner in the Trademark & Brand Management, and Litigation Groups. She represents emerging and established companies on intellectual property matters across a variety of industries, including technology, fashion, jewelry, finance, food, automotive, television and dance. *World Intellectual Property Review* recently included Ms. Maynard as a “Trailblazer” in its “Influential Women in IP” list.

Ms. Maynard guides her clients through all aspects of domestic and international brand-building and brand management. She works hard to understand client business goals and to craft practical, cost-effective legal strategies that meet those goals. Ms. Maynard analyzes and assesses the benefits and risks associated with adopting new brands, prepares and implements strategies for the development of new brands, and protects and expands established brands. Ms. Maynard represents clients before the Trademark Trial and Appeal Board and litigates cases involving complex trademark, trade dress, advertising, copyright and design patent issues in federal court. She also negotiates complex license and settlement agreements, advises on domain names and social media, and counsels on the proper use of trademarks and trade dress. Recently, she was part of the Frankfurt Kurnit team that represented Sprint in a high-profile false advertising case.

Prior to joining Frankfurt Kurnit, Ms. Maynard was an associate at BakerHostetler, where, among other things, she led a team of lawyers in an appeal of a Trademark Trial and Appeal Board decision before the Southern District of New York — ultimately securing ownership of trademarks for a major New York City dance theater. Prior to law school, Ms. Maynard was affiliated with Trisha Brown Dance Company.

Ms. Maynard is a member of the New York State Bar Association (Intellectual Property Group) and a member of the U.S. Trademark Law Committee (Intellectual Property Owners Association). She serves on INTA’s Young Practitioner’s Committee and was an Adjunct Professor at New York Law School, where she helped start the PTO Trademark Clinic. She is admitted to practice in the New York and New Jersey state courts, as well as in the Southern and Eastern Districts of New York, the District of New Jersey, and the Court of Appeals for the Second Circuit.

Kate Reardon

(Panelist; Fish & Richardson)

Katherine Reardon is an Associate in the litigation group at Fish & Richardson's New York office. Her practice focuses on patent, copyright, and trademark litigation in federal district courts and in section 337 proceedings before the U.S. International Trade Commission. Kate has worked with a wide range of technologies and clients, in areas including software, consumer products, battery materials, and pharmaceuticals. Kate was a Summer Associate with Fish & Richardson in 2012. Prior to joining the firm, she held law clerk and sourcing positions with GE Global Research, GE Energy, and Johnson & Johnson Consumer Products.

Jasmine Whyte, Ph.D.

(Panelist; Fish & Richardson)

Jasmine M. Whyte is a Technology Specialist, Patent Agent in the New York office of Fish & Richardson. Prior to joining the firm, Dr. Whyte (née De Cock) earned her Ph.D. in Biology from Dr. Robert Weinberg's laboratory at the Whitehead Institute for Biomedical Research/Massachusetts Institute of Technology (M.I.T.), where she investigated the role of inflammation in the awakening of dormant disseminated cancer cells. Dr. Whyte has experience working in both the pharmaceutical research industry as well as in Academia. As part of her undergraduate degree at King's College of London (U.K.), Dr. Whyte was an industrial placement student at Pfizer in Sandwich, U.K., where she worked in a multi-disciplinary group on high-throughput assay development. Dr. Whyte's practice focuses on patent prosecution and counseling in the life sciences (including cancer biology, cellular and molecular biology immunology, biochemistry, and molecular genetics). Dr. Whyte manages patent portfolios and assists with due diligence and freedom-to-operate studies. In 2015, Dr. Whyte was an intern in the Boston office of Fish & Richardson as part of the M.I.T. Alumni Association Externship Program.

HANDLING EXHIBITS AND LAYING FOUNDATIONS

- A. Handling Exhibits
- B. Diagrams
- C. Laying Foundations for Evidentiary Purposes
- D. Laying Foundations for Practical and Strategic Purposes
- E. Miscellaneous

A. Handling Exhibits

1. Important for Three Reasons

- a. Smoothness
- b. Making good record
- c. Using your time efficiently
 - (1) use the 7-hour limitation

2. How do you do it? Standard Litany

- First, make appropriate number of copies
 - a. Hand and ask court reporter to mark
 - b. Hand duplicate(s) to opposing counsel
 - c. Get document back from court reporter
 - d. **Hand to witness and ask witness to review Ex. ____**
 - e. **Have you had opportunity to review Ex. ____**
 - f. **Do you recognize Ex. ____**
 - g. **What is Ex. ____ (or, Ex. ____ is the letter you wrote to Joe Jones on February 14, 2019 correct?)**

IMPORTANT - Continue to refer to an Ex. __ or the ____ memo (for emphasis).

- No pronouns - not this, it or that document

- Also, if multi-page document, refer to page number of Ex. ____.

Having done this, you are ready to lay any foundation.

B. Diagrams

- 1. Very helpful in certain types of cases both for discovery purposes and to put the witness' feet in concrete.

2. Useful in personal injury cases, or sometimes in complex business cases for corporate tree or organization chart.
3. Same principles apply. Make clear record. Generally have witness do it and mark each separate piece of testimony with numbers, letters, etc., as appropriate.
4. This is verbal testimony and very helpful.

C. Evidentiary Foundations

1. All evidence at trial must be:
 - a. **Relevant (FRE 401)**
 - b. **Authentic (see C.2.a(1) below)**
 - c. **Admissible (not otherwise objectionable under the FRE)**
 - (1) Depends upon what type of evidence you are using and what you are using it for.
2. Authenticity - useful to do authenticity as part of the identification process - enhances the importance of the document.
 - a. Do you have to authenticate at all and, if so, how?
 - (1) Rule 901 (Requirement of Authentication and Identification) and Rule 902 (Self-Authentication)
 - b. Can be routine or very important.
 - (1) See Rule 901(b)
 - (a) “Testimony of Witness with Knowledge”
 - (b) Telephone conversations - personal v. business
 - c. What about social media?
 - (1) Comm. v. Mangel, Pa. Super. Ct., 2018 WL 1322179 (3/15/18)

“Additionally, the proponent of social media evidence must present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication in question, such as testimony from the person who sent or received the communication, or contextual clues in the communication tending to reveal the

identity of the sender. *See Koch*, 39 A.3d at 1005. Other courts examining the authentication of social media records have ruled that the mere fact that an electronic communication, on its face, purports to originate from a certain person's social networking account is generally insufficient, standing alone, to authenticate that person as the author of the communication."

- d. Practical concerns
 - (2) Frequently not an issue
 - (3) What about bogus contract -- is this the authentic "bogus" contract (FRE 901(a) -- "evidence sufficient to support a finding that the matter in question is what its proponent claims")

3. Admissibility - Example of business record.

- a. elements - clearly set forth in Rule 803(6):

(6) Records of 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) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. – Evidence that a matter is not included in a record described in paragraph (6) if:

- (A) the evidence is admitted to prove that the matter did not occur or exist;

- (B) a record was regularly kept for a matter of that kind; and
- (C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.
 - b. Easy enough - just look through your rule.
 - (1) use books - Mauet, NITA Tangible Evidence, Federal Trial Evidence (James Publishing -- Mark Dombroff)
 - c. Hard part - thinking ahead - what is it you are going to use the document for, does it help you or hurt you (i.e., do you really want to lay the foundation); what is your theory of the case.
 - d. Just a matter of laying the bricks, connecting the dots, etc. This part is science, not art.
 - e. Tactics - impact or just connecting the dots.
 - f. Unique considerations with e-mail and electronic documents – no separate rule of evidence.
 - (1) “Do you have a computer at work?”
 - (2) “Who provides that computer?”

D. Sequence Foundations or Tactical Foundations

- 1. In what sequence do you ask questions to create the best chance you will get answers you want.
- 2. Important document - which serves as admission
 - a. two ways of doing this
 - (1) short (and potentially not so sweet)
 - (2) longer
 - b. use longer more subtle method
 - (1) more general, the better
 - (2) why