

Taking and Defending Depositions

February 19, 2020

Back to the Basics - Things to Consider While Preparing for a Deposition

- Consider Your Goals
- Know the Protocols
- Prepare Your Exhibits

Back to the Basics – How to Get What You Want Out of a Deposition

- **Preparation vs. improvisation**
 - Take time to do the required personal preparation you need (e.g., sleep, mental state)
 - Always keep your goals in mind as you prepare
 - Prepare your witness (e.g., verbal and non-verbal communication (e.g., posture, gesture, tone, facial expression))
 - Prepare as much as you can for your witness to say something unexpected, and think about how to handle
 - Learn what you can about the opposing counsel
 - Court reporter
 - Think through your Exhibits
- **Prepare for Success by Establishing Control**
 - Physical arrangements (magic triangle)
- **Maintain Control**
 - Use breaks and objections strategically
- **Stick to a Strategy and Line of Questioning**

Scope of Discovery

FRCP 26(b)(1) *amended December 2015:*

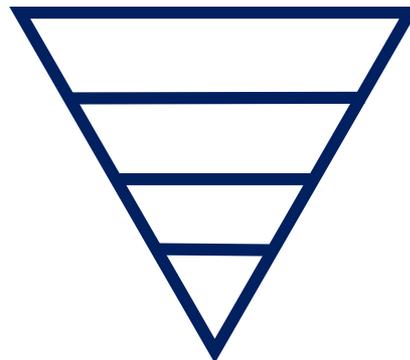
- “any nonprivileged matter that is relevant to any party’s claim or defense”
- Proportional to the needs of the case

Starting the Deposition – On the Record

- Swearing the witness
- Controlling the record
- The “usual stipulations”
- Establishing who represents whom

Questioning – Known Techniques

- Short, simple, clean questions (KISS)
- Maintain control
- Leading the witness
- Evoke the bad news
- “Why” and “Why not?”
- Funnel method: Going from open-ended to close-ended questions



Initial Questioning

- Introducing the witness to the deposition
- Establish the witness's competence and understanding
- Co-opt the witness
- Lay out any ground rules you want to apply
- Hug before you hit

Initial Questioning – Background Questioning

- No fixed formula
- Deposition Experience
- Witness' preparation: FRE 612
- What did the witness bring?
- Background, experience, and education
 - Be prepared for the lawyer who “starts in the middle”

Initial Questioning – The Unbroken Chain

- Most applicable to chronological sequences
- Education
- Job experience
- Meetings/contacts/ communications
- Second time through: using dates and recapitulations

Questioning – What to Listen & Look For – Practice Active Listening Flags, Hints & Leads

- Avoidance in the answer
- Extra words that qualify or conditions the answer
- A new name mentioned in the answer
- Witness's physical reaction to the question
- Opposing counsel's reaction to the question

Dealing with Objections Under the Rules

- **FRCP 30(c)(2):**
 - objections shall “be stated concisely and in a non-argumentative and non-suggestive manner.”
 - a deponent may be instructed “not to answer only when necessary to preserve a privilege, to enforce a limitation set by the court, or to present a motion under Rule 30(d)(3).

- **FRCP 30(c)(2):**
 - objections shall be recorded “but the examination still proceeds; the testimony is taken subject to any objections.”

Objections

- How to Object
- When to Object
- What Record must be made of the objection
- How to guide the witness when objecting
- Whether to argue about the objection

What to Do When the Guarding Lawyer Objects

- Stay in control and remember your goal
- Don't let the objection control your questioning
- Consider rephrasing
- Be persistent – obtain an answer
- If a privilege is asserted – make your record
- Professionalism – duty to your client to maintain professional at all times

Application of Rule 30

- Rule 30(d)(3)(A) issues are won or lost during the deposition
- Examples of obviable defects in questions:
 - ambiguous questions
 - compound questions
 - lack of competence of the witness
 - mischaracterizing earlier testimony
 - vague questions
 - leading (if leading is not allowed)

Rule 30(d)(1)

Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

Bad Faith Questioning

- FRCP 30(d)(3)(A)
 - If questioning is “in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party” then court sanctions are available.

How to Make a Record When a Privilege is Invoked

- Crisp question
- Appropriate objection
- Interrogator: ensure the witness refuses to answer the question
- Question to establish the scope of the asserted privilege

Nonverbal Testimony

- Gestures
- Heights/weights/distances
- Facial expressions
- Tone of voice

Closing the Deposition

- Remember your goal(s)
 - have they been met?
 - if not, why not?
- Did you finish?
 - if not, make your record
 - if yes, are any discovery requests pending?

Rule 30(c)(1)

Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615.

Videotape Depositions

- How does the video differ from a transcript?
- What does the picture tell us about the credibility or persuasiveness of the witness that the transcript does not? How?
- How is it different for the lawyers?