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Deposition Techniques and Strategies: Beyond the Basics

Sharpening Evaluation, Questioning and Objection Skills in Taking or Defending Depositions

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Today's faculty features:

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Deposition Techniques and Strategies, Beyond the Basics

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PREPARING FOR DEPOSITIONS

Developing a Discovery Strategy

- Think of this stage as the creation of a plan which is “theory” based.
- Consider the elements of the cause of action pleaded.
- Create a road map for obtaining documents and “staging” depositions.

Order of Depositions can be crucial and should be “mapped” and staged.

Some examples:

- Medical Negligence
- Complex business cases
- Piercing the Corporate Veil

Be prepared to set aside conventional wisdom: think out of the box!

- Mix it up
- Take a potential witness “out of their” game(s).
- The cardinal rule: The deposition is not about you...be prepared to be a good listener.

Be Ready for Plan B

- The best laid plans . . .
- Don't fall into being "Willfully Blind."
- Be prepared for that which makes us uncomfortable and unsettles.

Determining Whether or not to take a Deposition

- To preserve or not to preserve – just one question.
- The education of your opponent: pros and cons.

The Financial Dynamic in Today's Climate

- Necessity vs. Luxury
- Case Management and Budgetary Constraints
 - Contingency Cases
 - Corporate and insurance coverage litigation guidelines.

Strategy Thought:

When we confront facts and fears, we
achieve real power and unleash our
capacity for change.

Preparing for the Personality Dynamics – the Witness and Opposing Counsel

- Be smart.
- Be competent.
- Be nice.

If the goal is to truly discover facts, an atmosphere of free exchange must be fostered.

- Employ Psychology 101: If one is attacked, he or she will default to defensiveness.
- Do some investigation about a witness.
 - Lay witnesses
 - Experts – usually have track records.
- Find out about opposing counsel.

Conclusion: Personality Dynamics can be the most difficult thing to prepare for, so be prepared for the unexpected.

- Review strategies to overcome adverse dynamics – remind yourself of the purpose of the Deposition.
- Be prepared to use the Rules to keep control.

Preparing the Witness

Lay v. Expert: Obvious Differences

Preparation of Lay Witnesses

- Explanation of Purpose/Pitfalls
- Explanation of Mechanics
- Review of relevant documents
- Review of discovery and case status
- Focus on “trouble” areas
- Psychological preparation: establish a comfort level – avoid pressure.

Preparation of Lay Witnesses

Rehearsal: Pros and Cons

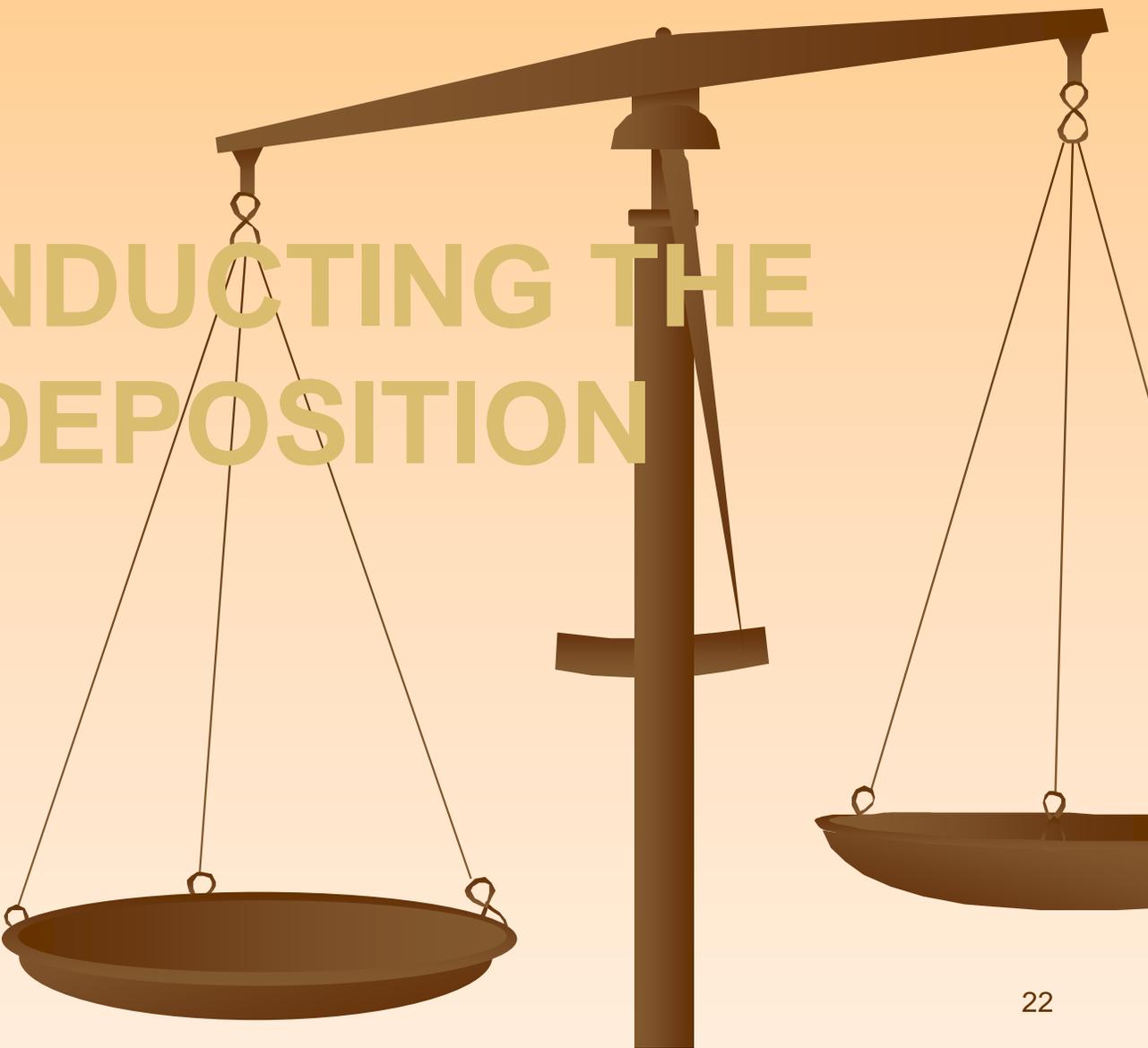
Conclusion: Comfort and Preparation is a winning combination.

Preparation of Expert Witnesses

- Investigation of former testimony
(land mines?)
- Face-to-Face meeting
- Discussion of case theory
- Discussion of adverse case theory
- Familiarize with documentary evidence.
- Familiarize with prior Depositions.

Preparation of Expert Witness (Conclusion)

Just because they “know the game,” don’t assume they can carry the ball across the goal line without preparation.



CONDUCTING THE DEPOSITION

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Objectives/Style:

- Discovering facts and opinions known or held by the opponent and third parties
- Evaluating credibility, appearance, competence, personality
- Obtaining concessions and admissions from the witness that support matters favorable to the case
- Obtaining potential direct testimony of an adverse party
- Preserving testimony for trial
- Obtaining information which can be used for impeachment
- Revealing parts of your case for settlement purposes
- Establishing facts known within an entity by use of a Rule 30(b)(6) deposition
- Establishing the universe of information known or unknown by the witness
- Laying the foundation for documents or other evidence
- Discovering or excluding contradictory evidence
- Potential Motions

Style of questioning depends in significant part on the purpose or objective of the deposition, and personality of those present.

Usable Questioning:

- A deposition can become unusable for purposes of trial if the questions become too complicated or meandering.
- For purpose of using a deposition for either direct testimony or impeachment, questions which are short and uncomplicated are easier for the jury to follow and understand.
- Leading question on matters that will be used at trial is an effective way of questioning a witness on trial points.
- Use documents when available to “coach/control” a difficult witness

Usable Responses:

- A deposition can become unusable for purposes of trial if the questions become too complicated or meandering.
- When the witnesses gives long, convoluted or complex answers:
 - Allow the information to be given by the witness
 - Return to the substance of the answer and dissect it with simple questions
- A usable answer does not always need to be “yes” or “no.”
- Listen to the answer and reflect on how it will sound to a trier of fact.
- Every question does not need to be asked and every argument does not need to be made.

Remember: Questions are revealing

Listen:

- Frequently a witness will volunteer information that needs to be clarified.
- A witness' answer is ambiguous and needs to be clarified.
- Make sure an answer to a question is made; witnesses do respond with statements that they deem to be pertinent, but are in fact nonresponsive.

Be fluid and prepared to pursue pertinent information provided by the witness, even if it was not requested by the question.

Exhibits:

- When using exhibits in a deposition, clearly identify the document.
- Re-identify the exhibit: an answer about a document that is identified several pages earlier in a deposition is difficult to clearly present to the jury.
- Control of a difficult witness.
- Refresh recollection – even if not a witness document.
- Consider the use of exhibit if the witness does not attend trial.

Points for Conducting the Deposition:

- Strategy of Questioning - Purpose
- Form of Questions - Leading/Open-ended, ambiguity
- Form of Answer - Complete/ambiguous
- Questions not asked
- Order of Questions
- Identification and Use of Exhibits
- Listen

DEFENDING THE DEPOSITIONS

Preparation

- Restatement (Third) Of The Law Governing Lawyers §176, comment (b):
- Ascertaining and discussing the witness's recollection and the probable facts.
- Discussing probable lines of hostile cross-examination the witness should be prepared to meet.
- Rehearsing the witness's testimony.
- Discussing a witness's prior testimony to refresh the witness's recollection.
- Discussing and revealing the testimony of other witnesses and asking the witness to reconsider his or her recollection of events in that light (except when the rule on exclusion has been invoked during a hearing or trial).
- Suggesting a choice of words *solely* to clarify a witness's testimony (but not to change substantive testimony or to cause the witness to testify falsely regarding a material fact).
- Informing the witness regarding applicable law and its relation to the events at issue (but not for the purpose of inducing a witness to misrepresent the facts).
- Discussing the possible inclusion of testimony regarding factual matters not initially mentioned by the witness, but only if the witness has an actual recollection regarding the matter.
- Inviting the witness to provide truthful testimony that may be favorable to the lawyer's client.
- Reviewing with the witness the factual context into which the witness's testimony will fit.
- Discussing courtroom or deposition demeanor and procedure.

Ethical Preparation:

- Rule 4.1 of the Model Rules Of Professional Conduct:
 - In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person;
 - or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
- Rule 4.2 of the Model Rules Of Professional Conduct:
 - In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- Rule 4.3 of the Model Rules Of Professional Conduct
 - In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Defending Your Witness

- Review with the facts of the case
 - Review both your own and opposition discovery responses
- Know the factual and legal issues that will be addressed
 - Extent of refreshing recollection
- Review the potential exhibits
- Potential for Impeachment
- Privilege and Waiver
- Instructing a witness not to answer a question
 - Seeking Court Intervention
- Potential Motions

Witness “Rules”:

1. “Be yourself”
2. Dress appropriately
3. Be polite
4. Posture and body language
5. Speak up
6. Don't argue or be an advocate
7. Wait for the entire question before answering
8. Answer only the question; the witness can explain at the right time
9. Never answer a question with a question
10. A witness may ask counsel to rephrase a question. Never answer a question that is not understood
11. Always review a document or exhibit before answering questions about it – But documents can be wrong

Witness “Rules” (Continued):

12. Remain firm unless convinced to the contrary.
13. Avoid equivocal and pompous language.
14. "I don't know" can be appropriate - "I don't know" is different from "I don't remember."
15. Be honest; tell the whole truth within the parameters of the question.
16. Listen to objections.
17. Do not adopt the language of the examiner asking leading questions.
18. The witness is not there to explain/help unless asked -
- Do not explain any of your answers unless requested to do so.
19. A deposition is not a conversation.

Attorney “Rules”:

- Do not embarrass the witness
- Do not be condescending to the witness
- Do not “instruct” the witness
- Do not raise your voice at the witness
- Avoid unnecessary tension
- Provide assurances to the witness

Instructions by Opposing Counsel:

- Such as:
 - Be certain you answer each question I ask you because if your answer is not responsive, I will ask that question again.
 - If you need to expand any answer feel free to do so.
 - If you should wish to add anything, feel free to do so.
 - If you need to explain an answer, feel free to do so.
 - If you don't know an answer say so, but I will assume that if you answer my question, you understood it as I asked it.
 - Do not concern yourself with the objections
- Inform the witness that the instruction will be given, but witness is to proceed as instructed in preparation, and not as instructed by the opposing attorney.
- Counsel also can/should note that the instructions are unfair, not contemplated by the Rules.

Objections

- Rule 30(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.
- (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. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.
- (2) Objections. An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).
....
- (d) Duration; Sanction; Motion to Terminate or Limit.
- (2) Sanction. The court may impose an appropriate sanction--including the reasonable expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

Waiver of Objections

- (d) Waiver of Objections.
- (1) To the Notice. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.
- (2) To the Officer's Qualification. An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:
 - (A) before the deposition begins; or
 - (B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.
- (3) To the Taking of the Deposition.
 - (A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

Waiver of Objections (Continued)

- (B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:
 - (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
 - (ii) it is not timely made during the deposition.
- (C) Objection to a Written Question. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.
- (4) To Completing and Returning the Deposition. An objection to how the officer transcribed the testimony--or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition--is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

- If a question is “leading,” the grounds for the objection can be easily cured or obviated, and the objection is waived if not made. *Assoc. Bus. Tel. Sys. Corp. v. Greater Capital Corp.*, 729 F. Supp. 1488, 1500 (D.N.J. 1990); *Roy v. Austin Co.*, 194 F.3d 840, 844, (7th Cir., 1999) (leading objection must be made);

- Argumentative objections are also curable and are waived if not made. *Bahamas Agricultural Industries, Ltd v. Riley Stoker Corp.*, 526 F.2d 1174, 1180 (6th Cir. 1975) (argumentative objection waived if not asserted at the deposition).

- Presumably irrelevant evidence cannot be “cured” to become relevant, and the failure to make the objection on relevancy grounds would not be a waiver. *United States v. Irvin*, 127 F.R.D. 169, 170 n.2 (C.D. Cal. 1989) (relevancy objection not waived); *but see Kirschner v. Braodhead*, 671 F.2d 1034, 1038 (7th Cir. 1982) (relevancy objection waived).

- “Competency” objections is not be waived if not made during the objection. *Cronkrite v. Fahrbach*, 853 F. Supp. 257, 259-60, 262 (W.D. Mich. 1994) (medical expert); *Osborne v. Wenger*, 572 N.E.2d 1343 (Ind. App. 1991)(medical expert). The courts seem to generally support the position that objections based upon relevancy and competency are reserved without an objection made at the deposition. *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 n.3 (E.D. Pa. 1993); *Thomas v. Hoffmann-LaRoache, Inc.*, 126 F.R.D. 522, 523-24 & n.1 (N.D. Miss. 1989).

- A non-responsive objection is waived if not made. *Kirschner v. Braodhead*, 671 F.2d 1034, 1038 (7th Cir. 1982).

Control:

- If the opposing attorney is interrupting the depositions with unnecessary objections, making “speaking objection,” giving instructions to the witness, or otherwise acting in a manner that is disruptive to the process, or, if an examiner is acting inappropriately, there are a few actions that can be taken:
 - Make a record before taking any action, such as allow the attorney some opportunity to establish that he or she is in fact disruptive and otherwise acting inappropriately
 - Ignore the disruptions if in fact the quality of the deposition will not be compromised
 - Provide notice that intervention from the court will be sought
 - If appropriate, use some humor
 - Avoid unnecessary argument over the quality of the objections or questions, but make a record
 - Video tape the depositions
 - Aggressive response
 - Court Intervention
 - Breaks in the depositions
 - Assurances to the witnesses

Attorney-Client Privilege

- United States Supreme Court Standard 503:
- (a)-- Definitions--As used in this rule:

(1)-- A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2)-- A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3)-- A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4)-- A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Attorney-Client Privilege (Continued)

- (b)-- General rule of privilege.--A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c)-- Who may claim the privilege.--The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

Using Deposition Testimony

- Take Inventory
- The Good, The Bad and The Ugly
- Review with Lay and Expert Witnesses

Post-Deposition Strategies

- Theming the case
- Reduce Pleadings and Discovery to Logical Anchors
- View Discovery from 30,000 Feet

Consider the Use of Focus Groups after Discovery is Complete

- Concept Focus Groups – Pros and Cons
- Mock Trials/Variations
 - Use of deposition testimony
 - Videotape depositions

Depositions for Use in the Formulation of Motions in Limine

- Inclusion of Transcript Portions

Depositions for use in Daubert Motions or other
Motions to Strike

- Good opportunity for education of Judge

Using Deposition Testimony during Discovery

- Depositions are cumulative and fluid: dealing with changing facts
- Fill in gaps
- Compare testimony and final explanations

Using Depositions during Discovery

- Organization of testimony
- Creating of “Issue Chart”
 - Helpful to organize testimony
 - Awareness of land mines
- Consider Motions for Summary Judgment
- Consider Motions to Strike

Using Deposition Testimony during Trial

Video Depositions

- Decisions on when and how to use
- Editing/Motion Practice

Using Depositions During Trial

- Witness Preparation
- Voir Dire – Introduce Testimony
- Opening Statement
 - Knowledge of Testimony
 - Explanation of Use in Depositions
- Observance of Rules Governing Use

Using Deposition Testimony during Trial

- Impeachment – The Golden Opportunity
- Common Mistake – The Deposition Testimony doe not impeach the testimony from the witness stand
- Use of “ELMO” or other visual aids in the courtroom

Using Deposition Testimony During Trial

- Admissions against Interest/FRE 801(d)(2)
- Lay the foundation properly/FRE 613

Using Deposition Testimony

CONCLUSION

- Take Inventory
- Evaluate – use with witnesses for Preparation
- Be creative