

DEPOSITION SKILLS PART II

General Taking and/or Defending Expert, Rule 30(b)(6), & Trial Preservation Depositions

Let's Discuss:

- ▶ Trial preservation depositions
- ▶ Expert depositions.
- ▶ Stating objections
- ▶ Rule 30(b)(6) depositions.

Trial Preservation Depositions

- ▶ Testimony to be used at trial as a substitute for live testimony
- ▶ Take when a witness is unavailable to testify to preserve testimony
- ▶ Prepare the same as if you were at trial
- ▶ But can be hybrid of discovery purposes and perpetuating testimony

Why take Expert Depositions?

- ▶ Discovery
- ▶ Theory testing
- ▶ Test cross examination
- ▶ Settlement purposes
- ▶ Motion practice
- ▶ Always keep in mind costs and timing and opening the door to more opinions...



-Once decided to
depose an expert what is
next?

What is the process?

**SUBPOENA TO ATTEND AND/OR PRODUCE AND/OR NOTICE
OF DEPOSITION**

EITHER WAIVER OF SERVICE OR RETURN OF SERVICE

Experts' Advantages

- ▶ Experts are experts
- ▶ Experts are generally not intimidated by the deposition process
- ▶ Experts can hide behind their expertise
- ▶ Experts may be more highly educated than lawyers
- ▶ Experts like to teach.

Experts' Disadvantages

- ▶ Experts are in the lawyer's arena
- ▶ Experts cannot resist teaching
- ▶ Experts don't know about the power of Fed. R. Evid. 803(18) or C.R.E. 803(18)
- ▶ Experts' time is finite and universe of facts is infinite
- ▶ Experts must rely on assumptions
- ▶ Experts are concerned about consistency
- ▶ Experts worry about facts they don't know.

How do we prepare for a (retained) expert's deposition?

- ▶ Review Rule 26 disclosure materials
 - A. Report
 - B. CV
 - C. Testimony list and publications
 - D. Compensation schedule
- ▶ Search for orders and review the law
- ▶ Consult with your expert
- ▶ Do not assume you know the answer

How do we take an expert deposition?

- ▶ The purpose and goals should drive the questions
- ▶ Ignorant but interested student
- ▶ Focus areas on cross at the deposition
- ▶ Point out the underlying assumptions
 - Accuracy of facts expert is relying on
 - Reasonableness of alternative assumptions the expert could have made
 - The sources of data the expert did not consider

How do we take an expert deposition? Continued

- ▶ Ask about the opinions, ensure they are no more or less than the report
- ▶ Ask about the reliable authorities in the field, the learned treatises supporting conclusions
- ▶ Ask about credentials and prior testimony

Defending your Expert

- ▶ Similar to lay witness preparation
- ▶ Spend more time with documents with an expert
- ▶ Tell the expert that the expert is not obligated to know everything
- ▶ Have the expert identify the pillars that support the opinions
- ▶ Role playing asking questions and subject to cross exam

Rule 30(b)(6) Depositions-

What are they used for?

- ▶ To depose a corporate entity versus searching out individuals that have knowledge about certain topics.
- ▶ Name an organization without knowing what individuals have knowledge of the topics/information you are seeking
- ▶ Fed .R. Civ. P. 30(b)(6) Depositions- 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.
- ▶ C.R.C.P. 30(b)(6) Depositions Before a notice is served, or promptly after a subpoena is served....

Rule 30(b)(6) Depositions

- ▶ **The party** seeking discovery must serve a notice allows you to name an organization of any type and list all topics for the deposition questions
- ▶ **The organization** must designate one or more individuals to testify about information known or reasonably available to the organization
- ▶ **The testifying designee(s)** must testify about information known or reasonably available to the organization
- ▶ **Organization/entity** is bound by answers

Rule 30(b)(6) Conferral

- ▶ (draft) Notice with proposed topics
- ▶ The serving party and the organization must confer in good faith about the matters for examination.
- ▶ Objections from organization regarding any topics
- ▶ If cannot resolve the disputed topics, court intervention

Considerations in designating the Rule 30(b)(6) designee

- ▶ Multiple versus one designee?
- ▶ State versus federal rules differ on deposition duration for multiple.
- ▶ Chose someone already knowledgeable of the issues and a participant?
- ▶ Versus someone not invested, but will take more time to prepare and become familiar?

Asking questions at 30(b)(6)

- ▶ Foundation supplied
- ▶ Be wary of in “my opinion, my belief is” answers and/or questions
- ▶ Can ask why, what was the purpose, reason, etc.
- ▶ May object about questions beyond the scope of the topics

OBJECTIONS- Know the Rules.

- ▶ C.R.C.P. 30(d)(1):
 - ▶ Any objection shall be stated concisely in a non-argumentative and non-suggestive manner.
- ▶ Fed.R.Civ.P. 30(c)(2)
 - ▶ (2) ...An objection must be stated concisely in a nonargumentative and nonsuggestive manner.

Stating Objections

- Do Not Worry About:
 - Relevancy/Materiality
 - Prejudicial
 - Hearsay (if not curable)
 - Confusion of Issues
 - Undue Delay/Waste of Time/Cumulative Evidence
 - Competency of Witness

Objections MUST Be Made At or Before the Deposition to:

- Notice
- Content of deposition
- Qualifications of Officer

Objections that MUST Be Made At the Deposition: Form of the Question

- Leading- depending on the witness
- Ambiguous/Vague/Confusing
- Argumentative
- Asked/Answered
- Assuming Facts Not in Evidence
- Compound Question
- Misleading Question
- Misquoting the Witness

Objections that MUST Be Made At the Deposition: Form of the Question

- Narratives (Questions or Responses)
- Speculation
- Unfair Characterization
- Calling for a Legal Conclusion
- Calling for Improper Lay Opinion
- Calling for Opinion beyond an Expert's Qualifications
- Calling for Hearsay

Objections that MUST Be Made At the Deposition: Other Objections

- ▶ Foundation objections
 - ▶ Authenticity
 - ▶ No Personal Knowledge
 - ▶ Best Evidence
- ▶ Objections to the Answer
 - same reasons as objections to questions

Must be made or are waived- Instructions Not to Answer if

- ▶ Necessary to preserve a privilege
- ▶ to enforce a limitation ordered by the court
- ▶ or to present a motion under Rule 30(d)(3)- motion to terminate or limit