

TAKING AND DEFENDING DEPOSITION

September 26, 2007

12:00-1:00 p.m.

Presenter: Thomasina F. Moore, Esq.

GENERAL INTRO: IMPORTANCE OF DEPOSITIONS PARTICULARLY IN
DEPENDENCY CASES:

I. Understanding The Different Types Of Depositions.

A. Discovery Depositions: Used to get as much information as possible. ASK ANYTHING AND EVERYTHING YOU CAN THINK OF. WHO, WHAT, WHERE, WHEN, HOW, WHY. ASK EMOTION QUESTIONS.

Rule 8.245 (a) Scope of Discovery. Unless otherwise limited by the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* **Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action**, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. **It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.**

B. Preserving Testimony: Use when witness will be unavailable; Here use short questions typical of trial, lay proper foundations. Form of the question very important.

Rule 8.245(g)(3) *Use of Deposition.* Any deposition taken under this rule may be used at any hearing covered by these rules by any party for the following purposes:

(B) For testimonial evidence, when the deponent, whether or not a party, is unavailable to testify because of one or more of the following reasons:

(i) He or she is dead.

(ii) He or she is at a greater distance than 100 miles from the place of hearing or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition.

(iii) The party offering the deposition has been unable to procure the attendance of the witness by subpoena.

(iv) He or she is unable to attend or testify because of age, illness, infirmity, or imprisonment.

(v) It has been shown on application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(vi) The witness is an expert or skilled witness.

IF A SKILLED WITNESS ASK AS APPROPRIATE:

- Their qualifications;
- Their opinions: Be sure to ask each opinion. Repeat each opinion offered with anything else until the list is exhausted.
- The bases of their opinions
- The sources of information relied upon in forming their opinions and bases;
- Their fees and whether they expect to testify for their party in the future
- The number of times they have testified for the party;
- Insufficient information, tests, or sources of information they have relied upon;
- The certainty of their opinions
- Possible explanations contrary to their opinions [not your own]
- Familiarity with any treatises which you might rely upon [i.e. dsm-iv]

C. Containment Depositions: Used to limit testimony in certain areas to nail a witness down. Concern for a “change in story.” If a containment deposition, limit to the areas necessary, no need to be complete or be as concerned with foundation.

No matter the type of deposition at the beginning you should introduce yourself, instruct witness to respond verbally, to wait until you have finished your questions before responding. Instruct witness to let you know if the witness does not understand a question and that by answering it will be assumed the question is understood. Offers breaks whenever the witness needs one.

At the end you want to ask whether the witness understood the questions, whether the witness answered every question truthfully and whether the witness would like to change the answers to any questions.

D. When Is A Deposition Appropriate? The Cost/Benefit analysis

Unless needed to preserve testimony, don't depose friendly witnesses.
Minute details might give grounds for impeachment.

Don't depose hostile witnesses who have already given a sworn statement.

DCF SCHEDULES AND PAYS FOR MOST. IF THEY DON'T, DON'T HESITATE.
MORE DEPOSITIONS ARE APPROPRIATE

II. Preparing For The Deposition. A lawyer needs to prepare to take as well as prepare to defend the deposition. Preparation of the attorney and the witness is necessary.

Attorney Preparation:

Review the file. Talk to witnesses. Read treatises if necessary.
Prepare an outline, but be flexible.

Outline can be organized by timeline, issues, defenses, whichever atty is comfortable with for that particular case. Remember, rules of evidence do not apply and question need only be reasonably calculated to lead to the discovery of admissible evidence.

Leave room for notes, follow up questions, etc. [mark ? in margin]

Go back to outline before adjourning. Take bathroom break. Give yourself time to think.

A. Requests for Production Use a R for P to obtain documents prior to the examination. Ask about those documents at deposition. Is there an expert opinion which isn't otherwise provided?

WITNESS PREPARATION: Use prepared witness instruction sheet as a beginning. Schedule meeting to: review facts and file; discuss and describe deposition procedures; provide Client Deposition Instructions; supplement instructions with any specific instructions. Practice questions with deponent. **PRACTICE BEST INTEREST QUESTIONS.** At the deposition, be sure to protect your client.

III. Objections. Apart from privilege, the only proper objections at deposition are objections based upon the form of the question:

A. Waiver rule Form objections not made are waived. Objection alone is insufficient. Objection form is, but be prepared to answer if asked for specific grounds. *Ask for specific grounds.* Standing objections. Don't recommend.

Examples: foundation, leading, vague, competency, lack of foundation, mischaracterizing testimony, compound question, speculation

Special note: asked and answered.

B. Speaking objections: Objections should be made in a non-argumentative and non-suggestive manner. Speaking objections absolutely prohibited and grounds for sanctions

Examples: "I object. This witness could not possibly know the answer to that. He wasn't there."; "I object. You can answer if you remember."

Apart from speaking objections attorneys may engage in other obstreperous conduct. Continual objections, giving speeches, raising voice, etc. Certain things you can do: Offer standing objections. Request court reporter bracket speeches. If engaging in non-verbal behavior note it for the record. If there are continual breaks, record the stop and start time of the breaks. **ASK IF THE PARTIES CONFERRED DURING ANY RECESSES. CANNOT ASK WHAT WAS SAID, BUT CAN ESTABLISH IF TESTIMONY WAS DISCUSSED.**

DON'T GET PUSHED AROUND. Remember this is your deposition.

C. Instructing a Witness Not to Answer: cannot instruct a witness not to answer except on grounds of privilege [Jones v. Seaboard Coast Line RR Co.] BUT can seek an adjournment to get the court's guidance on specific issue such as bad faith or to protect information which would be irreparable if revealed.

Rule 1.310(d) provides that "At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party the court may limit the scope and manner of the deposition under Rule 1.280(c)." That rule allows suspension and motion for protective order

If seeking adjournment, offer to allow counsel to complete remaining questions

IV. Introduction and Use of Exhibits: it is not necessary to offer exhibits for discovery depositions. The exhibit is introduced at trial. Foundation not necessary unless witness is unavailable. However, may want to do it anyways in case witness becomes unavailable.

To lay a foundation for use of exhibits: Each exhibit requires a separate foundations. Consult Fundamental of Trial Techniques. Have a checklist for laying the foundation:

Witness qualification. Do they have personal knowledge?

Authentication: chain of circumstantial evidence

Relevance: Not prove/disprove material fact but Rule 403 probative value outweigh prejudice?

Best Evidence rule: contents of document only

Magic words: original or true and correct copy of the document

For documents may also need to demonstrate a proper chain of custody.

Exhibits used to refresh recollection: anything can be used.

Use of exhibits at deposition: Most important is to describe what the witness is referring to as specifically as possible. On GAL's exhibit A, page three at the center left hand side.....

Have copies for all parties and show to witness's lawyer before showing to the witness themselves.

V. Motions for Protective Orders

A. Children under 16 pursuant to Rule 8.245(i). SUBJECT OF ANOTHER CONFERENCE CALL. Generally, based upon age and maturity of child attorney should inquire if the child wants to testify. If child is too young to ask or does not want to testify FILE A MOTION FOR PROTECTIVE ORDER. Attempt to resolve motion with opposing parties.

B. Limit witness attendance or discussion of certain information:

Rule 8.245(f) Protective Orders. On motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court; [parramore]**
- (6) that a deposition after being sealed be opened only by order of the court;
- (7) that confidential research or information not be disclosed or be disclosed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.