Depositions in Federal Court Cases

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I. Timing of Depositions

Fed. R. Civ. P. 26(d)(1) specifies that discovery may not be sought before the parties have conferred pursuant to Rule 26(f), unless the parties stipulate to earlier discovery or the court so orders. The Rule 26(f) conference must occur "at least 21 days before a scheduling conference is to be held or a scheduling order is due. . . ." In most federal courts, the scheduling order sets a deadline for completion of discovery, which is confirmed at the actual scheduling conference before a United States Magistrate or District Court Judge. Thus, as a practical matter, most depositions are taken between the date of the scheduling conference and the discovery deadline. Absent agreement of counsel, permission must be sought from the court to conduct depositions either before the Rule 26(f) conference or after the discovery cutoff. More specifically, Fed. R. Civ. P. 30(a)(2)(A)(iii) requires that in the absence of a stipulation, a party must obtain leave of court to conduct a deposition before the time specified in Rule 26(d), "unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time."

II. Location of Depositions

Fed. R. Civ. P. 30(b)(1) requires that the notice of deposition contain "the time and place of the deposition. . . ." Aside from this language, Rule 30 is silent about the location of depositions. Fed. R. Civ. P. 45(a)(1)(A)(iii) requires that a subpoena command a person to whom it is directed to "attend and testify," and Rule 45(b)(2) permits a subpoena to be served within the district of the issuing court, or outside of the district but within 100 miles of the place specified for the deposition,

or within the state of the issuing court if permitted by state statute or rule, or anywhere "that the court authorizes on motion and for good cause, if a federal statute so provides." Thus, the most likely choices for deposition locales are either within the district of the issuing federal court or within 100 miles of wherever the deponent is served.

A deposition of a party may be taken at any location deemed suitable by the examining party, subject to the court's power to grant a protective order under Rule 26(c)(2) designating a different place. 8A Charles Alan Wright et al., Federal Practice and Procedure § 2112 (2d ed. 1994). If the deponent is not a party and does not consent to attend, his or her attendance must be enforced by a subpoena, which is subject to the geographic limitations set forth above.

Good cause must be shown for changing the place of a deposition. Inconvenience, excessive cost, excessive travel time, and poor health of the deponent have all justified court orders moving a deposition from the site selected by the examining party. *Id.* The court has wide discretion in selecting the place of examination.

Generally, plaintiffs will be required to give their depositions in the district where suit was filed. Exceptions relate to financial and health reasons, as well as other circumstances constituting an undue burden on the deponent. Generally, the deposition of a corporation by its agents and officers will be taken at its principal place of business. *Id.* The District of Colorado's Local Rules allow the court to order that a deposition be taken at the federal courthouse "if deposition abuse is anticipated." D.C.COLO.LCivR 30.3C.

III. Length of Depositions

Fed. R. Civ. P. 30(d)(1) states that a deposition is limited to one day of seven hours "unless

otherwise stipulated or ordered by the court." However, the rule further specifies that "the court *must* allow additional time. . . if needed to fairly examine the deponent *or* if the deponent, another person, or any other circumstance impedes or delays the examination." Fed. R. Civ. P. 30(d)(1)(emphasis added).

Parties should be encouraged to discuss the need for more time for a deposition in advance, if possible. To the extent that a deposition scheduled for seven hours is not completed within that time, the parties may agree to additional time or seek a court order permitting it. Rule 30(d)(2) allows the court to impose an appropriate sanction, including reasonable attorneys' fees and costs, on anyone who "impedes, delays, or frustrates the fair examination of the deponent."

IV. Who May Attend Depositions

Before the 1993 amendments to the Federal Rules of Civil Procedure, parties sometimes argued about who could attend depositions. Those amendments made clear that Rule 615 of the Federal Rules of Evidence, which requires the court to exclude witnesses at the request of a party, does *not* apply to depositions. More specifically, Fed. R. Civ. P. 26(c)(1)(E) now clarifies that a party may seek a protective order "designating the persons who may be present while the discovery is conducted" based upon a showing of good cause, "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." A mere showing that the requesting party wishes to exclude others from a deposition "so that they cannot hear the testimony," as provided in Rule 615, is not enough, in my view. Orders of exclusion from depositions must be based upon a proper showing under Rule 26(c)(1)(E). Consult your court's Local Rules to determine whether the filing of a written motion is necessary. In my court, such a motion may be made verbally, so long

as counsel for all interested parties are present.

V. Deposition Objections

The Federal Rules of Civil Procedure do not specifically outline the types of objections permitted at depositions. In general, the only appropriate objections to be made at depositions are those which could be made at trial, and which therefore are based on the Federal Rules of Evidence (e.g., objections to the form of the question, relevance, privileges, and hearsay).

Fed. R. Civ. P. 32 addresses the issue of when objections are deemed to be waived. In general, a person waives any objection, whether to the form of questions or answers or any other matters, that might be corrected if promptly presented, by failing to note the objection at the taking of the deposition. Fed. R. Civ. P. 32(d)(3)(A), (B)(i) and (ii). Objections to the deponent's competence or to the competence, relevance or materiality of testimony are *not* waived, and may be presented at trial even though they were not noted at the deposition, *"unless* the ground for [the objection] might have been corrected" if presented at the time the deposition was being taken. *Id.* 32(d)(3)(A)(emphasis added).

Fed. R. Civ. P. 30(c)(2) describes the effect of objections on a deposition and imposes some restrictions on the manner of making objections. It reads: "An objection at the time of the examination . . . 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." Fed. R. Civ. P. 30(d)(3) permits a deponent or party to move to limit or terminate a deposition which "is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." Nothing in Rule 30(d)(3) expressly

excludes bad faith objections as a basis for seeking the relief allowed. Moreover, D.C.COLO.LCivR 30.3D. expressly permits a judicial officer to award expenses to a party if she determines that the other party "unreasonably has interrupted, delayed or prolonged any deposition . . . by . . . objecting . . . ."

The form of permissible deposition objections varies widely from district to district, and is largely governed either by the applicable Local Rules or by longstanding custom and practice. A favorite myth about federal court practice is that only objections to the form of the question and to questions which implicate a privilege are allowed. There is no Federal Rule of Civil Procedure which so specifies. Wise counsel will consult the court's Local Rules as well as local counsel to determine the form and scope of permissible deposition objections.

The District of Colorado's Local Rules make clear that speaking objections are not allowed in depositions. D.C.COLO.LCivR 30.3A.1. defines certain prohibited deposition conduct, including "making objections or statements which have the effect of coaching the witness, instructing the witness concerning the way in which he or she should frame a response, or suggesting an answer to the witness." Subsection B. of Local Rule 30.3 makes the prohibitions explained above "a standing order of the court for purposes of Fed. R. Civ. P. 37(b)," which authorizes imposition of sanctions for failure to comply.

As a practical matter, the combined effect of Local Rule 30.3 is to prohibit speaking objections in federal court cases in the District of Colorado. However, I do not read the rule to entirely prohibit a reference to a rule of evidence when making an objection in a deposition. For example, consider the following scenario:

Susan Supervisor sues ABC corporation for gender discrimination under Title VII. Peter

President testifies in his deposition that Susan was not promoted solely because she did not have an M.B.A. degree. In Jack Vice President's deposition, he is asked:

> Q: Please look at Exhibit 1. Is that a report you wrote to Peter President on June 1, 2008, thirty days before Susan Supervisor was not selected for the promotion?
>
> A: Yes.
>
> Q: And in the report, you wrote that Susan Supervisor was not well-liked by her subordinates because she "acts like she's on testosterone and refuses to wear dresses and skirts to work?"
>
> Defense Attorney: Objection, relevance.

In my view, "objection, relevance" does not violate Local Rule 30.3A.1., because it cannot reasonably be said to have the effect of coaching or instructing the witness or suggesting an answer. However, consider instead the following objection:

> Defense Attorney: Objection, irrelevant because Mr. President testified in his deposition that the only reason why Susan Supervisor was not promoted was because she lacked an M.B.A., and Mr. Vice President's complaints about her behavior are not relevant to the subject matter of the litigation.

In my view, this objection violates Local Rule 30.3A.1. It either informs or reminds the witness about another witness's deposition testimony, and focuses him on the defense theme that Susan was not promoted based solely on objective criteria. Hence, the objection coaches the witness.

A word or two must be included about instructions to a witness not to answer a deposition question. Fed. R. Civ. P. 30(c)(2) states: "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 [to terminate or limit examination] under Rule 30(d)(3)." Local Rule 30.3A.3. also prohibits "instructing a deponent not to answer a question except when necessary to preserve a privilege, to

enforce a limitation on evidence directed by a judicial officer, or to present a motion [to terminate or limit examination]."

First, note that the limitation on instructions not to answer applies to all *persons*, not just parties. According to the Committee Note on the 2000 amendments to Fed. R. Civ. P. 30, "the amendment is not intended to confer new authority on nonparties to instruct witnesses to refuse to answer deposition questions. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties."

Second, note that there is nothing in Rule 30 which cancels the requirements of Fed. R. Civ. P. 26(b)(5) regarding claims of privilege. The latter rule requires not only that a claim of privilege be "expressly" made, but also that the claiming party "describe the nature of the . . . communications . . . not disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Thus, consider the following scenario, using the same fact pattern involving Susan Supervisor's gender discrimination claim and the deposition of Jack Vice President:

Q:	With whom did you discuss Ms. Supervisor's request for a promotion?
A.	When?
Q.	Anytime between the date of her request and the filing of this lawsuit?
A.	Peter President, Stacy Subordinate and Cameron Counsel.
Q.	Who is Cameron Counsel?
A.	She was the head of our legal department.
Q.	She was the head of ABC Corporation's Legal Department?

A. Yes. At least she was then.

Q. When did you discuss it with Cameron Counsel?

A. Right around when Susan applied for the promotion.

Q. Why did you discuss it with Cameron Counsel then?

Defense Attorney: Objection, privileged. I instruct you not to answer.

In my view, this objection is insufficient pursuant to Rule 26(b)(5). It fails to identify the privilege, and fails to disclose enough information so that Plaintiff's counsel can assess the validity of assertion of the privilege in these circumstances. In other words, objecting counsel must provide enough information so that the opposing counsel can assess whether the reason why Mr. Vice President chose to speak to in-house counsel *at that time* is subject to any legal privilege.

Defense counsel has two better alternatives here, both of which comply with the applicable rules:

(1) Objection. If the question requires you to disclose information that you discussed only with in-house counsel, I instruct you not to answer on the basis of the attorney-client privilege; or

(2) Objection. I instruct you not to answer because the timing of the conversation was the subject of attorney-client privileged communications.

VI. Rule 30(b)(6) Depositions

This rule, adopted in 1970, allows the party seeking discovery to name as the deponent a public or private corporation, partnership, association, governmental agency or other entity and to designate with reasonable particularity the matters for examination. The burden is then on the named organization to designate one or more persons to testify on its behalf. The deponent entity "may"

set out the matters on which each person designated will testify, and those persons "must" testify about information known or reasonably available to the organization. When a person subpoenas a nonparty entity for a Rule 30(b)(6) deposition, the subpoena "must advise [the organization] of its duty" to designate the matters on which each individual will testify.

Although simple in design, Rule 30(b)(6) is a frequent subject of discovery motions in federal court. Issues include the number of matters for examination identified, the time required for the organization to be deposed on those matters, the location of the deposition, the cost of producing the witnesses to respond to the notice, the number of witnesses necessary to respond to the notice, and other issues regarding alleged burdensomeness (e.g., the degree of disruption to the deponent organization caused by the notice).

Suffice it to say that the court has wide discretion to decide these issues. *See,* e.g., *S.E.C. v. Nacchio*, No. 05-cv-00480-MSK-CBS, 2008 WL 4587240 at *3 (D. Colo. Oct. 15, 2008). In the District of Colorado, the parties are required to confer before filing discovery motions (see D.C.COLO.LCivR 7.1A.). If the parties cannot resolve their disputes about any deposition notice, the court will resolve them. Moreover, this court is likely to take into account both the reasonableness of the parties' efforts to confer, as well as the reasonableness of their positions with respect to discovery disputes.

VII. Purposes of Depositions

Depositions may be used in lieu of testimony at trial, to impeach a witness, to refresh his recollection, or in connection with a summary judgment motion. *See generally* Fed. R. Civ. P. 32, 56(c)(2) and (e); *Estenfelder v. Gates Corp.*, 199 F.R.D. 351, 354 (D. Colo. 2001); Fed. R. Evid.

607, 612.

The purpose of the deposition may affect your approach to it. If a deposition will be used for impeachment, summary judgment or in lieu of testimony, planning is critical. If the witness is adverse, questions should be framed as leading as often as possible. If the witness's credibility is an issue and the deposition will be used for impeachment, outline in advance the subject areas for examination, the documents to be used and the specific questions you wish to ask. For example, it may be helpful to make a list of the exact points you wish to establish regarding Jack Vice President's credibility, like the following: (1) he lied about the scope of his duties in his previous employment as Vice President of BigCo.; (2) he gave inconsistent statements about the quality of Susan Supervisor's performance; (3) although he now expresses a clear opinion regarding ABC's track record of promoting women, prior to litigation he professed lack of certainty on that topic, etc. Checking off your list during the deposition will help you to stay organized and cover the necessary territory.

But beware of gilding the lily in a deposition designed to discredit a witness. In the excitement of having cornered the witness in a lie or inconsistency, resist the urge to further provoke him. Once you establish the facts of the deception, you rarely need to do more. Consider the following example regarding the deposition of Jack Vice President.

Q: In July of 2008, you told the Board of Directors of ABC that you "didn't know much" about the company's promotion of female employees to high-level management positions, correct?

A. I guess so. I don't really remember.

Q. Please look at Exhibit D, the Minutes of a Board Meeting held on July 15, 2008. The second paragraph of Exhibit D states: "Mr. Vice President stated that he didn't know much about the company's promotion of women to high-

level management positions." Did I read that correctly?

A. Yes.

Q. You do not deny that you made that statement at the Board meeting, do you?

A. I said it, I suppose.

Q. One month ago, you told ABC's shareholders that the company has a long record of promoting women to management positions, that you yourself have helped several women obtain promotions at the company, and that you weren't aware of any "better track record with the ladies" in the industry, right?

A. I believe I made a remark about whether there are women managers at the company.

Q. Please look at Exhibit E, a copy of an article from *The Mountain Free Press* about the shareholders' meeting one month ago. You are quoted in the article as saying during the meeting: "All along we've promoted women when they've earned it. I've helped many of them myself. No company in the industry has a better track record with the ladies." Did I read that correctly?

A. Yes.

Q. You said that at the meeting, right?

A. I guess I did.

Counsel might be sorely tempted to try to pin down Mr. Vice President further, by asking: "What do you mean, 'I guess I did?' That's what it says, right?" Don't go there. The witness can always say that the reporter got it wrong, company documents are wrong, his memory isn't perfect and the statement was made too long ago, etc. Do not provide the witness with an opportunity to explain or pontificate further during a deposition for impeachment purposes. Get a confirmation of the inconsistency or deception and move on.

Similarly, a preservation deposition, which is designed to be used in lieu of live testimony

at trial, takes an extra degree of planning and preparation. If you know at the time of the deposition that the witness will be unavailable for trial ("because of age, illness, infirmity, or imprisonment" or because you "[can] not procure the witness's attendance by subpoena"), creating a transcript that provides clear, comprehensible testimony should be a priority. Fed. R. Civ. P. 32(a)(4)(C) and (D).

When preparing for a preservation deposition, you may want to create an outline or list of questions, properly framed as leading or not depending on whether the witness is adverse or not, to which you must obtain answers during the deposition. Use your list freely during the deposition, so that you ensure that you cover the necessary testimony. Second, use headnotes to mark the testimony in particular subject areas. For example, "Mr. Vice President, I am going to ask you some questions about your previous employment at BigCo."; or "Now let's talk about your performance evaluations of Susan Supervisor." Use of such headnotes will help you to find the testimony you need to present at trial, and will encourage you to stay focused on the subject until you have exhausted it before moving on to the next subject. Importantly, use of headnotes will also enhance the jury's understanding of the testimony when it is read aloud at trial. Third, do your best to avoid verbal distractions in your examination. Minimize use of "um," "ah," "just a moment," "er," and other common verbal hiccups. If you need to take a minute to collect your thoughts, simply go off the record and take a short break. Fourth, do not allow the witness to interrupt you, and try not to interrupt the witness's answer. Fix such broken questions or answers by repeating them as necessary to create a full record. Finally, as emphasized earlier, resist the urge to gild the lily. Make your points and move on, without allowing the witness an opportunity to muddy the waters by explaining his testimony, changing the subject or using personal charm to distract you or the jury.

If you intend to use a deposition for a specific purpose at trial, it is critical to fully understand

that purpose in advance and to plan to obtain the testimony you need to best serve that purpose. Clarity and completeness are critical for preservation depositions.

VIII. Practice Tips

A. Substance

Just like a trial, the key to an effective deposition is preparation. In order to make the best possible record, counsel must be aware of the legal elements of their claims or defenses, the facts which support those claims or defenses, which witnesses likely have those facts, and which witnesses likely do not. Counsel must use every available resource to identify this information, and should try to develop various ways to obtain it from the deponent during the deposition. In order to put your mind at ease about the issues you will need to cover during the deposition, it is best to make an outline in advance.

It is never too early to start thinking about the inevitable summary judgment motion. What must you do to win or defeat it? What will you have to show? Who is going to give you the evidence you need, and how will you get it?

Identifying and preparing exhibits for a deposition is critical. Be mindful of the time it takes to go through exhibits at a deposition, and use your time wisely. Authentication of documents can usually be handled through requests for admission, so you may not want to spend a great deal of time there. Avoid asking witnesses if the document says what it says (e.g., "And in the report, you wrote that Susan Supervisor was not well liked by her subordinates because she 'acts like she's on testosterone and refuses to wear dresses and skirts to work?'"). Instead, ask what the critical language means. If necessary, use depositions to clarify who wrote documents, who received them,

when they were written, their purpose, and how they were maintained.

Finally, don't forget that your client or client representative is a valuable asset to be used during your deposition. Be sure that the person with the most knowledge of the areas about which you intend to examine the witness attends. Prepare your client to help you during the deposition by taking notes and providing insights into the witness's answers and behavior.

List of tips:

- Be prepared and organized. Make an outline.
- Make a list of the legal elements of your claims or defenses.
- Make a list of the facts you want to establish in support of your claims or defenses for each separate deposition.
- Prepare alternative ways to get the facts you need from each witness.
- Compile only those documents you must discuss with each witness.
- Do not ask the witness to verify that the document says what it says. Ask what it means.
- Use depositions to clarify critical information about documents that is unclear.
- Go off the record to discuss stipulations as to authenticity of documents, if necessary.
- MAKE your client write a note every time the witness (1) is not telling the truth; (2) is failing to remember something s/he should remember; (3) can be contradicted by other known information; (4) is giving physical clues that the client recognizes; or (5) says or does anything else that the client thinks is important.

B. Style

There are probably as many different deposition styles as there are lawyers. The *worst* thing you can do is to try to be something you are not; as the bard wrote: "To thine own self be true." Thus, suggestions about style should be taken with a grain of salt. Nevertheless, you can refine your

own style to be more effective, and you should work on refining your style at every opportunity.

First, consider whether you will catch more flies with honey or vinegar. That consideration necessarily involves an evaluation of the particular witness whom you will depose, and his or her likely response to your demeanor. Ask your client what s/he thinks about the witness. No one is a mind reader, but it doesn't hurt to think about it.

Second, avoid being shocked by the witness's behavior. Prepare yourself for animosity, aggressiveness, belligerence, obstructiveness, arrogance, insults and the rest of the smorgasbord of bad human behaviors. In appropriate cases, prepare yourself for medical issues. Forewarned is forearmed. Think about how you will respond when the witness behaves badly and stick to your game plan. If the witness is sickly, consider how you will handle a medical emergency or other medical issue.

Third, consider proceeding in your examination in something other than a chronological fashion. For example, you may want to start with the most critical questions, so as to obtain the witness' answers before s/he has an opportunity to confer with counsel or others about his or her testimony.

Fourth, if the witness gets to you, take a break. Find someone (other than your client) with whom you can discuss the situation. Don't reconvene until you are back on your game.

Fifth, consider asking a more experienced lawyer to sit in on the beginning of the deposition, for the purpose of critiquing both you and the witness. Take a break after an hour or so and find out how you're doing.

Sixth, resist the temptation to argue with the witness. Indulge the temptation to let the witness dig his or her own grave. If the witness repeatedly behaves badly, fails to answer questions,

feigns poor memory or lies, do what you can to nip it in the bud. If you can't nip it in the bud, let it happen. You will not regret it.

Finally, call the Magistrate Judge when you need a ruling. I recommend that before you do so, you go off the record, ask opposing counsel to talk with you about the issue off the record and outside of the presence of clients in an attempt to work it out, step outside of the deposition room and away from clients to discuss the issue, and tell opposing counsel that you will seek a ruling from the court if you can't resolve it. Then, and only then, in the absence of a resolution, call the Magistrate Judge.

Professionalism goes a long, long way in most situations. Use it to your – and your client's – advantage.

List of tips:

- Think about vinegar or honey (or both).
- Prepare and steel yourself for the worst.
- Get organized. Don't automatically assume that a chronological examination is best.
- Take a break to cool off, calm down, regroup.
- Seek constructive criticism from a more experienced lawyer.
- Know when to hold 'em and know when to fold 'em.
- Call the Magistrate Judge when you need to.
- Be a professional.