

SUCCESSFUL STRATEGIES FOR WINNING COMMERCIAL CASES IN FEDERAL COURTS: DEPOSITIONS

I. INTRODUCTION

As opposed to the routine civil case, depositions in commercial litigation cases pose unique considerations. For instance, unlike an ordinary tort case with a distinct injury-causing event, commercial cases often involve witnesses trying to recollect events such as the negotiation of a complex transaction that could have taken place over several months or the lengthy development of a corporate policy. Also, in commercial cases, you more often than not have a witness who is testifying in the capacity of a corporate representative of a party.

This presentation will focus on the unique considerations that a lawyer is most likely to encounter in litigating commercial cases in federal court.

II. TAKING DEPOSITIONS

A. Before You Take the Deposition

1. Plan Your Sequence of Discovery

There is no question that sequence of discovery provides a tactical advantage. No rule requires that deposition need be taken in a particular order. Assuming that deposition is properly noticed, a deponent is required to appear. A party cannot unilaterally refuse to permit the client to be deposed based solely on an objection to the sequence or timing of the deposition. Motions for protective order changing the sequence of discovery are not routinely granted.

- Have a discovery plan—before you send out a notice for deposition, draw up a “game plan.”

2. Use the Model Jury Charge as Your Guide

Research all elements of model jury charge for your claims, affirmative defenses, counter-claims, and your affirmative defenses. This will guide your discovery and the preparation for taking deposition and preparation of witness.

3. Develop Goals for Each Deposition

Be able to state the specific points you intend to establish through the witness for trial and the manner (i.e. the questions) through which you intend to reach these goals.

Ex. of overbroad goal: “finding out everything the witness knows.”

Ex. of specific goal: “to establish that auditor lacked the requisite knowledge or experience to perform the audit” or “that auditor performed the relevant testing improperly by failing to follow GAAP guidelines.”

B. Taking the Deposition

1. Know the Documents and How You Will Use Them

Commercial cases often involves thousands if not hundreds of thousands of documents. Commercial cases frequently center on the interpretation and enforcement of agreements and transactions that are memorialized in documents. Depositions assist in developing the corporation’s interpretation and position.

- Organize the documents. You lose time and effectiveness if you have to fumble through documents.
- Familiarize yourself with the documents.

2. Box in the witness on critical issues and facts

- You promise to give me your best evidence
- Anything that I’ve missed
- Any other relevant facts
- “Have you told me everything you know about X?”
- “Have you told me your best evidence in supporting X?”
- “Even if you have told me everything you know, is there any person who could provide me with more information about X?”
- “Is there anything that you could review that would provide you with more information about X?”

3. Box in the witness’ lack of memory or opinion

4. Separate Facts from Opinions

- If the witness is offering a conclusion, opinion, or summary of what he or she claims to have observed, try to separate the witness’s opinion or conclusion from the actual facts.

5. Explore and exhaust

- Who, what, when, where, and why.
- Always ask, “Anything else?”

III. Specific Issues in Commercial Cases

A. Corporate Representatives

Governed by FED. R. CIV. P. 30(b)(6):

A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

1. Scope of Rule 30(b)(6) deposition

Rule 30(b)(6) requires that a deposition notice for a corporate representative describe the scope of the deposition with "reasonable particularity." However, to what extent is the actual deposition limited to the topics noticed in the deposition? Several district courts have held that Rule 30(b)(6)'s requirement that topics be identified does not limit the scope of the questions that may be asked. *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000); *Cabot Corp. v. Yamulla Enters., Inc.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995); *but see Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 730 (D. Mass. 1985) (deposition of corporate representative confined to matters identified in notice of deposition). Rather, the scope of inquiry, that is, relevancy, is limited solely by Rule 26(b)(1): relevant information is discoverable as long as it may lead to the discovery of admissible evidence. *See Detoy*, 196 F.R.D. at 366; *Cabot*, 194 F.R.D. at 500.

- a. How do you deal with a deposition of a corporate representative that strays from the identified topics?
 - Short of instructing the witness not to answer, object to the question and note on the record that the answers are not intended as the answers of the corporation and are not binding on the corporation.
 - If the witness' testimony is offered at trial, object on the grounds that the questions were beyond the scope of the designation and therefore not binding on the corporation.

- If the testimony is allowed at trial, ask for a limiting instruction designating the answers as those of the individual witness and not the designating party. *See Detoy*, 196 F.R.D. at 367.

2. Corporation and Fifth Amendment

- Corporation may not assert the Fifth Amendment against self-incrimination to avoid answering a complaint. But, corporate officers, however, may invoke the privilege in order to avoid incriminating themselves personally and individually.
- In *United States v. Kordel*, 397 U.S. 1 (1970), the Supreme Court ruled that if no corporate representative could answer without being subjected to a risk of self-incrimination, then a protective order should issue postponing discovery until any criminal prosecution has concluded. Obviously, for the civil litigant, the more workable resolution would be either to withdraw the discovery or simply allow the individual officer to take the fifth amendment as necessary without abating all discovery.

IV. Preparing a Witness in Commercial Case

A. Overview: Lawyer has Two Goals in Defending a Deposition:

1. **Control the Damage**—Commercial cases are never won, but often are lost, during the deposition of one’s own client or witness.
2. **Create a “Good Witness”**
 - Preparation of the witness is the key
 - Develop the self-confidence of the witness

B. Rules for Preparing to Present a Witness:

1. Put yourself in your opponent’s shoes
 - What are your opponent’s goals in taking this deposition?
 - What facts are your opponent going to try to establish through the deposition of your witness?
 - What are the elements of plaintiff’s claims and what facts can your witness provide (even if unintentionally) to support those elements?
 - Anticipate the questions that the examiner will pose
2. Interview the witness before conducting the deposition preparation

- Your first meeting with witness should not be the deposition preparation
 - Need to build rapport with witness and to encourage the witness to trust and confide in you
 - If attorney-client relationship exists, then emphasize that all communications are deemed confidential, and not subject to discovery. Build trust.
3. Decide schedule for preparing the witness
 - Don't wait till last minute
 - Meet a week earlier for the full witness preparation and meet again for an hour or so before the actual deposition
 4. Explain to the witness how depositions work and about deposition procedures
 - Emphasize: Although the other side's lawyer will ask the questions, you will be in control of the deposition. The purpose of the preparation is to learn the technique that will enable your side to maintain this control.
 5. Emphasize: Witness must tell the truth
 - The overriding rule is for the witness to be truthful
 6. Teach the Witness how to maintain your side's control of the deposition:
 - Don't let opposing side's attorney coax more elaborate response
 - Don't give into temptation to fill in silence with further responses
 - If given document, take the time to look through the document
 - Even if the document indicates that the witness received or was on the document's distribution list or even authored the document, the witness generally should not testify about contents of the document unless he actually recalls the document
 7. Waiver of Privilege for documents used to refresh witness's memory
 If documents otherwise entitled to work product protection are used to refresh a witness's memory prior to being deposed, privilege is impliedly waived, and disclosure may be compelled under FED. R. EVID. 612. *See S & A Painting Co., Inc. v. O. W. B. Corp.*, 103 F.R.D. 407, 409 (W.D. Pa. 1984) (holding that waiver

of attorney-client and work product privilege occurred as to portions of notes to which witness referred during deposition to refresh memory).

C. Know the Local Rules

You should review the applicable Federal Rules and local rules governing depositions. For instance, the Southern District has a special standing order regarding video-taped depositions.

D. During the Deposition

1. Refreshing Recollection

- A common error in preparing a witness is to encourage the witness not to recall events or overemphasizing that the witness not guess. This may give the witness the impression that he or she is better off not remembering an event.
- The overriding rule is for the witness to be truthful.
- Overly forgetful witness is never credible. Remember you eventually will need a witness at trial. This is important if you want to put the same “overly forgetful” witness on the stand and his deposition testimony could be used to impeach any “good” recollections of the witness at trial.

E. Expert witness

An entire seminar could be dedicated to expert witnesses in commercial cases. But, here are just a some tips:

- “Professional witness” may resist preparation; demand witness’ attention and insist on conducting the necessary preparation
- Focus on the assumptions that underlie each opinion and how changes in the assumptions could alter the opinion
- Prepare for attacks to your expert witness’ credibility and bias: Make sure that expert’s resume is accurate and correct, including that what he identifies as an article he has written is both an actual article (not just a letter to the editor) and actually written by him (not just the forward or critique of another article). Know the cases and the subject matter of cases in which your expert witness has testified to in the past.
- Prepare expert for hypothetical questions

F. Objections at the Depositions—Fed. R. Civ. P. 30(d)(1)

1. Is Question Objectionable?

2. Even if the Question is Objectionable, Should You Object to It?

- The answer may not damage your case
- The answer may not be useful to the taker
- Your objection may fluster the witness
- You may assist the taker by cueing him or her to ask better questions
- Your objection can raise a red flag. If you aren't making many objections and then suddenly begin doing so, you definitely alert the taker that he is touching an area of concern.
- Irrelevancy not a valid objection. Of course, at some point the repetition of irrelevant questions may become harassment or invades the witness's privacy in which case an instruction not to answer may be permissible.
- Even if irrelevant and innocuous, why not let the opposing party waste its time? If the worst thing that happens to your witness in a deposition is that the other party spends substantial time asking irrelevant questions, that's a successful deposition.

G. Objections that must be made or waived

Objections to the form of the question must be made or they will be waived.

FED. R. CIV. P. 32(d)(3)(B): "Error and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonably objection thereto is made at the taking of the deposition."

An objection to the form of the question generally does not justify an instruction not to answer.

Fed. R. Civ. P. 30(d)(1) mandates that "[a]ny objection to evidence during a deposition shall be stated concisely and in a *non-argumentative and non-suggestive manner*."

1. "The Question is Ambiguous"—An ambiguous question uses terms that may be unfamiliar to the witness or is not specific enough to elicit a proper answer.
2. "The Question is Vague"—Similar to objection for ambiguity.

3. “The Question is Compound”—A compound question combines two or more questions into one so that the response could refer to one or all of the parts of the question.
4. “You are Mischaracterizing prior testimony”
5. “The Question Calls for Speculation”—a non-expert witness should not be made to speculate or guess. The testimony should consists of facts.
6. “The Question has been Asked and Answered.” If you ask a witness the same question ten times, he may vary his response one of those times. Therefore, takers often repeat questions in order to develop an inconsistency in the response or to trip up the witness.
7. Assumes facts not in evidence.

H. Objections that are not Waived

FED. R. CIV. P. 32(d)(3)(A): “Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.”

1. In practice, the objections to the following should not be made at a deposition:

- Hearsay
- Offers to compromise or settle
- Relevancy
- Questions regarding insurance
- Subsequent remedial measures

I. Protecting a Privilege/Complying with Court Order

May instruct not to answer only “[w]hen necessary to preserve a privilege [or] to enforce a limitation on evidence directed by the court.” If a question seeks to invade a privilege, you should object and instruct the witness not to answer. Otherwise, the privilege is waived.

1. Privileges

- Self-incrimination (5th Amendment)
- Attorney-client privilege

- Physician-Patient

2. Court Order

You can also instruct Witness not to answer a question if necessary to conform to a prior court order.

J. Consulting the Witness during the Deposition

- Generally, can only confer with a witness only for the purpose of ascertaining whether the witness' response will invade the attorney-client privilege. These situations are the exception.

V. Special Considerations for Videotaped Depositions

- Because appearances and vocal tone become more important on videotape, defending lawyer must be more attuned to the witness' stamina, attention span, and body language.
- Unlike written deposition transcripts, videotape clearly reflects pauses between questions and answer.
- Remind witness that unduly long pauses may cause the witness to appear evasive.