Use of Depositions at Trial[1]

by Anthony J. Battaglia, U.S. District Judge,
Southern District of California

I. In General

A. Depositions, and their use at trial, are covered by Rules 30 and 32 of the Federal Rules of Civil Procedure. These differ in many respects from state court rules, so be sure to proceed consistent with the correct controlling principles.

B. Objections, Instructions Not to Answer and Protecting the Record.

In order to be able to use a deposition it must be taken consistent with the applicable rules, and in a way that it is useful and able to overcome objections to its contents. This means a clear record! Rules and some observations to accomplish predicates follow:

1. Rule 30(c) provides that the examination "of witnesses may proceed as permitted at trial" under the rules of evidence. This means that counsel should refrain from interjecting comments and statements. That would be inappropriate. Rule 30(c) also provides that if objections are made, testimony is taken subject to the objection;

2. Rule 30(d)(1) prohibits "argumentative" or "suggestive" objections and also limits instructions not to answer.

3. Rule 32(d)(3)(A) provides that "objections to the competency of a witness or to the competency, relevancy,

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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." Rule 32(d)(3)(B) goes on to state that "errors and irregularities. . .in the form of the questions or answers. . .which might be obviated, removed, or cured if properly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."

a. Therefore, all objections to competency, relevancy or materiality are preserved and are unnecessary during the deposition. Only those objections to questions that can be obviated, removed or cured need to be made;

b. The following challenges to the form of the question must be made:

   i. leading or suggestive;
   ii. compound;
   iii. assumes facts not in evidence;
   iv. calls for narration;
   v. ambiguous or uncertain;
   vi. calls for speculation or conjecture; or,
   vii. is argumentative.

c. An objection that the answer is not responsive to the question and a motion to strike also should be made since this falls into the category of items that can be obviated, removed or cured if properly presented at the time of the deposition;

d. Counsel should be careful regarding this waiver rule and seek to cure the "alleged" problem with the question or answer during the deposition. If the question is likely compound, then break it up. If it is leading or suggestive, re-ask in a more open form, etc. This is important. It is not unusual for

these issues to be raised at trial. Where the objection is lodged at the time of the deposition, but not cured, the court is likely to sustain the objection and prevent the use of the testimony. Where counsel has had the foresight to cure, the prohibition to use has been removed.

e. In addition, grounds of privilege are waived unless a specific objection to disclosure is made at the deposition. *Baxter Travenol Labs v. Abbott Labs*, 117 F.R.D. 119 (N.D. Ill. 1987).

f. Instructions not to answer are limited to circumstances where it is necessary:

1. To preserve a privilege;

2. To enforce a limitation directed by the Court;

3. Or to present a motion under Rule 30(c)(2) (bad faith, etc.).

Following these, and the other rules, will enhance the ability to use depositions and use them effectively at trial.

II. Use Against Adverse parties and their agents

A. The deposition of an adverse party, or an adverse party's officer, director or managing agent, or Rule 30(b)(6) designee, can be used for any purpose at trial. (Rule 32(a)(3))

B. *Both for impeachment and as substantive evidence.*

C. **NOTE:** A party must designate the witnesses whose testimony will be presented by deposition, unless it is presented solely for impeachment under Rule 26(a)(3)(A)(ii). This is part of the Pretrial Disclosures required in every federal case. The Pretrial Designation date will be set as part of the case scheduling order. If no such date has been set, then the designation must be made at least 30 days before trial. A failure to disclose this information could result in exclusion. Rule 37(c)(1).

D. In addition, many judges require parties to submit " a list of all deposition transcripts by page and line, or videotape depositions by section, that will be offered at trial", as part of the Final Pretrial Order in a case. A failure to list this information can result in exclusion as a violation of the Court's order.

II. *Use Against Other witness*

A. *Depositions of other witnesses taken in the matter can be used against a party at trial for certain purposes, provided the party had adequate notice of the deposition.*

B. *Impeachment (Rule 32(a)(2))*

C. Unavailability per Rule 30(a)(4)

D. As otherwise allowed by the Federal Rules of Evidence [e.g., refreshing recollection (FRE 612); recorded recollection (FRE 613) or other hearsay exceptions under Rules 803 or 804, prior statements under Rule 801(d)(1)and (2)].

E. Adequate notice must be "reasonable" under Rule 30(b)(1). Since a party may seek a protective order under Rule 32(a)(5)(A) within 14 days of notice to prevent a deposition from proceeding, 14 days notice is by implication general guidance for what is reasonable. However, particular facts and circumstances may warrant a longer period. Note that where documents are requested from a party, 30 days notice is required. Rules 30(b)(2) and 34(b)(2)(A).

III. Impeachment

A. Statement at trial must be truly inconsistent with testimony at deposition.

1. A direct contradiction of current testimony. *U.S. v. Thompson*, 708 F2d 1294 (8th Cir. 1983). But, it need not be in plain terms, and can be inconsistent if taken as a whole "it affords some indication" that the facts are different from those testified to by the witness at trial. *U.S. v. Gravely*, 840 F2d 1156 (4th Cir. 1988); *U.S. v.*

Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976) (allowing inconsistent statements from trials, hearings, and other proceedings while defining "other proceedings" broadly). Trial judges must retain a high degree of flexibility in deciding the exact point at which a prior statement is sufficiently inconsistent with a witness's trial testimony to permit its use in evidence. *U.S. v. Morgan*, 555 F.2d 238, 242 (9th Cir. 1977) .

2. The burden is on the proponent to demonstrate inconsistency. Evanston Bank v. Brinks, Inc., 853 F2d 512 (7th Cir. 1988).

3. What about, I don't remember?

   a. A claim of "amnesia" was found to be pretense by court (under Rule 104) and prior statement found "inconsistent". *U.S. v. Di Caro*, 772 F2d 1314 (7th Cir. 1985).

   b. A "selective memory" was found "feigned" by the court (Rule 104 again), and therefore inconsistent. *U.S. v. Bingham*, 812 F2d 943 (5th Cir. 1987).

   c. Note, some courts, including courts in the Ninth Circuit, do not distinguish between genuine and feigned loss of memory, holding loss of memory by itself renders earlier testimony admissible as prior inconsistent statement. *U.S. v. Russell*, 712 F2d 1256 (8th Cir. 1983); *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004) (Memory loss, genuine or feigned)

d. In loss of memory situations, you may want to show the witness the transcript to attempt to refresh recollection. If not "refreshed" then proceed under FRE 803(5), "Recorded Recollection". This may be a helpful alternative where you may not be able to establish inconsistency easily.

B. *The typical procedure is to recommit a witness to deposition; show transcript excerpt to witness and opposing counsel.*

1. Note, however, FRE 613 has eliminated the old requirement of showing or disclosing the substance of the deposition (inconsistent statement) to the witness before using it or asking about it.

2. Note, also, if the statement is something other than a deposition, opposing counsel is entitled to see it on request. With depositions, the court and counsel will want the page and line location in the deposition provided before any reading.

C. *Read/play excerpt into the record.*

D. The nonparty witness must be given an opportunity to explain or deny and be subject to cross examination. FRE 613(b).

E. Make sure the point you are impeaching on is significant. Don't nit pick and do not attempt to impeach on collateral or irrelevant matters. It will not be allowed! *Calhoun v. Ramsey*, 408 F3d 375 (7th Cir. 375). A matter is "collateral" if it could not be introduced into evidence for any purpose other than impeachment. *Simmons Inc. v. Pinkerton's Inc*., 762 F2d 591 (7th Cir. 1985). So items relevant (material), Rule 401,

non-trivial, and contradictory of any material given on direct. *Walder v. U.S.*, 347 U.S. 62 (1945).

IV. Rule of completeness/continuation (Rule 32(a)(6) and FRE 106)

A. Request for introduction during examination by adverse counsel of additional testimony that "in fairness should be considered with the part introduced."

B. On your own responsive examination of the same witness

V. Depositions taken in other actions—normally hearsay, but subject to certain exclusions/ exceptions.

A. Depositions in another action involving the same subject matter between the same parties or their representatives or successors in interest. Rule 32(a)(8).

B. Former testimony given under oath in another proceeding where: (a) the witness is unavailable; and (b) the party against whom the testimony is being offered, or its predecessor in interest, had an opportunity to similar motive to examine the

witness in the other proceeding. FRE 804(b)(1).

C. Statements against interest of an unavailable witness where supported by corroborating circumstances that clearly indicate its trustworthiness. FRE 804(b)(3).

D. Prior statement of a witness subject to examination at trial where: (a) the prior statement is inconsistent with testimony at trial; (b) the prior statement is consistent with trial testimony and offered to rebut a charge of fabrication; or (c) the prior statement involves identification of a person after perceiving him. FRE 801(d)(1)

E. Admission by a party opponent/agent/co-conspirator. FRE 801(d)(2).

F. Other exclusions/ exceptions to the hearsay rule. FRE 801-804.

VI. Non-stenographic form of transcript (Rule 32(c)).

A. Must provide Court with stenographic transcript as well.

B. If video exists, any party can insist that deposition testimony used for any purpose other than

impeachment be presented by video, unless the court orders otherwise.

VII. Use of 30(b)(6) Depositions.

A. Rule 30(b)(6) governs organizational depositions. In 1970, Congress amended Rule 30(b)(6) to place the burden on the organizational entity to designate the appropriate representative(s) to testify on its behalf. The purposes for the rule were to (1) reduce difficulties of the requesting party in determining whether an employee was a "managing agent," (2) curb the bandying by which organizational officers or agents would disclaim knowledge or facts clearly known by some other officer or agent, and (3) protect the organization by eliminating unnecessary and unproductive depositions of employees with no knowledge of the topic at issue. *See* FED. R. CIV. P. 30(b)(6) advisory committee's notes.

B. The rule contains three basic requirements. First, the deposing party must describe the subjects to be covered with reasonable particularity. Second, the organization responding must designate one or more representatives to testify. Third, the representatives must testify to matters that are known or reasonably available to the organization. The rule gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on its behalf.

C. The majority rule, including the Ninth Circuit, holds that Rule 30(b)(6) depositions are only limited in scope by the broad relevance and privilege provisions of FRCP 26(b). So, a Rule 30(b)(6) designee can be questioned outside the scope of the deposition notice, but only to the extent of their personal knowledge. Their answers regarding matters not clearly noticed would not bind the organization as the organization would not have been able to properly prepare the designee on its position.