

Depositions in Consumer Bankruptcy Cases

Scott A. Wolfson, Moderator

Wolfson Bolton PLLC; Troy

Kelley Callard

Office of the U.S. Trustee; Detroit

Hon. Scott W. Dales

U.S. Bankruptcy Court (W.D. Mich.); Grand Rapids

Howard S. Sher

Jacob & Weingarten, P.C.; Southfield

**SOME USEFUL AND PRACTICAL INFORMATION
RELATING TO CONDUCTING AND DEFENDING DEPOSITIONS**

1. Know the law and what facts are relevant to the law.

Prior to conducting or defending a deposition, it is imperative that you know exactly what is the law and know what facts are relevant to the law. This cannot be stressed enough. You must know what are the elements of the claims and defenses at issue (whether you are representing the plaintiff or the defendant). If you represent the plaintiff, you must think about how you will prove the elements of each of your claims.

2. You must be familiar with the applicable court rules.

Rule 26 (which deals with general provisions regarding discovery).

Rule 26(b)(1) states:

Unless otherwise limited by court order, the scope of discovery is as follows: **Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense** and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. **Information within this scope of discovery need not be admissible in evidence to be discoverable.**

Rule 26(c) deals with protective orders. It is important to note that protective orders can be sought in connection with depositions.

Rule 30 (which deals with depositions by oral examination). It is very important that you be familiar with Rule 30(c) and (d).

Rule 30(c)(1) provides that: "The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence."

Rule 30(c)(2) provides:

An objection at the time of the examination - - whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition - - 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. 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 under Rule 30(d)(3).**

Rule 30 (d)(3) provides as follows:

- (A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.
- (B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.
- (C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

Rule 32 (which deals with the use of depositions in court proceedings).

Rule 32(a)(2) provides that: "Any party may use a deposition to contradict or **impeach** the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence."

Rule 32(b) provides that: "Subject to Rule 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying."

Rule 32(d) addresses the concept of waiver of objections. Significantly **Rule 32(d)(3)(A)** provides that: "An objection to a deponent's competence - - or to the competence, relevance, or materiality of testimony - - is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time."

Significantly **Rule 32(d)(3)(B)** provides that:

An objection to an error or irregularity at an oral examination **is waived if:**

(i) it relates to the manner of taking the deposition, **the form of a question** or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; **and**

(ii) **It is not timely made during the deposition.**

Rule 37 which deals with discovery **sanctions**, is also applicable to depositions.

3. **Examples of some proper objections.**

- Form of the question.

- Relevance.
- Leading questions (but ok if being asked to adverse witness).
- Lack of foundation.
- Assumes facts not in evidence.
- Compound question.
- Confusing question.
- Mischaracterizes testimony.
- Lack of personal knowledge.
- Asked and answered.
- Argumentative.
- Answer is beyond the scope of the question.
- Harassment of the witness.
- Calls for a legal conclusion.
- **Privileged** (waived if not raised) and must state the privilege.

Privileges include, among others:

- Attorney-client privilege.
- Physician-patient privilege.
- Privilege against self-incrimination.
- Confidential marital communication privilege.

4. **Improper objections.**

- Seeks evidence which is inadmissible.
- Hearsay objections.
- Asks for an opinion.
- Asks for speculation.

5. **Preparing to take the deposition.**

Be extremely familiar with prior discovery obtained within the case. Use of documents can be extremely helpful in connection with the deposition. Questions relating to information contained in documents can be extremely beneficial. (I am a big fan of highlighting and writing on my set of the documents).

6. **Preparing your client for deposition.**

Make sure that your client understands what the case is about and understands themes, arguments, etc. which are likely to be covered during the deposition. Make sure that you review and discuss important documents likely to be used.

7. **Pointers relating to conducting a deposition.**

- Have some introductory statements (i.e., I am _____, I represent _____, I will be conducting your deposition today pursuant to _____), make comments relating to the fact that a court reporter is present and that answers need to be made verbally, etc.
- Know how to mark documents and ask questions about them (i.e., please identify what has been marked as Exhibit ____). Have sufficient copies of documents.
- Be comfortable directing witnesses to answer questions after objections have been stated by the deponent's counsel. ("**Your attorney's objection is noted, please answer the question.**")
- Don't get side tracked by attorney objections.

8. **Other miscellaneous pointers.**

- Always remember that the transcript needs to be readable (i.e., make sure that it will read the way it was intended).
- At trial, make sure that the deponent/witness knows his/her deposition testimony backwards and forwards (so as not to be impeached about it **or** to know how to best explain prior testimony).
- At trial, you should know all of the relevant deposition transcripts backwards and forwards.
- Know how to use a deposition transcript to impeach a witness.
- Know where in the transcript the deponent said what (for impeachment purposes).
- Understand that effective cross-examination can be conducted by asking leading questions through the use of a deposition transcript.

- Always remember that at some point the Judge may end up reading the transcript.
- Even though a significant majority of cases settle before trial, deposition transcripts can be used to convince the other side to settle and can be used in support of and in opposition to summary judgment motions.
- Depositions can also be helpful to learn more about your case or your opponent's case.
- Sometimes you may want to ask leading questions during a deposition and sometimes you might want to ask non leading questions (which tend to be less confrontational and might help you obtain more information).
- If you represent the deponent, it's okay if he/she does not know the answer to a question. If deponent does not recall the answer, it's okay to say "I don't recall."
- If you represent the deponent, your client should be told to only answer the question that is asked. The deponent should often keep the answers simple. There is no need to educate the examiner and no need to volunteer information.
- Deponent must tell the truth.
- If your client is the deponent and he/she does not understand the question, your client should ask for clarification.
- There are situations in which you might want to ask questions of your own deponent. Examples may include trying to clean up bad testimony and with a witness who might not be available to testify at trial.
- You might want to terminate the deposition if there is continuous harassment of the deponent or if the person conducting the exam continues to ask for privileged information.
- It's a good idea to jot down on a legal pad some of the basic objections and have copies of applicable discovery rules.