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How to Take and Defend Depositions

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December 9, 2022

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Threshold Deposition Issues

- Who is taking and where?
- Video?
- Court Reporter
- What type of transcript?

Strategy Issues

- How accommodating?
- Comfort
- Supplies
- Taking breaks

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Ground Rules

- Available
- Competent
- Need to take a break
- Not finished, come back
- Agree to supplement
- What are the usual stipulations
- Fed Rule Civil Procedure 29(a) allows parties to stipulate
- Reserving and not waiving objections until time of trial, except to form of questions
- Arguing deposition was properly noticed and court reporter is qualified

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Experts Depositions

- Two types of experts –
testifying and consulting
- Consulting generally protected
by work product privilege
- Need to be:
 - a) Independent
 - a) Helpful to the trier of fact
 - a) Daubert and Kumho Time
apply

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Experts Depositions

Gather info

- Get all testimony
- Get all reports
- Get all publications
- What assumptions
- Where and how did you gather facts? Any
independent analysis?

2 Keys to Experts

- Gain as much knowledge as possible
- Pin down their story/testimony

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Considerations and Tips for Taking Depositions: ABI Winter Leadership Conference 2022

(Philip.Mohr@wbd-us.com)



Understanding the Different Types of Witnesses in a Deposition

- Understand different types of witnesses vis-à-vis the case
 - Party vs. Non-Party

Party v. Non-Party Witnesses: Practical Considerations

- | | |
|--|--|
| <ul style="list-style-type: none"> • <u>Party</u> (Company, Officer/Director, Employee): | <ul style="list-style-type: none"> • <u>Non-Party</u> (Everyone else, including former employee): |
| <ol style="list-style-type: none"> 1. Getting the witness there <ul style="list-style-type: none"> • Notice or agreement 2. More than testimony? <ul style="list-style-type: none"> • Rule 34 Request (F.R.C.P. 30(b)(2)) 3. Location <ul style="list-style-type: none"> • Corporate defendant's headquarters (usually) | <ol style="list-style-type: none"> 1. Getting the witness there <ul style="list-style-type: none"> • Subpoena or agreement 2. More than testimony? <ul style="list-style-type: none"> • Subpoena duces tecum 3. Location <ul style="list-style-type: none"> • Dictated by F.R.C.P. 45 |



Understanding the Different Types of Witnesses in a Deposition

- Understand different types of witnesses vis-à-vis the case
 - Party vs. Non-Party
 - Party
 - a) Corporate Designee (Rule 30(b)(6))
 - b) Officer, Director or Managing Agent (Rule 30(b)(1))
 - c) Employee (Rule 30(b)(1))
- Type of witness determines type of deposition



Rule 30(b)(6) Witness: Obligations of Witness

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- Deposition notice is of “a company.” F.R.C.P 30(b)(6).
 - Topics must be provided in the notice (i.e., before the deposition).
 - Individual selected by party being deposed (i.e., the company).
 - Individual not testifying in individual capacity, but on behalf of company.
 - Case law requires individual to be prepared to discuss information about the identified topics or company faces sanctions. *Paul Revere Life Ins. Co. v. Jafari*, 206 F.R.D. 126, 127 (D. Md. 2002).



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Rule 30(b)(1) Witness: Obligations of Witness

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- Can be any individual; selection by deposing party.
 - No obligation to be “prepared” in any way.
 - Rule 30(b)(1) merely requires the deponent to testify in “his or her own individual capacity.” *Power Home Solar, LLC v. Sigora Solar, LLC*, 339 F.R.D. 64, 73 (W.D. Va. 2021).
 - Sanctions not available if individual does not know about information and/or has not taken any steps to learn about areas of inquiry.



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Issues to Remember with Rule 30(b)(1) witness and Rule 30(b)(6) witness

- May need to serve a Rule 30(b)(1) notice along with a Rule 30(b)(6) notice:
 - An individual can be both a Rule 30(b)(1) witness and a Rule 30(b)(6) witness. *Pres. Techs. LLC v. Mindgeek USA, Inc.*, No. 217CV08906DOCJPR, 2020 WL 10965164, at *2 (C.D. Cal. Nov. 12, 2020)
- An officer, director or managing agent can still bind the company in a Rule 30(b)(1) deposition. *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 628 (C.D. Cal. 2005).
- Beware the Apex doctrine.



Overall Goal of the Deposition

1. Attempt to learn about your client's own "bad facts."
2. Try and limit the potential damage from the bad facts.
3. Try and get confirmation of good facts to support your case.
 - a) "Beginning with the end in mind."
 - b) "Top 10 Must Gets"



Tips Once the Deposition Begins

1. “Standard stipulations”
 - a) What does that mean?
 - b) All objections, except as to form, are reserved
2. Know the Local Rules
 - a) Conferences during breaks
3. Introduction of ground rules
4. Objections
 - a) “Speaking objections”—not permitted per Rule 30(c)(2)
 - 1) Witness must still answer
 - b) Privilege objections



Privilege Objections

1. Attorney-Client Privilege
 - a) Protects communications between the attorney and client
 - b) Unique to bankruptcy: the debtor’s attorney-client privilege may rightly belong to the trustee. *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 352, 105 S. Ct. 1986, 1992, 85 L. Ed. 2d 372 (1985). But it does not follow that the trustee can always waive the privilege. *In re Infinity Bus. Grp., Inc.*, 530 B.R. 316, 324 (Bankr. D.S.C. 2015).
2. Attorney Work Product
 - a) Protects work performed by attorney in anticipation of litigation



Privilege Objections

2. Attorney Work Product Doctrine (cont'd)

- a) Learn documents reviewed in preparation for deposition?
- b) Split of authority: Compare *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 240 (D. Md. 2010) (adopting essentially a *per se* rule) with *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 393 (D. Or. 2017) (adopting balancing test).

3. Fifth Amendment

- a) Protects against self-incrimination
- b) However, the Fifth Amendment does not extend to corporations. *Wilson v. U.S.*, 221 U.S. 361, 55 L.Ed. 771, 31 S.Ct. 538 (1911).



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Cooley

Best Practices for Defending Depositions

presented by:
Eric Walker

December 9, 2022

attorney advertisement

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Overview

- Arrange prep session(s)
 - Explain what will happen, who will attend, and attendees' roles
 - Assess witness
 - Build rapport and trust with witness
- Cautions
 - No discussion of subject of testimony with anyone else
 - No review of documents, unless provided by counsel

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Prepare for Key Topics

- Assess witness's knowledge of facts (good and bad)
- Explain purpose of deposition in context of case
 - Overview of relevant legal principles at issue
 - Your key theories
 - Opposing counsel's key theories
 - Witness's anticipated role in context of key theories

3

Answering Questions Effectively

- Confirm understanding of question
 - Request clarity
 - Request time to review any document shown
- No guessing or speculation
- Answer truthfully, BUT
 - Only answer questioned asked
 - As few words as possible (no volunteering)
 - STOP! (say no more)

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Sequence of Objections

- Pause to allow counsel to object
 - Especially important if deposition is virtual
- Objections offer a clue that a question is unclear or unfair
 - Witnesses to consider carefully if they understand the question
- Still must answer, unless instructed not to
- Consult rules on objections
 - Local rules
 - Judges' standing orders

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Preparing Deposition Summaries

- Prioritize information
 - Not intended to be verbatim
- All key points summarized briefly up front
- Essence of what was said *and* what occurred
- Different forms
 - Initial summary: quick update, complete asap, while memories are fresh
 - Full summary: for case file, add detail, quote key testimony from transcript

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Faculty

Philip J. Mohr is a partner with Womble Bond Dickinson in Greensboro, N.C., and has more than two decades of trial experience with publicly traded corporations, privately held companies, and middle-market international businesses in federal courts and arbitration proceedings throughout the country. Representing companies that have both been wronged and accused of wrongdoing, he has honed his trial skills in cases involving complex business litigation (including fraudulent-transfer and equitable-subordination cases in the Delaware bankruptcy court), commercial torts (e.g., unfair trade practices, fraud, trade secrets theft, etc.), cybersecurity/data-breach matters, and shareholder derivative suits. Mr. Mohr authors the North Carolina Business Court Report, a blog discussing how recent decisions from the North Carolina Business Court impact companies doing business in North Carolina. He received his B.A. *magna cum laude* from the University of Notre Dame and his J.D. *cum laude* from Notre Dame Law School.

Abigail O'Brient is a member of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. in Los Angeles. Her insolvency and litigation practice focuses on the representation of secured and unsecured creditors in bankruptcy cases and other insolvency proceedings in California and nationwide. Ms. O'Brient routinely represents parties in litigation related to insolvency and distressed debt in state and federal court, as well as purchasers and sellers of distressed assets and bankruptcy trustees and receivers. In addition, she has successfully represented numerous chapter 11 debtors through plan confirmation. Outside of the insolvency arena, Ms. O'Brient has significant judgment-enforcement experience. She was a contributor to *ABI's Quick Evidence Handbook, Second Edition* (ABI 2018) and has been listed in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law for 2023. Ms. O'Brient received her B.A. *magna cum laude* from Washington and Lee University and her J.D. from the University of California, Berkeley.

Eric E. Walker is a partner with Cooley LLP in its Business Restructuring & Reorganization Group in Chicago, where he focuses his practice on all aspects of financial restructuring, bankruptcy and litigation. He has represented virtually every major stakeholder in bankruptcy proceedings throughout the country. Mr. Walker has particular experience in restructuring hospital systems, senior-living facilities, continuing-care retirement communities (CCRCs), skilled nursing facilities (SNFs), behavioral health centers and diagnostic medical laboratories. His successful representation of the asset-purchaser in the Health Diagnostic Laboratories (HDL) bankruptcy case was awarded the 2016 Restructuring Deal of the Year (Under \$100M) by The M&A Advisor. Mr. Walker also has experience in the hotel and hospitality industry and regularly represents hotel owners, developers, operators, lenders and major hotel brands in transactions, state and federal litigation, and bankruptcy. He represented the petitioners before the U.S. Supreme Court in *RadLAX Gateway Hotel LLC, et al. v. Amalgamated Bank* (Case No. 11-166), a landmark chapter 11 bankruptcy case involving secured creditor cramdown. Mr. Walker has been recognized as a leading bankruptcy practitioner by *Chambers USA*, *Lawdragon* and the National Conference of Bankruptcy Judges. He is a member of ABI's inaugural class of 40 Under 40 (2017), and he currently serves on ABI's Board of Directors. He also is an executive editor of the *ABI Journal*, and serves on the advisory board of ABI's Health Care Program. He frequently writes and speaks on issues of bankruptcy and health care law. Mr. Walker

received his B.S.B.A. in finance in 2000 from Miami University and his J.D. in 2006 from the University of Connecticut School of Law, where he served on the *Connecticut Law Review*.

R. Scott Williams is a partner with Rumberger, Kirk & Caldwell, P.A. in Birmingham, Ala., where he focuses his practice on bankruptcy, reorganization and creditors' rights and commercial litigation. He represents creditors and debtors in complex bankruptcy matters and has substantial experience in handling complex commercial litigation cases. In addition, his experience extends to litigation and transactional work in a number of areas, including the automotive, energy, health care and manufacturing sectors. Mr. Williams is active in the Bankruptcy Bar on both local and national levels. He was a contributing editor to *Collier on Bankruptcy* and co-authored ABI's *Bankruptcy Litigation Manual: What Civil Litigators Need to Know* (2007). In 2007, Mr. Williams became the first practicing attorney from Alabama to serve on ABI's Board of Directors, and he served as a vice president and a member of its Executive Committee. He also has co-chaired ABI's Litigation Skills Symposium and is a frequent lecturer and author on bankruptcy and commercial law topics. Prior to entering private practice, Mr. Williams served as counsel within several administrative units within the U.S. Government. He served as counsel to U.S. Sen. Howell T. Heflin on the U.S. Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice (1988-92), then served as legislative liaison to the Federal Courts Study Committee (1989-90). he played a significant role in drafting the U.S. Bankruptcy Code Amendments enacted in 1995 while serving as counsel to Sen. Heflin. Mr. Williams received his B.A. from the University of Illinois in 1985 and his J.D. from the University of Alabama in 1988, where he was an editor of the *Journal of the Legal Profession*.