

TAKING AND DEFENDING DEPOSITIONS

(And Then Using Them At Trial/Hearing)

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In This Session We Will Discuss. . .

- ▶ Preparing for depositions
- ▶ Setting groundrules
- ▶ How to get all the information you need
- ▶ How to deal with uncooperative witnesses and opposing counsel
- ▶ Tips for “defending” a deposition
- ▶ Uses at trial – Impeachment

WHAT IS A DEPOSITION?

- ▶ A deposition is witness's sworn out-of-court testimony. It used to gather information as part of the discovery process and, in limited circumstances, may be used at hearing/trial. The witness being deposed is called the “deponent.”
- ▶ Depositions usually do not directly involve the court/adjudicatory agency. The process is initiated and supervised by the parties.

WHAT IS A DEPOSITION? cont'd

- ▶ Usually, the only persons present at a deposition are the deponent, attorneys for all interested parties, and a person qualified to administer oaths.
- ▶ Depositions are usually transcribed by a court reporter, although video recordings are increasingly common.
- ▶ At the deposition, all parties may question the witness. The lawyers' ability to object to deposition questions is usually limited. (Generally, information sought must be privileged to be objectionable).

- ▶ Depositions are a “high-yield” discovery tool.
- ▶ Obtain spontaneous answers; ask follow-up questions.
- ▶ Lay the groundwork for impeachment.
- ▶ Preserve testimony for latter use where deponent is unavailable at trial/hearing

▶ THERE ARE NO “*HARMFUL*” ANSWERS!!!!

- This is *DISCOVERY!* You are literally learning (discovering) the evidence the other side has.
- Unlike the hearing/trial, a deposition is not the place to limit the witnesses’ testimony to what *you* want to hear. This is the time to learn whatever relevant information the witness has.
- A “bad” answer, *i.e.*, information that doesn’t advance your case or even hurts it, will help you better evaluate your case, including evaluating settlement options or worse (gulp withdrawal).

Preparing to Take a Deposition

- ▶ There are three keys to taking a good deposition:
 - Preparation!
 - Preparation!!
 - Preparation!!!

- ▶ There is simply no substitute for being prepared.
- ▶ Review all relevant documents
 - Policies, emails, memos, etc
- ▶ Review deponent's prior statements
- ▶ Review other witnesses' statements
- ▶ Review Complaint/appeal; Agency File; Rol, etc.



- ▶ For the most part, identify “areas” of questioning, rather than compiling a list of questions
- ▶ Annotate *your* copy of any documents you want to question the witness about; ask questions about those areas you annotated.

Set The Groundrules

- ▶ If you are taking the deposition, this is your show. **YOU** set the groundrules!
- ▶ Set the groundrules *on the record*.
- ▶ Set groundrules in the form of questions that require the deponent to answer and “buy into” your groundrules.
- ▶ Compare the following:

- ▶ A: *Instruction as a declarative statement.*

“If you do not understand my question, please ask me to repeat or clarify the question.”

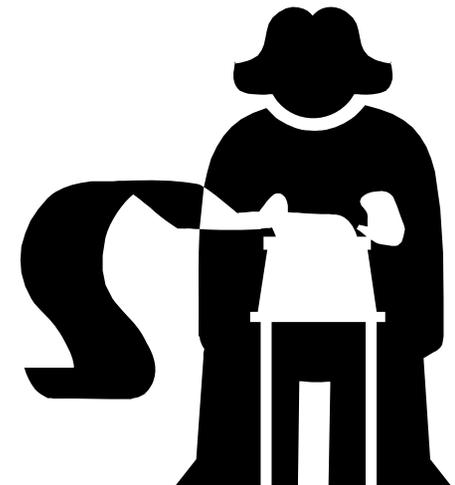
or

- ▶ B: *Instruction as a question:*

“If you do not understand my question, will you please tell me that you didn’t understand the question so I can repeat or clarify the question?”

- ▶ The Deponent “agrees” to your instruction by answering “Yes.”
- ▶ If Deponent later claims in testimony he didn’t understand the question at deposition, you can impeach by reminding the deponent (reading from the transcript if necessary) he affirmatively told you he would tell you if he didn’t understand the question, and that he did not tell you at the deposition that he didn’t understand the question.

- ▶ When taking a deposition, the court reporter takes instructions *ONLY* from you.
- ▶ Court Reporter doesn't go "off the record" until you instruct the court reporter to.



OPEN ENDED QUESTIONS

- ▶ Your goal at deposition is the opposite of your goal with that witness on cross-examination at trial/hearing.
- ▶ At deposition, you want/need to know *all* the relevant information the witness has. Later on you'll decide what aspects of that information you want the witness to testify about.
- ▶ Consequently, open ended not leading questions are your workhorse questions.

OPEN ENDED QUESTIONS

- ▶ *Who*
- ▶ *What*
- ▶ *When*
- ▶ *Where*
- ▶ *Why*
- ▶ *How*
- ▶ *Describe . . .*
- ▶ *Tell me . . .*
- ▶ *Explain . . .*

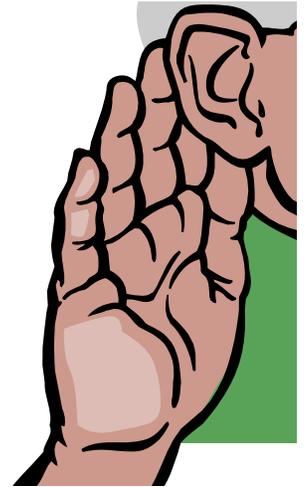


Clarify / Pin Down

- ▶ After asking your open ended questions, you can narrow in on the information that needs pinning down or on admissions you are seeking
- ▶ Clarify that “I don’t recall” is not a denial:
“Mr. Smith, when you say you don’t recall the conversation, are you denying that it took place?”

Be A Good Listener

- ▶ Do not stick to a prepared set of questions
- ▶ Listen to your witness and follow-up every bit of relevant information
- ▶ Exhaust each part of an answer before moving on to the next “prepared” question or issue



Get It All!

- ▶ When a witness closes an answer, especially involving a list or series, follow-up with questions such as:
 - *Is that all?*
 - *What else do you recall?*
 - *Who else was present?*
 - *Do you remember anything else?*
 - *Was anything else said?*
 - *Do you have any other damages?*
 - *Are there any documents that would help you recall?*



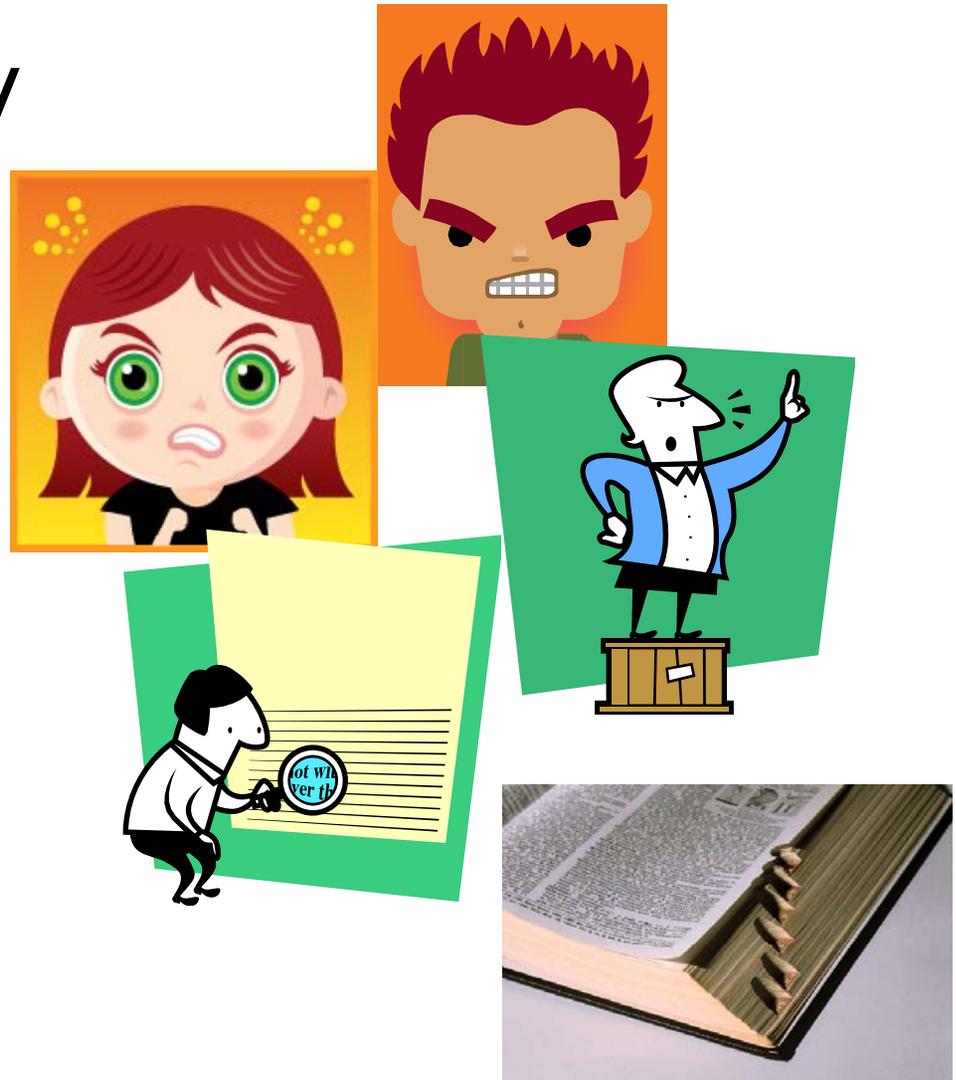
Keep asking until the witness expressly has nothing more to add.

Control the Process

- ▶ You are likely to encounter uncooperative witnesses and opposing counsels.
- ▶ Control them.
- ▶ Control your anger/frustration

Uncooperative Deponents – 7 types

- ▶ The Bad Memory
- ▶ The Definer
- ▶ The Denier
- ▶ The Evader
- ▶ The Rambler
- ▶ The Reader
- ▶ The Speculator



Uncooperative Deponents

Let's discuss some tips for dealing with each type.

Uncooperative Opposing Counsel

- ▶ The role of opposing counsel is to make appropriate objections to preserve them for use at hearing/trial.
- ▶ It is *NOT* the role of opposing counsel to assist the deponent in answering or to provide hints as to what the answer should be. Counsel most often tries to do this through “speaking objections.”

A "speaking objection" is an objection that goes further than required to state the ground for the objection, usually to send a message to the witness as to what the lawyer would like for the witness to say.



OBJECTIONS

- ▶ F.R.C.P. 30(c)(2) *Objections*. An objection at the time of the examination—whether to evidence, to a party's conduct, . . . 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 or to enforce a limitation ordered by the court

This means *no*
speaking
objections!



- ▶ If opposing counsel makes speaking objections, warn counsel that speaking objections are not permitted; ask reporter to read back the question.
- ▶ If opposing counsel continues, repeat the warning and advise that a further instance will result in calling the judge. Ask reporter to mark the objection for further reference.
- ▶ If opposing counsel continues, have the question marked then call the judge. Have the reporter prepared to read the offending objections to the judge.



Make a Clear Record

- ▶ A deposition transcript is useful to you *only* if it is clear and understandable. If questions and/or answers are unclear in the transcript, you will not be able to use them to successfully impeach; nor will they serve you as satisfactory testimony if the deponent is unavailable for trial/hearing.
- ▶ Avoid compound sentences
- ▶ Refer to Documents by name

Make a Clear Record

- ▶ Pronouns ... your worst enemies! They can turn relevant testimony into a confusing mess.
(Did they word “they” refer to “pronouns” or “enemies”?)
- ▶ Avoid pronouns in your questions; Have your witness clarify pronouns in their answers.
- ▶ Avoid acronyms and abbreviations
 - Have witness clarify; or
 - Have a commonly understood definition. “When I refer to the “BAD” will you agree that I am referring to the “Big Agency Department?”

Closing the Deposition

- ▶ Consider asking the following (I typically do):
 - On reflection, are there any answers you gave that you believe are incomplete that you need to complete?
 - On reflection, are there any answers you gave that you believe are inaccurate complete that you need to correct?
 - Was I fair to you during this deposition?

Preparing to Defend A Deposition

- ▶ The key to defending a deposition is in preparing the *deponent*.
- ▶ Deponent must be familiar with all her prior statements, discovery responses, and sworn/validated pleadings.
- ▶ Identify questions you *expect* the witness will be asked. Have a practice session.

Some Advice for the Deponent

- ▶ Be Truthful.
- ▶ Answer the questions *as if* a judge or jury was in the room.
- ▶ “I don’t remember” is always as appropriate answer as long as it’s an *honest* one.
- ▶ Only answer the question being asked.
- ▶ When asked, “Is that all?” the best response is “that’s all I recall *at this time*”.

Some Advice for the Deponent

- ▶ Don't guess or speculate
- ▶ Don't answer a question you don't understand or didn't fully hear
- ▶ Do not let the opposing lawyer put any words in your mouth with which you do not *fully* agree
- ▶ Ask for breaks when needed

Defending “Offensively”

- ▶ As counsel “defending” the deposition, you have the right to ask questions as well.
- ▶ If there are concerns about a motion for summary judgment motion being filed against you, consider using this opportunity to ask questions of your client to get evidence showing material facts in dispute, even about matters not raised by the counsel taking the deposition.
- ▶ Otherwise, only ask follow up questions where *absolutely necessary* for clarification/correction.

Use of Deposition at Trial/Hearing

- ▶ Two Primary Uses:
 - Witness Unavailability
 - Impeachment



Witness Unavailability

FRCP 32(a)(4)

“A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness’s attendance by subpoena;

Witness Unavailability

- ▶ It is not necessary to submit the entire transcript into evidence. FRCP 32(a)(6)
- ▶ In prehearing submission, designate those portions of the transcript you want submitted as the witness's testimony. (If the deposition was videoed, you also need to excerpt the video portions that coincide with the transcript).
- ▶ The other side can “counter” designate portions.

Impeachment

FRCPP 32(a)(2)

“Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness”
..

How to Impeach:

- First, make sure you have an answer that is *directly* inconsistent with an answer given at deposition.
- An “approximately” different answer won’t do!
- Tip: Use your deposition transcript so that at trial/hearing you ask exactly the same question you asked at deposition.

How to Impeach:

- ▶ Next steps:

1. Mr. Johnson, do you remember having had your deposition taken on January 15, 2009?

2. Do you remember that a court reporter was present at your deposition?

3. Do you remember having been sworn in to tell the truth?

4. Did you tell the truth on that date?

How to Impeach:

You can add credibility to the prior answer with such questions as:

5. “Your testimony at deposition was closer in time to the events than your testimony today, correct?”
6. “You had the opportunity to review and correct the deposition transcript, correct”?

How to Impeach:

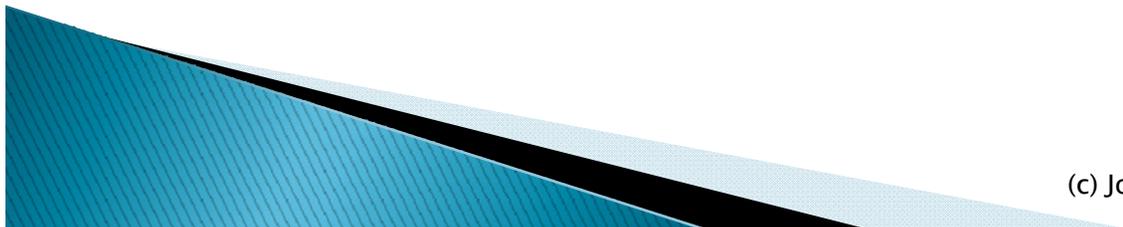
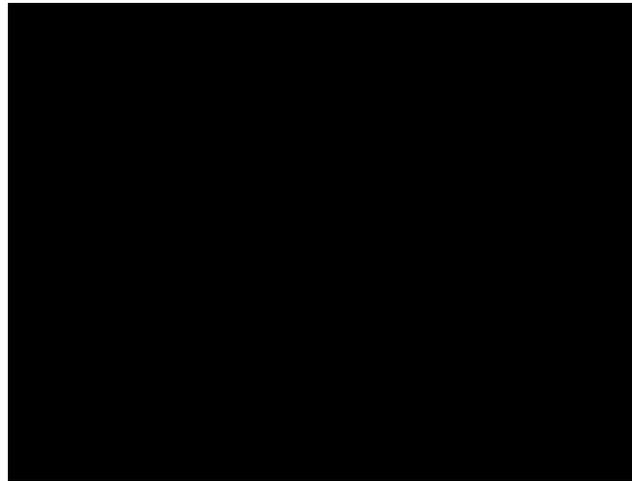
- ▶ You have now established the foundation that the witness was previously deposed, under oath, swore to tell the truth, that the prior answer was truthful and the witness stands by it.
- ▶ You are now ready to pounce on the inconsistency!

How to Impeach:

7. "Do you remember having been asked the following question _____ and giving the following answer_____."

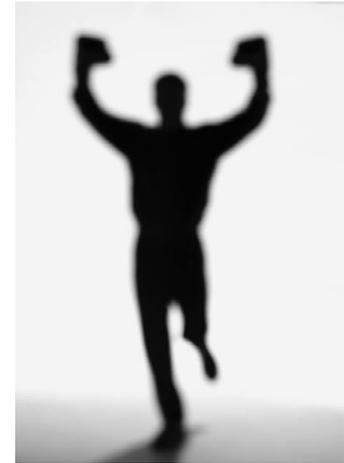
8. If the answer is anything but an unconditional "yes," hand the witness a copy of the transcript. And say: "Please turn to page __. I'm going to read the question beginning on line __ and you are to read your answer verbatim beginning at line __."

Example



How to Impeach:

- ▶ Your job is done!
- ▶ No need to ask the witness *which* answer is the truthful answer or to explain the inconsistency. You have demonstrated that the witness will give different answers on different days and is therefore unworthy of belief. That's what you argue in closing!
- ▶ Rinse, lather, repeat!



A Good Example of Impeachment? You Decide!



Any Questions?



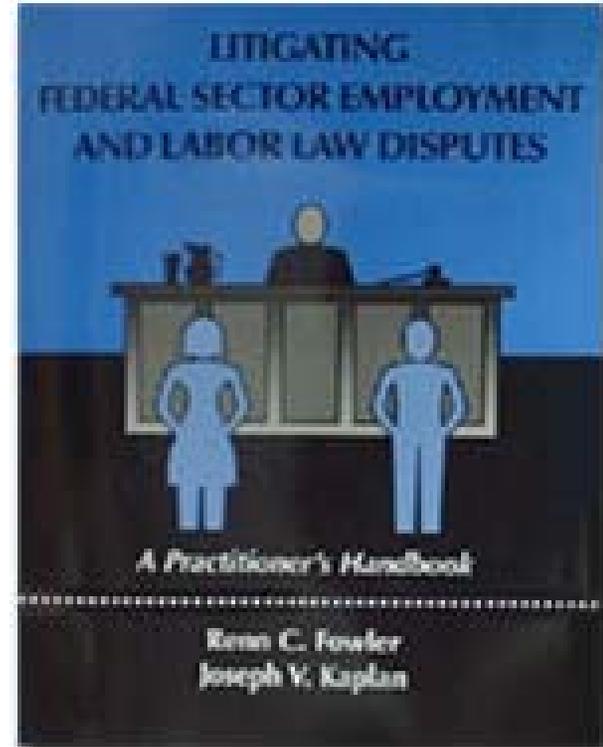
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