

BASIC DEPOSITION LAWYERING

DEFENDING AND TAKING A DEPOSITION

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DEFENDING THE DEPOSITION

1. Prep Your Witnesses For Deposition

a. **You need to tell them about how they should answer:**

- i. Do not guess or speculate
- ii. Do not give opinion unless specifically asked and then say it is an opinion
- iii. Do not volunteer answers or actions
- iv. Only answer question asked
- v. Use own words not those of the attorney
- vi. Do not agree with the attorney just to get done
- vii. Do not be afraid to say the question has already been answered.

b. **Use of their reports** (this is usually a police officer or some form of expert)

- i. Be sure they have reviewed them before the deposition.
- ii. Bring the reports so they can be referred to during the deposition, if they are reports which have been turned over.
- iii. If we are talking about reports which were not turned over prior to deposition then be prepared to turn them over before the deposition starts.

1. Do **not** let the attorney break the deposition into two parts because of the report issue either do whole deposition or reschedule.

c. **Prior statements**

- i. Have the witness review their own prior statements.
- ii. Have witness ready to explain any incorrect or miswritten prior statements.

d. **Photos**

- i. Review photos with the witness before the deposition.
- ii. Be sure the witness does not ID photos during the deposition that they have never seen before.

e. **Evidence:** Hopefully you and/or the witness review the evidence before the deposition. If it is not possible to review the actual evidence then review the evidence logs and receipts to refresh memory.

- i. Tell the witness to **NOT** comment on strength of evidence or comment on use of evidence. The witness cannot know how you plan on using evidence or what evidence you will be using.
- ii. **No drawings.**

The witness does not have to do drawings at a deposition and cannot be forced to do so.

- a. You can tell the witness that. See *State v Kuntsman*, 643 So. 2d 1172 (Fla. 3rd DCA 1994)
- b. However, the defense may use photo lineups supplied by the police during the depo. *State v Mc Williams* 817 So. 2d 1036 (Fla. 3rd DCA 2002)

- iii. **No demonstrations.**

Do not let witness do a demonstration at a deposition.

The witness cannot be required to do so, and they will never be helpful to the State. Since the deposition cannot be introduced into evidence there is no reason for a demo.

f. **Joint meetings**

- i. Can be very helpful.

At times will trigger each witness's memory.

- ii. Do not be afraid of this. There is no rule against it and it is not unethical.

2. Controlling depositions during the deposition

a. **Multiple attorneys with a single defendant and/or multiple attorneys with multiple defendants.**

- i. Order of questioning

1. Direct the order by limiting it to one attorney per defendant.
2. If there is more than one for the defendant make them choose which one will ask the questions. Prevent them from the double team. If there are multiple defendants then each attorney gets to question for their defendant. But you can limit how much is rehashed the same way.

3. Civil rule 1.310(c) says the examination and cross-examination of witnesses may proceed as permitted at trial.
 - a. **Use this rule as your sword.** A judge would NOT allow double teaming of a witness and neither will you. A judge would ultimately restrict questioning when it has become too repetitious even if it is from multiple attorneys.
 - b. Be familiar with 90.612(1), which gives the court the ability to prevent harassment, etc. Use this in conjunction with the civil rule.

b. Objections

i. Form of the question

Under the civil rule this is the only real objection and is designed to allow the answer and then have a court determine the propriety.

ii. Repetitious.

1. Object that it has been asked and answered. Then start objecting as to how many times if you know. Let the witness know they do not have to answer a question which they have already answered.
2. BUT REMEMBER: YOU **CAN NOT** INSTRUCT THE WITNESS NOT TO ANSWER. You may only suggest it. See *Smith v. Gardy*, 569 So. 2d 504 (Fla. 4th DCA 1990).

iii. Privilege

If the question violates a recognized privilege you can object. You can also instruct the witness that there is a privilege and what the privilege is and that they can exercise the privilege if they wish. See *The Haskell Company v. Georgia Pacific*, 684 So. 2d 297 (Fla. 5th DCA 1996) and *City of Miami Beach v. Town*, 375 So. 2d 866 (Fla. 3d DCA 1979).

iv. Harassment: Base this on Rule 3.220(e) and Civil Rule 1.310(d).

v. Limit witness personal information: Base this on Rule 3.220(e) and Civil Rule 1.310(d).

Let the witness know they do not have to give certain personal information out. In addition if it exceeds the scope that is also a reason to object. Discovery is permissible with respect to any matter that is relevant to the subject matter of the pending action, where the information sought is reasonably calculated to lead to the discovery of admissible evidence. *Brooks v. Owens*, 97 So.2d 693 (Fla.1957).

Relevant evidence is evidence tending to prove or disprove a material fact. s 90.401, Fla.Stat. (1979). Relevant evidence is generally admissible unless its probative value is substantially outweighed by unfair prejudice. s 90.403, Fla.Stat. (1979). See *Murray Van and Storage v. Murray*, 343 So. 2d 61 (Fla. 4th DCA 1977).

- c. **Certification:** Certify any question or objection which is not answered for the court to review and decide on at a later time.

Try to go all the way through the deposition this way.

- d. **Stopping witness:** If your witness seems to be out of control, take a break and stop them. Also if they are clearly saying lies and fabrications try to end it before you are forced to correct it on the record. See *Scipio v. State*, 928 So. 2d 1138 (Fla. 2006).
- e. **Conferring with witness:** You MAY confer with the witness. There is no rule preventing this and the defense attorney cannot stop you. Be prepared for them to ask the witness what you talked about. See *The Haskell Company v. Georgia Pacific*, 684 So. 2d 297 (Fla. 5th DCA 1996). If a deponent changes his/her testimony after consulting with his/her attorney, the fact of the consultation may be brought out, but the substance of the communication generally is protected. So, as you are not the deponent's lawyer, there is no privilege and the whole conversation may be brought out.
- f. **Asking questions:** The State has the absolute right to ask questions when the defense is done. You MAY ask them in a leading fashion. Be sure to bring out anything important which was not brought out to avoid claims of discovery abuse. See *Scipio v. State*, 928 So. 2d 1138 (Fla. 2006).
- g. **Actual Evidence.** A deponent may be asked about actual evidence and shown evidence and questioned about it. For example, a witness may be

shown the actual photo lineup that the police used. See *State v McWilliams* 817 So.2d 1036 (Fla. 3rd DCA 2002).

TAKING THE DEPOSITION

1. **Have a purpose**
2. **Know what you want**
 - a. Goal of taking depositions – a discovery tool, not to win. Limited scope. Deposition is not to be used as evidence but for discovery and impeachment
3. **Be nosy**
4. **Be nice if you can**
5. **Strategize prior to the deposition to not educate opposing counsel re: trial strategy, to the extent possible**

Perhaps even adopt a different approach to the questioning than the one to be used at trial. If you are nice during the deposition, then of course the contrast of not being nice during trial might throw off the witness
6. **Ask open ended questions at first, then hone in**

Tie up question so it will be clean for impeachment later

7. INDIVIDUALIZE THE DEPOSITION

- a. Each witness is different
- b. How did they become a witness
 - i. How they were contacted/who contacted them/relationship of the person who contacted them
 - ii. How often they spoke to the defense attorney or investigator
 - iii. How they met defense attorney
 - iv. When was last communication with the defendant/defendant's family by any method
 - v. Benefits they received from the defense or defendant
 - vi. Did they volunteer or did someone seek them out to become a witness
 - vii. Find out what was discussed each time they met with defense/investigator
 - viii. What physical evidence have they been shown by the defense/investigators
 - ix. Are they on social media/which/are they friends on media with defendant/defendant family/defendant's attorney/other witnesses
- c. Depose experts differently than a civilian
 - i. Who contacted expert
 - ii. Get the expert to open up about everything they saw or heard
 - iii. Have the expert explain each piece of material they have reviewed/confirm that they have reviewed all material before coming to a conclusion
 - iv. Discuss how the expert is being paid and the rate
 - v. Go through expert's prior testimony to find out who they have testified for
 - vi. If the expert is published, have them explain portions that may apply to your work
 - vii. Find out if the expert has talked to other experts in their field or in similar fields
 - viii. Try to get the details of all conversations between the expert and the defense counsel
- d. Alibi witnesses

- i. Relationship to the defendant, if any (relationship with any relatives of the defendant)
 - ii. How did they meet/how long have they known each other/what do they do together/are they friends
 - iii. What do they know about the defendant's family/any connection between their family and the defendant's family
 - iv. What do they know about the defendant's criminal history/ask about their own criminal history/affiliations
 - v. Ask them about any nicknames they or the defendant might have
 - vi. Ask about any other witnesses listed by the defense and their relationships
 - vii. How do they remember that date/that time/what proof
 - viii. Where were they/why there/how get there/ who else there
 - ix. Any conversations with people that were there before this deposition
- e. Other civilian witnesses
 - i. Utilize the same type of questions as for alibi witness, but focus in on the relationships
 - ii. What conversations/calls/texts/social media to or from defendant/defendant family
- f. Law enforcement
 - i. Who contacted them to be a defense witness
 - ii. What has been discussed about why they are a witness
 - iii. Any relationship law enforcement might have with defendant/defense counsel

COURT RULES RELATING TO DEPOSITIONS

1. **Protective orders:** Rule 3.220(l) gives the authority to file such a motion
2. Rule 3.220(e) deals with restricting disclosure
 - a. Be aware of scheduling requirements under 3.220(h)(1)
3. **Videotaping**

- a. Civil Rule 1.310(b)(4) permits the videotaping of a deposition without leave of court with the appropriate notice.
- 4. **Phone deposition:** Civil rule 1.310(b)(7) permits the taking of depositions by telephone on motion. Again, since the criminal rule connects to the civil rule, this can be used in the same way that the rule for videotaping is used
- 5. **Prevent additional defense witness at deposition**
 - a. Civil Rule 1.310 controls how a deposition is conducted. Use it in connection with Fla. Stat. 90.616. See *Ferrigno v. Yoder*, 495 So. 2d 886 (Fla. 2d DCA 1986) and *Dardashti v. Singer*, 407 So. 2d 1098 (Fla. 4th DCA 1982)
- 6. **Limit people at deposition:** If deposition is in the SAO then you easily control. If not then use the connection of 1.310 and 90.616. See *Ferrigno v. Yoder*, 495 So. 2d 886 (Fla. 2d DCA 1986) and *Dardashti v. Singer*, 407 So. 2d 1098 (Fla. 4th DCA 1982)
- 7. **Certification:** Certify any question or objection which is not answered for the court to review and decide on at a later time. Try to go all the way through the deposition this way
- 8. **Suspending Deposition**
 - a. Rule 1.310(d) of the Civil Rules permits termination or suspending of deposition to have a motion heard
 - a. Rule 3.220(1)(2) of the Criminal rules also permits suspending or terminating the deposition until the motion is heard
 - b. Emergency Hearing. If the defense attorney is completely unreasonable, terminate the deposition, contact the court, and request an emergency hearing. Best procedure is to terminate /suspend and prepare a written motion but sometimes you cannot do that
 - c. Try to be sure that the court reporter taking the deposition comes to see judge with you.
 - d. If it is really contentious and the court reporter is recording the deposition, subpoena the recording so that a judge can hear the tone and the volume of the attorneys

CONTENTIOUS LITIGATION

Request judge or magistrate: If there has been a history of problems with depositions with the defense attorney then file a motion asking for the/or a judge

to be present or for the court to appoint a magistrate to sit in. See Rule 3.220(1)(2).

ATTORNEY PROTECTION AND PRIVILEGE

Attorneys are protected as to certain actions taken during depositions or in conferring with opposing counsel. See *Sussman v. Damian*, 355 So. 2d 809 (Fla. 3d DCA 1977).

HALLWAY (DEPOSITIONS)

This is a Miami Dade County creation. Our judges try to assist the defense by having the defense attorneys speak to witnesses out in the hallway prior to them testifying. Usually these are not recorded in any way. Thus, creating an issue if someone tries to impeach based upon the hallway conversation.

In the event, you are forced to do one of these hallways, be sure that your witness does not speak to the defense attorney without you being present. If your witness wants to record the conversation, let them, as there is nothing to prevent a witness from recording their own conversation, especially if they are a police officer.

If one of our judges forces you to take the deposition of a defense witness in this manner, make sure to bring a witness or observer so that they can be called to testify if impeachment is required.

Obviously, you need to do everything you can to avoid this ridiculousness.