

# **TAKING DEPOSITIONS OF DEFENSE WITNESSES**

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## **1. TO DEPOSE OR NOT TO DEPOSE**

### **a. Deciding**

#### **i. Advantages**

1. Florida gives it to us
2. Can observe defense witnesses
3. Get a feel for the defense case and witnesses
4. Can depose all defense witnesses available

#### **ii. Disadvantages**

1. Need to subpoena witness
2. Immunity issue

#### **iii. Defense bringing witnesses in**

## **2. TYPE OF WITNESS**

### **a. Civilian**

### **b. Alibi**

### **c. Family**

### **d. Fact**

### **e. Rebuttal/Discrepancy**

### **f. Impeachment**

### **g. Character**

#### **i. For Defendant**

#### **ii. Against state witness**

#### **iii. Against victim**

### **h. Expert**

#### **i. Forensic**

#### **ii. Medical**

#### **iii. Psych**

#### **iv. Technical**

- v. Phone/computer
- vi. Social worker
  - i. Law enforcement
  - j. Investigator (private)

### **3. PREPARATION**

- a. Review all material first
  - i. Review case file
  - ii. Review photos and diagrams
  - iii. Review police reports of your case
- b. Look for information on witness
  - i. Civilians
    - 1. A-forms
    - 2. FCIC
    - 3. Priors
    - 4. Nicknames
    - 5. NCIC
    - 6. David Search
    - 7. Google
    - 8. Talk to state witnesses
    - 9. Talk to police
    - 10. Facebook
    - 11. Instagram
    - 12. Civil cases
    - 13. Accurant
  - ii. Experts
    - 1. Google them
    - 2. Get CV

3. Prior testimony at a trial and or depositions
    - a. Civil and criminal
  4. Reports
  5. Notes/measurements
  6. Ask your own expert about them
  7. Photos
  8. LinkedIn
  9. Professional organizations/associations
- iii. Law enforcement/investigators
1. Personnel files
  2. Employment history
  3. Google
  4. Internet
  5. Ask your law enforcement
  6. Prior testimony at a trial and or depositions
  7. Reports
  8. Notes/measurements/photos

#### **4. COURT RULES RELATING TO DEPOSITIONS**

- a. Protective orders. Rule 3.220(l) gives the authority to file such a motion
- b. Rule 3.220(e) deals with restricting disclosure
  - i. Be aware of scheduling requirements under 3.220(h)(1)
- c. Videotaping
  - i. Civil Rule 1.310(b)(4) permits the videotaping of a deposition without leave of court with the appropriate notice.
- d. Prevent additional defense witness at deposition
  - i. 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)

- e. 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), *Dardashti v. Singer*, 407 So. 2d 1098 (Fla. 4th DCA 1982) and *Daughtry v. State*, 211 So. 3d 84 (Fla. 4th DCA 2017).
- f. 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
- g. 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
- h. Suspending Deposition
  - i. Rule 1.310(d) of the Civil Rules permits termination or suspending of deposition to have a motion heard
  - ii. Rule 3.220(l)(2) of the Criminal rules also permits suspending or terminating the deposition until the motion is heard
  - iii. 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
  - iv. Try to be sure that the court reporter taking the deposition comes to see judge with you.

- v. 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

## **5. CONTENTIOUS LITIGATION**

- a. Request judge or magistrate. If there has been a history of problems with depositions with the defense attorney, 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)

## **6. TAKING THE DEPOSITION**

- a. Have a purpose
- b. Know what you want
  - i. 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
- c. Be nosy
- d. Be nice if you can
- e. Ask open ended questions at first, then hone in
  - i. Tie up question so it will be clean for impeachment later
- f. Strategize prior to the deposition to not educate opposing counsel re: trial strategy, to the extent possible
- g. Strategy: 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
- h. 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 by any method/with defendant's family?
- 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?

## **7. INDIVIDUALIZE THE DEPOSITION**

- a. Each witness is different
- b. 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

- viii.** Try to get the details of all conversations between the expert and the defense counsel

**c. 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

**d. 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's family

**e. 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.