

EFFECTIVE LAWYERING BEFORE
AND
DURING DEPOSITIONS OF STATE WITNESSES

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A. Before the Deposition

1. Determine what witnesses do not need to be prepped.

a. Note: if the defense wishes to depose them, then they need to be prepped.

2. Determine who the State's most crucial witnesses are and be sure you know their role in the case:

a. Eyewitnesses

b. Witnesses who have statements of defendants

c. Experts

d. Flip witnesses

e. Informants: Confidential or other

3. Prepping Witnesses for Deposition

a. 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
- viii.** Sometimes an officer will be able to say “it is in my report exactly as it is”
- b.** Use of their notes:
 - i.** Be sure they have reviewed them before the deposition.
 - ii.** Do not let them into deposition room during the deposition.
 - iii.** If they wish to write new notes as a refresher for the deposition, then that they can use
- c.** Use of their reports:
 - i.** Be sure they have reviewed them before the deposition.
 - ii.** Bring them so they can be referred to during the deposition, if they are reports which have been turned over. 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. Then expect to be faced with a postponement of the deposition. Do not let the attorney break the deposition into two parts because of the report issue.
- d.** Prior statements:
 - i.** Have the witness review their own
 - ii.** Have them review that of any witness they heard.

iii. Have witness ready to explain any incorrect or miswritten prior statements.

e. Photos:

i. Have witness review them (if possible) before the deposition.

ii. Be sure the witness does not id photos they have never seen before.

f. Evidence:

i. 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.

ii. Do not comment on strength of evidence

iii. No drawings. **The witness does not have to do drawings at a deposition and cannot be forced to do so.** You can tell the witness that. See *State v Kuntsman*, 643 So. 2d 1172, (Fla. 3d DCA 1994), *Reed v. State*, 783 So. 2d 1192, 1195 (Fla. 1st DCA 2001).

iv. No demonstrations. **Do not let witness do a demonstration at a deposition.** The witness cannot be required to do so. The demonstration will never be helpful to the State. (Remember the OJ case). See *Kuntsman*, 643 So. 2d at 1172, *Reed*, 783 So. 2d at 1195.

v. No comment on use of evidence. The witness cannot know how you plan on using evidence or what evidence you will be using.

g. Joint meetings:

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

If you do this, decide how you want to group them; for example; all witnesses on same or similar point; Police officers.

h. Getting witnesses to deposition.

- i.** Use State subpoena if necessary (but remember that a State subpoena will confer statutory immunity).

- ii.** Have officers pick them up

j. Flip witnesses:

- i.** Be sure to review their plea agreements and plea colloquy with them. Be sure they know the possible sentence they are/or were facing or sentence they have received. Be sure they know any special conditions.

B. Motions Before Depositions

- 1.** Protective orders. Rule 3.220(1) gives the authority to file such a motion.

- a.** Prevent the deposition.

- i.** If there is a valid reason, such as unavailability; already deposed; substantial risk of; intimidation, reprisal, physical harm; witness not ready and no reason to give deposition twice (expert).

- ii.** Rule 3.220(e) deals with restricting disclosure.

- iii.** Be aware of scheduling requirements under 3.220(h)(1).

- b.** Prevent videotaping or limit video. Civil Rule 1.310(b)(4) permits the videotaping of a deposition without leave of court. When the notice of taking deposition is received and you have a concern then file a protective motion before the date the deposition is scheduled for. Possible reasons include protection; security; harassment; concern about an improper use of the video.
- c.** Prevent defense witness at deposition. Civil Rule 1.310 controls how 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).
- d.** Limit people at deposition. If deposition in 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).
- e.** Limit scope. Deposition is not to be used as evidence but for discovery and impeachment. The witness does not need to be embarrassed or harassed and you can limit the scope to prevent this. Argue this based on the criminal rules as opposed to civil rules.
- f.** Limit usage. Probably better after deposition is taken so you can show the extreme of the questioning.

- g.** 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 as to videoing is used.
- h.** 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).

C. Controlling Depositions

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

 - a.** Order of questioning

 - i.** Direct the order by limiting it to one attorney per defendant. If there is more than one for the defendant make them choose which one. 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.
 - ii.** Civil rule 1.310(c) says the examination and cross-examination of witnesses may proceed as permitted at trial. 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. Be familiar with 90.612(1), which gives the court the ability to prevent harassment, etc. Use this in conjunction with the civil rule.

2. Objections

a. Legitimate Objections

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

ii. Repetitious. Object by saying that is 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. 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), *Rocca v. Rones*, 125 So. 3d 370, 371 (Fla. 3d DCA 2013).

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),

Butler, Pappas, Weihmuller, Katz, Craig, LLP v. Coral Reef of Key Biscayne Developers, Inc., 873 So. 2d 339, 343 (Fla. 3d DCA 2003)

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. Proper scope is discoverable material which might lead to additional discoverable material and or impeachment material. *See Murray Van and Storage v. Murray*, 343 So. 2d 61 (Fla. 4th DCA 1977).

3. 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.

4. Stopping witness. If your witness seems to be out of control, take a break and stop them. Also, if they are clearly telling 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).

5. Confering 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), *State v. Wells*, 538 So. 2d 1292 (Fla. 2d DCA 1989)

6. 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 asked (confession, defendant statement, etc.) to avoid claims of discovery abuse. *See Scipio v. State*, 928 So. 2d 1138 (Fla. 2006).
7. Do not permit demonstrations. Since the deposition cannot be introduced into evidence there is no reason for a demo. And since the witness has not prepared for one, the result is usually horrible (remember the glove).

D. Suspending Deposition

1. Rule 1.310(d) of the Civil Rules permits termination or suspension of depositions to have a motion heard
2. Rule 3.220(1)(2) of the Criminal Rules also permits suspending or terminating the deposition until the motion is heard
3. Emergency Hearing. If the defense attorney is completely unreasonable, terminate the deposition, contact the court, and request an emergency hearing. The best procedure is to terminate/suspend and prepare a written motion (sometimes this is not possible to do).

E. After the deposition

Remember that because something was allowed at a deposition does not mean that it is admissible at trial. Prepare your pretrial Motions in Limine after the deposition.

F. 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), *The Haskell Company v. Georgia Pacific*, 684 So. 2d 297 (Fla. 5th DCA 1996)