

How to Prepare for and Take Effective Depositions

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I. The Fundamentals

- A. What – Depositions are answering oral or written (rarely) questions before court reporters under oath (FRCP Rule 30; Va. S. Ct. Rule 4:5, 4:6; ILCS S.Ct. Rule 201 (a) *et seq.*; Fla. R. Civ. P. 1.310). These Rules vary jurisdiction-by-jurisdiction and therefore must be closely reviewed.
- B. Who can be deposed? Anyone, including parties, non-parties, organizations (Va. Rule 4:5(b)(6), Fed. R. Civ. Pro. 30(b)(6), ILCS S.C. Rule 206(a)(1)), and experts designated to testify at trial (Fed. R. Civ. Pro. 26(b)(4)(a); Va. S.Ct. Rule 4:1(b)(4); Ill. S.Ct. Rule 213(f)).
- C. Location –
 - 1. Federal – by agreement of the parties or court order.
 - 2. Virginia -- For parties, where the lawsuit was filed or in an adjacent county. Va. S. Ct. Rule 4:5(a)(1)(i). For non-parties, in the county the deponent resides or works. *Staples Corp. v. Washington Hall Corp.*, 44 Va. Cir. 372 (Va. Cir. Ct. 1998). In general, by agreement of the parties and the witness or by order of court if no agreement possible.
 - 3. Illinois – where deponent resides, works or transacts business in person. For plaintiff, where suit was filed. Ill. S. Ct. Rule 203.
 - 4. Practice -- Depositions are usually noticed for the requester’s office, although the parties may agree on another arrangement (opposing counsel’s office or court

reporter if out of town, witnesses' place of employment); more popular now is via zoom, but must be familiar with technology, get documents pre-marked and available to deponent, and get stipulation that deponent and counsel remain on camera.

D. Timing and Limits

1. Federal – Generally depositions can begin after the time set under Rule 26(d)'s scheduling order. Under Rule 32(e), notice of 10 days is reasonable, and less is unreasonable. Deps are limited to one 7-hour day unless stipulated or court ordered, Rule 30(d)(1), and *each side* without leave of court is limited to ten depositions. Rule 30(a)(2)(a). Before filing a complaint, a person can obtain a deposition to perpetuate testimony by filing the procedure in Rule 27.
2. Virginia – If you want to depose someone before an answer is due, leave of court is required, otherwise a deposition can be taken at any time after filing the complaint. Rule 4:5(a). In Virginia, the number and duration of depositions is unlimited. Rule 4:6(a).
3. Illinois – No dep (or other discovery) until all defendants have appeared (or are required to appear), without leave of court for “good cause.” Rule 201(d). There is no set sequencing of discovery unless ordered by the court. Rule 201(e). Deps are limited to *3 hours* (regardless of number of parties), unless stipulated by the parties or ordered by the court upon a showing of “good cause.” Rule 206(d).

E. Compelling Attendance

1. Parties – in all three jurisdictions, a notice of deposition is all that is required to compel attendance. FRCP 30(b)(1),

Va. S. Ct. 4:5(b)(1), and ILCS S.Ct Rule 206(a). The notice must state the time and place for taking the deposition, the name and address of the person to be examined (if known), or information sufficient to identify the deponent if the deponent is unknown. ILCS S.Ct Rule 206(a); FRCP 30(b), Va. S.C. Rule 4:5(b)(1). All three also permit a document request to be attached to the notice. *Id.*; Va. S. Ct. R. 4:5(b)(5). The notice must also state whether the dep will be recorded by audio, audiovisual or stenographic means, and in Illinois the videographer must be identified in the notice. ILCS S.Ct Rule 206(a)(2). If a dep is being taken via telephone or video, the court reporter must be present with the deponent. Va. S. Ct. R. 4:5(b)(7).

2. Non-parties – subpoenas are necessary to compel attendance, and you must provide the non-party with a witness fee and mileage. In Illinois and Virginia, attorneys of record in the case can issue subpoenas as officers of the court. ILCS S.Ct Rule 206(a); Va. Code § 16.1-89; FRCP 45(a)(3). In other jurisdictions, you may have to get a subpoena from the clerk of court.
3. Officer – In Virginia, the Officer (typically a court reporter) starts deposition with oath or affirmation for deponent. Va. S. Ct. R. 4:5(c). In federal court, the Officer must provide his/her name and business address; the time, date, and place of the deposition; the deponent's name; the administration of the oath; and the identity of all person's present. FRCP 30(b)(5)(A). At the end of the deposition, the officer must state that the dep is complete, any stipulations made by the attorneys, and the custody of the transcript and exhibits. FRCP 30(b)(5)(C). In Illinois, the only requirement is that the person taking the deposition must be authorized to administer oaths. Rule 205(a).
4. Designation of Corporate/Government Deponents – Each jurisdiction permits a party to name as a deponent a public or private corporation, partnership, government organization and describe the matters for examination. The named organization then must designate an officer,

director, agent or employee to testify on its behalf. FRCP 30(b)(6), ILCS S.Ct Rule 206(a)(1); Va. S. Ct. R. 4:5(b)(6).

F. Special Situations

1. Video Depositions – These depositions are permitted in all three jurisdictions. See FRCP 30(b)(2); Va. S.Ct. Rule 4:7A; Ill. S.C. Rule 201(g).
 - a. Federal -- Under the federal rules, the notice of deposition must state that video will be used to record the testimony, and FRCP 30(b)(4) requires certain statements on the record to be done at the beginning of each tape, and a statement to be made at the end of the tape. There is, however, no requirement that an independent videographer must actually perform the videotaping. See *Juanita J. Ott v. The Stipe Law Firm*, 169 F.R.D. 380 (E. D. Ok. 1996); *Rice's Toyota World, Inc. v. Southeast Toyota Distributors*, 114 F.R.D. 647 (M. D. N. C. 1987).
 - b. Virginia – Va. Code § 8.01-412.4 states that in Virginia, “The deposition must begin with an oral or written statement on camera which includes (i) each operator's name and business address or, if applicable, the identity of the video conferencing or teleconferencing proprietor and locations participating in the video conference or teleconference; (ii) the name and business address of the operator's employer; (iii) the date, time and place of the deposition; (iv) the caption of the case; (v) the name of the witness; (vi) the party on whose behalf the deposition is being taken; (vii) with respect to video conferencing or teleconferencing, the identities of persons present at the deposition and the location of each such person; and (viii) any stipulations by the parties.” Va. S. Ct. Rule 4:7A repeats this provision and adds that editing of the videotape is permitted only upon agreement of the parties or per court order.

- c. Illinois – Ill. S.Ct. Rule 201(g) governs video depositions and mandates and, similar to the federal and Virginia rules, certain matters must be recorded at the beginning of the deposition. At the conclusion, the operator must determine the exact length of the deposition and provide an affidavit regarding this length.
2. Depositions by zoom – Ill. Rule 206(h) permits “Remote Electronic Means Depositions” and states that “any exhibits or other demonstrative evidence to be presented to the deponent by any party at the *deposition shall be provided to the officer administering the oath and all other parties within a reasonable period of time prior to the deposition*, unless the deposition participants are able to view the exhibits in real time during the deposition.” *Id.* at Rule 201(h)(2). The Committee Comment on Rule 201(h) is also important: “Where a deponent testifies from a remote location and no neutral representative or representative of an adverse party is present in the room with the testifying deponent, care must be taken to ensure the integrity of the examination. *The testifying deponent may be examined regarding the identity of all persons in the room during the testimony. Where possible, all persons in the room during the testimony should separately participate in the videoconference. In furtherance of their obligations under Illinois Rules of Professional Conduct 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), and 8.4(d) (Misconduct), counsel representing a deponent should instruct the deponent that (a) he or she may not communicate with anyone during the examination other than the examining attorney or the court reporter and (b) he or she may not consult any written, printed, or electronic information during the examination other than information provided by the examining attorney.* Unrepresented deponents may be similarly instructed by counsel for any party. Neither the federal nor Virginia

rules have special provisions for Remote Electronic Means Depositions.

3. Physicians – In Illinois, a court order is required to subpoena a non-party physician for a discovery deposition in his or her professional capacity, unless the parties agree and the deponent consents to the deposition. Ill. S. Ct. R. 204(c). The party requesting the deposition must pay the physician a “reasonable fee” for his or her testimony unless the physician is being deposed for the purpose of rendering an opinion at trial in which case the party presenting the physician must pay the fee. Id.

G. Reasons to Take Deposition

1. Discovery – get details from deponent’s perspective; pin down testimony; determine witness’ likeability; test memory and perception (*My Cousin Vinny*)
2. Summary Judgment – FRCP 56 and 735 ILCS 5/2-1005 (c) allow Motions for Summary Judgment to be supported by deposition testimony. In Virginia, the use of deposition testimony in support of summary judgment is prohibited except in cases where the only parties are business entities and more than \$50,000.00 is at issue. Va. S. Ct. Rule 3:20; Va. Code Ann. § 8.01-420.
3. Use at Trial – Impeachment, Designated Corporate Witness -- In all three jurisdictions, deposition testimony can be used to impeach a witness at trial (prior inconsistent statement) or if the witness is unavailable. Under Va. S. Ct. Rule 4:7(a)(4), a witness is unavailable if he is dead, more than 100 miles away, outside the Commonwealth, unable to testify because of age, infirmity or imprisonment, or if he is a licensed physician, chiropractor, public official or judge. Any corporate deposition taken pursuant to Va. S. Ct. Rule 4:5(b)(6), Federal Rule 30(b)(6) or ILCS S.Ct Rule 206(a)(1) is admissible for any purpose. See Va. S. Ct. Rule 4:7(3); FRCP 32.

4. Use at Trial -- Other – Under the Federal Rules, there is no distinction between a discovery and evidence deposition. All or part of a deposition taken in a federal case may be used in court proceedings if (A) the party was present or represented at the taking of the deposition or had reasonable notice of it; (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (C) the use is allowed by Rule 32(a)(2) through (8) [impeachment, deposition of a party or designee, witness is unavailable (dead, more than 100 miles from the place of trial, absence procured by party offering deposition, witness cannot attend or testify because of age, illness, infirmity, or imprisonment; or couldn't procure by subpoena) or deposition in prior matter]. In Illinois, there is a distinction between discovery and evidence depositions. Often a discovery deposition will precede an evidence deposition. The Rules of Evidence apply to an evidence deposition, and cross-examination is conducted as at trial. Ill. S.Ct. Rule 206 (c)(2). In Virginia, there is no separate rule for “de bene esse” depositions which act like evidence depositions. These generally are used by stipulation of the parties.

H. Objections – No speaking objections.

1. Federal – “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, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).” FRCP 30(c)(2)
2. Virginia – Similar. Rule 4:5(c)(2)
3. Illinois – Rule 206(c)(3) similar (“concise, stating the exact legal nature of the objection”)
4. Appropriate Objections
 - a. Form of the Question – Waived unless objected to at the deposition. Examples of objection as to form:

- "Vague" "ambiguous". The question is unclear perhaps because it is too long, some key words are ambiguous, or the period of time is unclear. The question might be too long, some of the key words in the question might have more than one meaning, or the period of time to which the questioner is referring might be unclear.
- "Compound." The question is actually two questions. Example: "Did you find the cancelled check on the ground and take it with you?"
- "Argumentative"
- "Asked and answered" covering the same ground a second time, asking a question to which he has already received an answer.
- "Assumes facts not in evidence" The question contains a factual statement that has not yet been established.
- "Misstates the evidence" or "misstates the witness's testimony."
- "Privilege"

Note – hearsay and relevance objections not proper

I. Protective Orders

1. Federal. FRCP 26(c) states that "the court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including 8 specific instances. FRCP 30(d)(3) further authorizes a deponent or party to move to terminate or limit the deposition on the ground that it was conducted in bad faith or in a matter that "unreasonably annoys, embarrasses, or oppresses the deponent or party."
2. Virginia – Rule 4:1(c) authorizes protective orders.
3. Illinois – Rule 201 (b)(1) tracks FRCP 26(c) and Rule 206(e) tracks FRCP 30(d)(3)
4. In all three jurisdictions, the movant must certify that s/he has in good faith conferred or attempted to confer

with the affected parties in an effort to resolve the dispute. FRCP Rule 37 (a)(1); Va. S.Ct. Rule 4:1(c); Ill. S.Ct. Rule 201(k).

II. Practice Pointers

A. Before or After Written Discovery; Major or Minor First.

No rule requires depositions to follow written discovery or the plaintiff to be deposed before the defendant. The parties may schedule discovery as they please subject to any court scheduling order. Think about whether you want to depose key deponents first, before they know the case, or last.

B. Develop a Plan for the Deposition

1. Why are you taking this deposition? Fact witness (what seen, heard, knowledge of policy, etc.), anything necessary to prove through this witness (evidentiary foundation, custody of information)? If so, be persistent.
2. Ask open-ended questions if you are seeking to extract information. Witness must do most of talking. Ask many “why” questions.
3. Consider near end of deposition to cross-examine the witness on important areas covered to nail down testimony.
4. When finished with an area of inquiry, ask deponent if he has given you all his knowledge concerning this area.
5. Make sure you ask the deponent if anyone else has knowledge in this area of inquiry.
6. If deponent does not know the answer in a specific area, ask who else in the company may know this.

C. The Home Court.

Think seriously about going to the deponent’s office rather than taking the deposition at your own. Often you might learn things while walking through the plant or noticing close by office mates. Remember also that the deponent has immediate access to his sources and files, allowing him to retrieve anything that he mentions.

D. Remember to Make a Record if not Recording.

The old adage that a picture says a thousand words remains true, and therefore seriously consider videotaping each deposition. Get the right camera and a good microphone and your paralegal can serve as the videographer. Absent this, you must state on the record things like lengthy pauses, snickers, frowns, burst of anger, etc. (“Why did you pause for 30 seconds before responding?” “Why did you turn beet red before answering?” “Why did you just snicker?”).

E. Breaks.

See *Hall v. Clifton Precision*, 150 F.R.D 525 (E.D. Pa. 1993) (no discussions between lawyer and deponent during breaks); *Odone v. Croda Intl PLC*, 170 F.R.D. 66 (D.D.C. 1997) (Hall distinguished and no violation if no coaching while on record and 5 minute recess was after deposing counsel had finished line of questioning); *Morales v. Zondo, Inc.*, 204 F.R.D. 50 (S.D.N.Y. 2001) (basis for imposing sanctions, which were imposed for coaching a witness during breaks and speaking objections).

F. On the Record/Off the Record.

Unless both sides agree to go off the record, the court reporter will continue on the record. Be careful what you say since “body language” that would deflect a verbal statement will not be recorded typically. If something happens off the record (like on a break), make sure a record is made of it.

G. Risk an Asked and Answered Objection by Asking Questions Twice?

While a witness is fresh, you may not get a hoped for answer to an important question. Should you ask the same question a different way later in the deposition?

H. Waive Reading of the Deposition and Completing Errata Sheets?

While typically reserved for transcription errors, Errata Sheets have been more recently used to change the deposition's substantive testimony, which is permissible in Virginia if done within 21 days. See Va. S.Ct. Rule 4:5(e). The federal rules also permit substantive deposition changes if done within 30 days after notice that the deposition has been transcribed. See FRCP 30(e). The Illinois Supreme Court sought to stop this practice by amending Rule 207(a), which now reads "that corrections based on errors in reporting or transcription which the deponent desires to make will be entered upon the deposition with a statement by the deponent that the reporter erred in reporting or transcribing the answer or answers involved. The deponent may not otherwise change either the form or substance of his or her answers." Since even minor transcription errors can lead to troublesome impeachment, it is good practice never to waive the signature and to review and change the transcript if necessary.

III. Preparation of Witness before Deposition and Trial – my advice:

The testimony you will give at either a deposition or a trial is very important. Like other important events about which you know in advance, preparation is possible and necessary. Before your deposition or the trial, I will have an opportunity to sit down with you and go over your testimony, and also prepare you for potential cross-examination.

If you have given a previous statement in this case (either a deposition, written statement, an oral statement that was recorded, or answers to interrogatories), please take a few moments to review the testimony. Don't be overly concerned whether your present memory differs from that of the previous statement. However, please realize that the inconsistencies between your present memory and your previous statements will be used by the opposition.

During our preparation period, we will review all exhibits which you will be asked to authenticate. In addition, we will review the probable testimony of other witnesses to see if there

are any inconsistencies between your statements and the statements of other witnesses.

For both the deposition and the trial, please dress neatly and conservatively. At trial, men should wear a suit or a sport coat with a dress pair of pants. Women should wear a dress if possible. Depositions are more casual than trial, and therefore men can eliminate a tie, and women can wear slacks with a nice blouse.

The following are important rules which you should follow at all times during the deposition or your testimony at the trial. By following these rules, you will favorably affect the way either the court or the jury will evaluate your testimony.

1. Above all, always tell the truth according to your best recollection of the facts and events involved. Be as specific or as vague as your memory allows, but do not be put in a position contrary to your true recollection. If you cannot remember an answer to a question, say, "I can't recall" or "I can't remember". If you don't know an answer to a question, say simply "I don't know". Do not guess. The FIRST and primary rule in a deposition or trial is TELL THE TRUTH.
2. Listen carefully to every question and wait for the lawyer to finish his question before you answer it. Resist the temptation to answer the question you anticipate the lawyer is asking you. The question actually asked may differ substantially from the question you anticipate the lawyer would ask. Answer only the question asked. Do not volunteer information. Do not add to your answer just because the examiner looks at you expectantly. If the examiner asks you if that is all you remember, say yes if that is the case.
3. Do not answer a question you do not understand. If you don't understand a question, say so and either I or the opposing lawyer will rephrase it.
4. Do not say anything more than simply answering the question. If your answer is yes or no, say that and stop. Volunteering information just leads to more questions.

EXCEPTION TO THIS RULE IS WHEN YOU ARE DISCUSSING DAMAGES.

5. If an objection is made to any question, stop. Follow my lead. If there is an objection, wait for me to state the objection. Then follow my lead as to whether to answer the question after the objection is made. Obviously, if you do not remember the last question asked, say so and either the lawyer will rephrase it or will ask the court reporter to read it from the record.
6. Be serious and polite at all times. Do not give cute or clever answers. Remember, the testimony you give at a deposition or trial is recorded, and the court reporter cannot show on her sheet of paper that you are giving an answer jokingly. Most importantly, do not lose your temper. If a deposition or trial examination becomes unpleasant, that is what I get paid for.
7. You will be allowed to testify only to what you personally saw, heard, and did. You generally cannot testify to what others know, or to conclusions, opinions, and speculations.
8. Do not volunteer any information. You are not there to educate the examiner. It is up to the examiner to frame intelligible questions. Do not help the examiner by saying "do you mean X" or "do you mean Y." You then will be asked both of these questions.
9. Do not explain any of your answers unless requested to do so. For example, when answering a question which requires your recollection of other facts not called for by the question, do not refer to these other facts in explaining how you can answer the question. In other words, if you are asked when a conversation with Jones occurred, and you recall that it had to be in December because you met Smith after Jones and that was in January, do not explain this thought process to the examiner.
10. When testifying on conversations, make it clear whether you are paraphrasing or quoting directly.

11. Do not characterize your own testimony with phrases such as "In all candor," "honestly," "I'm doing the best I can" etc.
12. Avoid all adjectives and superlatives. I "never" or I "always" have a way of coming back to haunt you.
13. Do not testify to your state of mind unless asked. In other the words, if the question is: "Did you read that document?" the answer is: "Yes," not "Yes and I believe every word in it."
14. If information is in a document which is not an exhibit at the deposition, answer the question if you can recall the answer. Do not tip off the examiner as to the existence of documents he does not know about. If you cannot answer the question without looking at a document which is not marked as an exhibit, you may simply answer the question by stating you do not recall. If you can answer the question, it should be done. After a witness states he does not recall a fact which the examiner believes he should have knowledge of, the examiner will ask if there is a document which can refresh his recollection.
15. Do not let the examiner put words in your mouth. Do not accept his characterization of time, personalities, events, etc. Rephrase the question into a sentence of your own using your own words. Do not adopt an examiner's summary of your prior testimony.
16. Do not answer a compound question unless you are certain that you have all parts of it in your mind. If the question is too complex to be held in your mind, it is too complex and ambiguous to answer.
17. Pay particular attention to the introductory clauses preceding the guts of the question. Leading questions are often preceded by statements which are either half-true or contain facts which you do not know to be true. Do not have the examiner put you in the position of adopting these half-truths or unknown facts on which he will then base further questions.
18. If you are interrupted while answering a question, stop but remember. If you are interrupted, let the lawyer

finish his interruption and then firmly but courteously state that you were interrupted, that you had not finished your answer to the previous question and then answer that question. Again, if you do not remember exactly the question asked or even the portion of your response given before the interruption, you can ask for the question to be read back by the court reporter.

19. If you are caught in an inconsistency, do not collapse. What will happen next will depend on what questions are asked of you. State, if asked, what you currently remember. State the reason for the inconsistency only if you are asked.
20. Don't expect to testify without the other side scoring points. If the other side appears to you to be asking questions which call for answers that do not help your case, accept the fact that every lawsuit has two sides and sit back and take your punishment.
21. Avoid even the mildest obscenity and avoid absolutely any ethnic slurs or references which could be considered derogatory.
22. There is no such thing as "off the record." If you have any conversation with anybody in the deposition room, be prepared for questions on that conversation.
23. If the examiner appears totally confused about your business and its technical aspects, do not attempt to educate him.
24. If you do not remember something, so state. You may then be asked if a statement or document refreshes your recollection. If it does not, the answer remains that you do not remember. You may be asked whether there exists a document which may help you refresh your recollection.
25. If there is a pause ("dead air"), don't think that you have to fill it. Most often, the lawyer asking questions is simply pausing to reorganize. At worst, the lawyer is simply tempting you to start talking, which will result in more questions.

26. If you are hit with a flash of insight or recollection while testifying and this has not been previously discussed with counsel, hold this to yourself, if possible, until you have had an opportunity to go over it with counsel.
27. Every witness makes mistakes on a deposition. Do not become upset if you find you have made one. If the witness realizes he made a mistake during the deposition, the mistake should be corrected as soon as it is realized. Mistakes discovered after a deposition may be corrected at the time the witness reviews and signs the transcript.

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Video Depositions

With a deposition that is being only stenographically recorded, the visual aspects of the testimony, as contrasted to testimony at trial, need not be considered. However, with a videotape, the visual aspects of testifying become important. Consider the following checklist:

1. Sit comfortably, but reasonably straight, both feet on the floor, hands on the table in front of you.
2. Sit still. Everyone has their version of the meaning of a witness squirming, which might simply be occasional movement.
3. Sit straight. Often, the more tired you become, the poorer your physical posture becomes and poor physical posture usually creates a poor impression. Having your feet flat on the floor helps to maintain good posture. (Make sure that you have a comfortable chair that is not unduly relaxing.)
4. Look at the examiner when he or she is asking a question. However, if the camera is considered to be the jury, testimony directed to the jury is preferable. Juries are generally more receptive to answers given to them as opposed to a mere dialogue between the questioner and the witness. Depending upon the location of the camera,

it may be advisable that the witness look at the camera when responding to the question. Remind the witness that you will insure that the camera angles will not unreasonably distort his or her physical appearance.

5. Speak in your normal voice, but try to invoke reasonable gestures, inflections.
6. Reading documents. Of course, you must take the time to read any document that is handed to you if you are going to be asked questions about it. However, try not to be unreasonably bent over the document. Instead, hold the document somewhat up. When you are not reading the document, switch your eyes back to the examiner. If the document has any length, ask if you can go off the record and read the document without the camera and lights on. Even if the request is denied, it may be of effect.
7. Remind the witness to follow the same rules for a stenographically recorded deposition. However, long pauses between the question and answer, although generally not discernible in a stenographically recorded deposition, can, in a video deposition, give the appearance that the deponent is somewhat less than forthright in his or her testimony. While the witness should carefully consider each question before answering, the witness nonetheless should be cognizant that long delays can be misinterpreted by the trier of fact.

Practice. Practice. Practice -- Role playing is necessary to solidify the advice in the attached memo. You know you have successfully prepared the witness when s/he remarks that the prep was worst than the dep.

III. Depositions of Experts

A. Documents Received through Court Scheduling/Designation

You should have already received the following that will give you a foundation for deposition preparation:

- Curriculum vitae or resume of the expert's qualifications;
- Notes and reports made by the expert;
- Photographs, videotape or other visual media of the persons or objects involved;

- Test data made or reviewed by the expert;
- Transcripts of fact witness depositions taken in the case;
- Witness statements obtained in the case;
- Published literature or text books relied upon or consulted by the expert;
- Correspondence between the expert and counsel for the opposing party; and,
- Time and billing records of the expert for the case.
- Drafts of any reports prepared by the expert, including any written comments provided thereon by any counsel, party, or other individual who read any draft.
- Transcripts of any testimony given by the expert in any prior deposition or court proceeding over the past four years (as identified in the Fed. R. Civ. P. 26(a)(2)(B) disclosure).
- Copies of publications from the past 10 years

B. Discovery Deposition – Example Check List (Sepsis Case)

- Name for record -- previous deposition? How many?
Context for those depositions -- treating physician, expert witness or some other variation
- Rules -- wait to answer; uh huh; shrugs; let me know if do not understand question (assume if answer)
- Designation – Exh. 1 -- did you draft this? Who did? Did you participate in the prep of this document? What did you do?

1. Background

- Mark the deponent's CV (typically as Exhibit 2), and ask whether the CV is current (including any new articles or books written), the deponent's current position, whether the deponent conducts any peer reviewing for any medical literature (if so, which periodicals), and ask how much of the deponent's professional time involves clinical practice, and what the remaining part of this practice involves (research studies, teaching, peer reviews, etc.). Written any publications on sepsis, Klebsiella or other subjects

that you believe bears on your opinions of this case ?
Lectured on these topics? Had any presentations, including in-hospital presentations, on sepsis or Klebsiella? Create any Power Points for lecture(s)? Presentation(s)? Distribute any hand-outs or other literature at lecture, presentation?

- Review past history on the CV, including residency and fellowships, licensure (Licensed in Virginia? When? Other states? When? Still licensed in all states? Disciplinary action taken against any of your licenses? Suspended or revoked?), privileges at which hospitals, privileges ever subject to discipline (suspended, revoked, reprimanded), and reason for leaving his previous positions. Also inquire as to whether the deponent is Board-certified, in which specialties, and whether the deponent passed both the written and oral portions of the board certification process on the first attempt. Also ask whether the deponent has been a defendant in a medical malpractice case. If so, how many, facts of case, trial? Deposition? disposition of case.
- Medical journals you receive and review? Is _____ reliable on the subject of medicine?
- Nature of your practice – how much clinical last year? Consistent with previous years?
- Is sepsis a rare diagnosis? Ever diagnosed sepsis caused by Klebsiella? Is Klebsiella gram positive or gram negative? Is Klebsiella sensitive to most antibiotics prescribed for gram negative bacteria?

2. Work as an Expert

- Ask when the deponent started reviewing cases as an expert, and the number of cases reviewed to date. What percentage of these cases is on behalf of the plaintiff, what percent on behalf of defense counsel? How many depositions has the deponent given to date, are these depositions balanced between plaintiff and defendant, and how many times has the deponent testified at trial. Ask whether the deponent has retained any deposition transcripts in the case, or any bills in the case of that

there is information as to the court where the case is pending, the title of the case, and the attorneys involved in the case.

- What does the deponent charge per hour for reviewing cases, and is there a different charge for testifying at trial or at deposition? How much have the bills in this case been so far, what work has been done, and are there any other requests for work outstanding by the attorney who has hired the deponent.
- Has the deponent ever advertised his services as a medical/legal expert? What percentage of the deponent's annual income is derived from medical/legal work? How much income did the witness have as an expert in 2018? 2017?
- Has the deponent previously reviewed other cases for the attorney who has hired him in this case? Have these cases involved a deposition? Have any of these cases going to trial?

3. Work on this Particular Case

- What letters or emails have you received from the attorney that has hired the deponent? What letters or emails have you sent to this attorney? [Mark these letters/emails as a Group Exhibit]
- What materials has the deponent reviewed in the case? [Mark these as exhibits and review them to see if there are any notes on them by the deponent].
- Has the deponent performed for this case any independent literature review during his/her work on this matter? If so, what found [produce them and ask questions about literature] Has the deponent consulted with any other medical practitioners? In addition to the materials already identified, are there any additional materials that the deponent has reviewed that serve as a basis for any of his opinions in this case?
- Does the deponent know any of the physicians that were involved in the care of the plaintiff? The parties in the case?

- How much time has the deponent spent so far in reviewing materials and meeting with the hiring attorney in this case?
4. Opinion in Case/ Standard of Care and Causation
- Were you working as a hospitalist/ID doctor in 2015? During that year, did you diagnose anyone with sepsis? Frequent occurrence at your hospital in 2015? Is it true that in 2015, sepsis was in the top 10 causes of death in the US?
 - Are you familiar with the acronym SIRS? What is it? Are you familiar with the phrase “SIRS positive”? What is it?
 - Are you familiar with the term sepsis? Do you accept Dr. Liu’s definition of it (pp. 20-21)? Is that the same definition you would have used in 2015?
 - Are you familiar with the phrase “severe sepsis”? Do you accept Dr. Liu’s definition of it (p. 107 – indication of organ failure)? Is that the same definition you would have used in 2015?
 - Are you familiar with the term septic shock? Do you accept Dr. Liu’s definition of it? Is that the same definition you would have used in 2015?
 - Are you familiar with the phrase “occult bacteremia”? “occult sepsis”? What is it? [bacteria in the blood without a known source]. Looking back at Mr. Wolfe’s condition, is this something he had? Do you know the percentage of sepsis cases where there is no source found for the bacteria? What is that percentage?
 - What is your understanding as to what bacteria caused Mr. Wolfe’s sepsis? Where is that bacteria found in the body? Do you agree with Dr. Schaefer that Klebsiella is commonly found in a person’s gut? Is the gut readily observable without a laparoscopic exam or laparotomy?
 - As you know from Dr. Liu’s Assessment/Plan on p. 18 of the St. Francis records, his diagnosis of Mr. Wolfe on April 4 was “sepsis of unclear etiology.” He suspected viral illness, but according to his deposition, his secondary differential diagnosis was bacterial infection (p. 48). At

1901, what facts would lead you to think that Mr. Wolfe had a viral infection? What facts would lead you to believe that Mr. Wolfe had a bacterial infection?

- Dr. Northrop on p. 43 of her deposition said that she ordered a CBC to see if Mr. Wolfe's infection was bacterial vs. viral. Remember that? She said that this was a standard order for a fever. Results on p. 86 of chart. Dr. Northrop in her deposition noted that Mr. Wolfe's high neutrophil count indicates a bacterial infection, while a low neutrophil count indicates a viral infection. In his admission note, did Dr. Liu even mention this high neutrophil level? With Dr. Liu failing to document this high neutrophil level, can you state for a fact that he considered this level when deciding that Mr. Wolfe was suffering from a viral illness and not a bacterial illness?
- In your experience, can a bacterial infection cause a drop in a patient's blood pressure as happened to Mr. Wolfe? In your experience, can a viral infection cause a drop in a patient's blood pressure?
- Go through each of the Standard of Care opinions expressed in the other Disclosures – focus on exact opinion, basis for the opinion and any literature support
- Do the same with Causation opinions
- Do the opinions in your Designation marked as Exhibit ____, plus your answers to my questions, contain all your opinions in this case?
- Have you had an adequate opportunity here to explain your opinions?