**Depositions 301: Deposition Horror Stories and How to Prevent Them**

1. **Basics**
   1. **Most Significant Portions of the Rules Governing Depositions**

When an attorney takes a deposition, or oversees the deposition of their client, they are at a critical juncture to acquire the facts that can lead them to win or lose their case. It is the rare opportunity to have a discussion with someone who has relevant facts to the dispute or knows more about an aspect of the case than the lawyers involved. Attorneys should approach a deposition as the critical tool that it is, and they should attend each deposition prepared and with an understanding of the process.

Deposition procedures are codified in both state and federal civil rules. The Kentucky and federal rules that outline deposition procedures are as follows:

Ky CR 30.02

A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

Ky CR 30.03

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rules 43.05 and 43.06. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his or her direction and in his or her presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Rule 30.02(4). If requested by one of the parties, the testimony shall be transcribed at that party's expense.

FRCP 30(b)

(b) Notice of the Deposition; Other Formal Requirements.

(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

In general, questioning proceeds as it might in court, but with no judge and no jury. However, in practice taking a deposition is an art more than a science and some practice is required to make the best of this discovery tool.

* 1. **Objections**

Usually, objections in a deposition are limited to form and privilege. In the case of an objection to form, the question is generally rephrased to eliminate the problem. Only in the case of an objection as a result of privilege should the deponent be instructed not to answer.

Kentucky Rule of Civil Procedure 30.03 states:

Any objection to evidence during a deposition shall be stated concisely and in a nonargumentative and nonsuggestive manner. An attorney may instruct his or her client not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under CR 30.04.

While the Federal Rule differs slightly, the objective is the same:

An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, 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, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

* 1. **Conflicts at the Deposition**

In most cases, conflicts between counsel can be worked out in real time at the deposition. Young attorneys should be aware that judges almost always favor parties working out their differences concerning discovery amongst themselves without need for consultation with the court. A sincere attempt to resolve a discovery dispute between counsel is almost always required to file any motion concerning discovery. Under both the Kentucky Rules of Civil Procedure, CR 30.04, and the Federal Rules, FRCP 30(d), parties may file motions to terminate or limit depositions. Additional motions for problematic deposition behavior can also be filed under CR 37 or FRCP 37 to request sanctions.

In some jurisdictions, it is the rule, either set by official local rule or local custom, to call the judge for consultation during the deposition if a conflict arises. (See, e.g. Local Rule 30-1 in the Southern District of Indiana.)

1. **Special Considerations Concerning Remote Depositions**
   1. **Choosing Which Deponents Can Testify on Video**

While theoretically any deponent can testify by remote means, it is perhaps best to specially consider a few points when deciding if this is the best method for a deposition.

* Where is the deponent located relative to the attorneys?
* Is the deponent or any other participant in poor or questionable health?
* How technologically adept is the deponent? Or what support or resources can be provided to assist the deponent?
* Does the deposition need to be recorded on video?

It is the policy of a lot of practitioners that parties should not testify remotely, if possible. Parties are generally unsophisticated and not well versed in the use of the technology, causing technical problems during the deposition itself. They are also more prone to take the deposition lightly if they are remote in their homes and often allow others to walk in and out of the room and sometimes even try to consult others during the deposition. While each attorney’s style is different, some attorneys build a rapport with an adverse party during a deposition in an effort to negate hostility and to have a more fruitful discussion. This can be more difficult to accomplish remotely and attorneys should take their communication style into consideration when deciding whether to take a deposition remotely.

On the other hand, a lot of attorneys have no problem allowing so-called professional witnesses, doctors, engineers, and other hired experts, to testify remotely. Professional witnesses are typically used to the deposition procedure, and they will testify to the facts that they have prepared in their expert report regardless of the rapport that an attorney builds with them. These witnesses are often very well versed in the technology and remote depositions in these situations can save time and money.

* 1. **Videotaped Video Depositions**

Depositions conducted via remote means can be easily recorded, creating a video of the deposition. However, under the Kentucky Civil Rules, video depositions are required to be taken under a set of exacting conditions in order to be admissible for later use at trial. See CR 30.02(4). For this reason, it is likely not sufficient to simply click record on the remote platform. *See, Alcorn v. Chicago*, 336 F.R.D. 440 (N.D. Ill. Aug. 20, 2020).