



Taking and Defending
Depositions for Ohio New
Lawyer Training, April 22, 2019

Phil Eckenrode

Depositions

Agenda

1. Nuts and bolts of noticing a deposition
2. Scope of deposition
3. Use of deposition testimony in later proceedings
4. Best practices for taking depositions
5. Best practices for defending depositions

Ohio Supreme Court

“If there is one area of the practice of law that consistently gives rise to an inordinate number of complaints about lack of professionalism, it is the area of depositions. Depositions, of course, are an extremely important and valuable component of our adversary system, but, if abused and mishandled, they can engender unnecessary and costly strife that impedes and undercuts the entire process.” – Ohio Supreme Court, Professionalism Dos & Don’ts

Depositions – Ohio Civil Rule 30

“After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination.” Ohio R. Civ. P. 30(A).

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, STATE OF OHIO

KIMBERLY YOUNG, Individually	:	
and as Administrator of the Estate of	:	
Willie C. Young, deceased.	:	
	:	
Plaintiff,	:	Case No. 13CV009888
	:	
v.	:	Judge R. Sheward
	:	
THE RAYMOND CORPORATION,	:	
RAYMOND STORAGE CONCEPTS, INC.	:	
and RAYMOND STORAGE CONCEPTS,	:	
LLC,	:	
	:	
Defendants.	:	

**AMENDED NOTICE OF VIDEOTAPED CORPORATE 30(B)(5) DEPOSITION OF
DEFENDANT THE RAYMOND CORPORATION**

PLEASE TAKE NOTICE, pursuant to Rule 30 (B) (5), that the undersigned will take the testimony of a corporate designee(s) on behalf of The Raymond Corporation, on April 22 – 23, 2015, beginning at 9:00 a.m. at the offices of Czerenda Court Reporting, 71 State Street, Suite 2, Binghamton, NY 13901.

Deposition Notice

- Typically not filed with the court unless local rule requires; just exchanged among counsel.
- Why would anyone file them?
- How do you set the date and time to take the deposition?

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THE RAYMOND CORPORATION, RAYMOND STORAGE CONCEPTS, INC. and RAYMOND STORAGE CONCEPTS, LLC,	:
	:
Defendants.	:
<p style="text-align: center;"><u>AMENDED NOTICE OF VIDEOTAPED CORPORATE 30(B)(5) DEPOSITION OF DEFENDANT THE RAYMOND CORPORATION</u></p> <p>PLEASE TAKE NOTICE, pursuant to Rule 30 (B) (5), that the undersigned will take the testimony of a corporate designee(s) on behalf of The Raymond Corporation, on April 22 – 23, 2015, beginning at 9:00 a.m. at the offices of Czerenda Court Reporting, 71 State Street, Suite 2, Binghamton, NY 13901.</p>	

Deposition Notice

“Cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time, and place. Then send out a notice reflecting the agreed upon date.” – Ohio Supreme Court Dos & Don’ts

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Deposition Notice

- As a matter of professionalism, typically take the deposition on “their” territory at a time most convenient for “them.”
- Court reporter/videographer logistics; must note matter of transcription other than stenographic!
- Find a favorite court reporter.
- Check Local Rules!

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30(B)(5) Deposition Notice

- When taking deposition of a corporate entity, must specifically designate the topics to be covered, and the corporation designates who their 30(B)(5) witness will be.
- Another point of professionalism: this should not be a surprise!

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Deposition Notice

- Uniform Interstate Depositions and Discovery Act (Ohio Rev. Code 2319.09)
- Allows for easy domestication of foreign subpoenas and discovery orders
- Transforms a foreign jurisdiction (another state) subpoena into an “Ohio subpoena” for service and enforcement in Ohio
- Ohio practitioners can use similar statutes in other states, now that Ohio has adopted

Depositions

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Scope of Deposition

Ohio Rule 26(B) Scope of discovery.

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

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Scope of Deposition

“The concept of relevancy as it applies to discovery is not to limit it to the issues in the case, but to the subject matter of the action, which is a broader concept.” *Dennis v. State Farm Ins. Co.*, 143 Ohio App.3d 196, 204 (7th Dist. 2001) (citations omitted).

Complaint for breach of contract later amended to add fraud claims.

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Use of Depositions in Later Proceedings

Ohio Rule 32(A) – Use of Depositions in Court Proceedings

Any part or all of a deposition, so long as it were admissible if they were testifying live, can be used:

- (1) By any part for the purpose of contradicting or impeaching the testimony of deponent as a witness (*see also* Ohio Evidence Rules 801, 804);
- (2) 30(B)(5) deposition can be used by an adverse party for any purpose;
- (3) Deposition can be used if (a) witness is dead; (b) witness is beyond subpoena power of the court or resides outside of the county in which the action is pending; (c) witness unable to attend because of sickness, infirmity, or imprisonment; (d) party has been unable to procure testimony by subpoena; (e-g).

Use of Depositions in Later Proceedings

**TRANSCRIPT MUST BE FILED
AT LEAST ONE DAY BEFORE
THE TRIAL OR HEARING!**

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Taking Depositions – Best Practices

Zealous advocacy v. professionalism

“The purpose of a deposition is to probe the mind of the deponent, not to elicit self-serving answers from counsel.”
Shimola v. Nationwide Ins. Co., Ohio 8th Dist. Nos. 48772, 49372 (1985).

Taking Depositions – Best Practices

First, some initial questions:

- Who is the witness? Hostile or not? Party or not? Neutral or not?
- What is the purpose of the deposition? Fact-finding? Locking in testimony?
- What stage of discovery are you in? Early, with few documents and other depositions? On the eve of trial?

Taking Depositions – Best Practices

Preparing Logistics:

- Did you schedule a court reporter?
- Did you schedule a conference room?
- Did you follow-up with opposing counsel a few days before and confirm?
- Did you make copies of all of your exhibits (original, opposing counsel, your client)? Pre-mark all originals with **blank** stickers.

Taking Depositions – Best Practices

Introduction:

- Lay the ground rules
 - Copy of Notice of Deposition (first exhibit)
 - You are here voluntarily
 - On any medication or under the influence of any substance
 - Take a break at any time other than when a question is pending
 - If you don't understand one of my questions, ask me to clarify
- Set the tone! Admittedly subjective.

Taking Depositions – Best Practices

Asking the Questions:

- Outlines are key!
 - Prepare it from the perspective of thinking what you want the deposition to accomplish.
 - What are the key points you hope to get out of this?
- But don't be married to your outline!

Taking Depositions – Best Practices

OUTLINE FOR DEPOSITION OF JOE SMITH

Key Points to Elicit

1. Smith was at the April 23, 2017 sales meeting in Orlando, FL
2. Smith was not present at the follow-up meeting in Nashville, TN on May 17, 2017
3. Smith deferred decisions related to personnel hiring to his supervisor, Michelle Jones
4. Smith made recommendation to Jones to terminate Stephanie Jordan
5. Since Jordan's termination, Smith has been promoted twice and is making \$100K more in salary

Taking Depositions – Best Practices

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Taking Depositions – Best Practices

Asking the Questions:

- Ease witness in at the beginning; don't attack
- Make sure everything important is on the record, even if you have to read it in
- Don't be afraid of awkward silence
- Listen for intonation clues that might suggest unsaid answers
- Don't be afraid to skip around

Taking Depositions – Best Practices

Asking the Questions:

- Remember your court reporter friend
- ***Always*** remember the purpose of the deposition

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Defending Depositions – Best Practices



“I ask the witness to quit taking advantage of the fact that his deposition is not being videotaped.”

Defending Depositions – Best Practices

Before the Deposition:

- Make sure noticed time/place works for your client
- Set time limit with opposing counsel ahead of time; indicate any “hard stop” deadlines
- Meet with your witness ahead of time

Defending Depositions – Best Practices

Tips for your Witness:

- You will not win the case for us! It's baseball.
- Not their goal to prove the case, but rather to tell the truth, avoid irrelevant commentary, and avoid contradicting anything you might say at trial.
- Tell the truth!
- There 5 correct answers: (1) Yes; (2) No; (3) I don't recall; (4) I don't know; or (5) I don't understand your question.

Defending Depositions – Best Practices

Tips for your Witness:

- Take your time before answering – this serves two purposes
- Only answer the question you are asked, not the 2 or 3 questions you think will be coming next
- Don't help an unprepared lawyer
- Watch the intonation in your voice when you answer
- Don't guess or speculate
- Give accurate estimates

Defending Depositions – Best Practices

Tips for your Witness:

- Listen for compound questions and break them out appropriately
- Don't let the opposing counsel misconstrue your prior testimony
- Be careful of alternative questions – there may be other answers!
- Answer concisely (but don't be an idiot)
- Don't explain your answer
- Don't volunteer information not asked
- Don't joke!

Defending Depositions – Best Practices

Tips for your Witness:

- Beware of “Have you told me everything?”
- Prepare for wide latitude on the scope of the questions
- Listen for your lawyer’s objections
- Review documents carefully
- Don’t be combative (*see Office of Disciplinary Counsel v. Levin*, 35 Ohio St.3d 4 (1988)).

Defending Depositions – Best Practices

Tips for You:

- Be judicious with the use of objections (use continuing objections when necessary)
- Note items for the record if necessary
- Always say “we will read.” Civ. R. 30(E).