CHAPTER 7

Uses of Depositions

There are a variety of ways to use a deposition. You should plan in advance your intended use, as that may affect your approach during the course of the deposition. You also should consult the rules of evidence and civil procedure, as those rules govern the uses to which deposition testimony may be put.

A. Use With Motions

One extremely effective use of depositions is as evidence in support of motions, particularly summary judgment motions.[153] Depositions are sworn testimony and contain the words of the deponent rather than the attorney. This makes them particularly persuasive.

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[153] Rule 56 of the Federal Rules of Civil Procedure specifically contemplates the use of deposition testimony in connection with summary judgment motions. Admissibility of the testimony contained in the deposition is subject to the rules of evidence in the same way that the rules govern admissibility of allegations contained in an affidavit. *Cf.* Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1555 (10th Cir. 1995) (hearsay testimony contained in deposition inadmissible to support or oppose summary judgment).

You may use deposition excerpts both in support of and in opposition to summary judgment motions. In support of such a motion, deposition testimony may provide evidence to prove the elements of a claim or defense. In defense against a motion, you may use deposition testimony to refute a factual allegation or to prove the existence of a factual dispute.[154] Mechanically, you simply attach the excerpt to an affidavit that identifies and authenticates the deposition.[155]

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[154] If you have pinned down a witness in a deposition and the witness subsequently submits an affidavit containing contrary testimony in connection with a summary judgment motion, the deposition testimony prevails and the affidavit testimony is disregarded. *See* Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703 (3d Cir. 1988); Wilson v. Westinghouse Elec. Corp., 838 F.2d 286, 289 (8th Cir. 1988); Marathon Ashland Petroleum v. Int'l Bhd. of Teamsters Local No. 120, 300 F.3d 945, 951 (8th Cir. 2002). Some courts and commentators have described this as the "sham affidavit" doctrine. *See, e.g.*, Malave-Torres v. Cusido, 919 F. Supp. 2d 198 (M.D. Ga. 1987); David F. Johnson & Joseph P. Regan, *The Competency of the Sham Affidavit as Summary Judgment Proof in Texas*, 40 ST. MARY'S L.J. 2005 (2008).

Some cases have cited *Videon Chevrolet, Inc. v. Gen. Motors Corp.*, 992 F.2d 482, 488 (3d Cir. 1993), to distinguish the facts of their case from those of *Martin*. For example, *Wise Invs., Inc. v. Bracy Contracting, Inc.*, 232 F. Supp. 2d 390 (E.D. Pa. 2002), distinguished *Martin* as involving a factual question (date medication was ingested), and cited *Videon* for the proposition that "judicial estoppel should not apply where a party most likely was confused or did not intend to address an ultimate legal issue such as the characterization of a surcharge." *Id.* at 401. Similarly, *Armour v. County of Beaver*, 271 F.3d 417 (3d Cir. 2001), cited *Videon* as standing for the proposition that *Martin* only applies in the "extreme circumstances" where the affidavit is "flatly contradictory" and contains "no explanation for her change in position." *Armour*, 271 F.3d at 431, n.5. The *Armour* court then identified an explanation for the discrepancy in testimony that could have been accepted by the fact-finder. *Id.*

In re Safeguard Scientifics, 2004 WL 2644393, at *2 (E.D. Pa. 2004), contains a succinct explanation of the two different types of affidavits involved in these cases, and *Pittman v. Atlantic Realty Co.*, 754 A.2d 1030 (Md. 2000), contains a list of the factors to be considered "[i]n distinguishing between a sham affidavit . . . and a correcting or clarifying affidavit." *Id.* at 1042; *see also* Cothran v. Brow, 592 S.E.2d 629, 633 (S.C. 2004) (listing the factors as: "(1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted"). The holding in *Pittman* has been superseded by state rule in Maryland. *See* Marcantonio v. Moen, 959 A.2d 764, 772 (Md. Ct. App. 2008). *Pittman's* discussion of sham affidavits, however, is still useful.

If you anticipate before taking a deposition that you may use it in conjunction with a motion, you should try to organize and phrase your questions in a way that will provide you with a crisp and orderly excerpt. Some questions you may want to script in advance.

Additionally, do not overlook the opportunity cross-examination may provide. If the witness is your own, the witness probably will be available to provide an affidavit if necessary. However, because depositions are in the witness's own words, while affidavits typically are drafted by attorneys, the testimony may appear more compelling when in a deposition. On the other hand, such cross-examination may tip your hand and invite additional questioning from opposing counsel. In the end, you must make a judgment call about whether cross-examination will quickly and cleanly provide evidence for use in connection with motions or will open the door to additional questioning that may not be advantageous to your case or that may muddy the record in a way that may defeat a summary judgment motion. Generally speaking, this weighing of the pros and cons may persuade you to forego using cross-examination in an attempt to support a summary judgment motion, but cross-examination may be an effective tool to defeat a summary judgment motion.

B. Use at Trial

In addition to being an extremely useful trial preparation tool, a deposition may be used a number of ways at the trial itself. Following are some of the situations in which you may use a deposition in a trial setting, along with procedural suggestions.

1. Deposition Testimony as Substantive Evidence

Deposition testimony may be used as substantive evidence at trial if the witness is unavailable and the deposition qualifies as former testimony under Fed. R. Evid. 804(b)(1), or if the deposition contains the admissions of a party opponent under Fed. R. Evid. 801(d)(2), or if the witness testifies at trial and the

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[155] *See* FED. R. CIV. P. 56(e); *see also* Stuart v. Gen. Motors Corp., 217 F.3d 621, 635 n.20 (8th Cir. 2000).

deposition testimony qualifies as a prior inconsistent statement of the witness under Fed. R. Evid. 801(d)(1)(A).

a. Witness Unavailable

If a witness is unavailable to testify live at trial, you may use the witness's deposition testimony as if the witness were present and testifying so long as the testimony offered is otherwise admissible under the rules of evidence and so long as certain procedural requirements are met.[156] Under Rule 32(a)(4) of the Federal Rules of Civil Procedure, a witness is unavailable for purposes of substituting deposition testimony if the witness is dead, the witness is more than 100 miles away, the witness is unable to testify live because of age, illness, infirmity or imprisonment, or the party has been unable to procure the witness's attendance by subpoena.[157] Even if the witness's deposition was noticed by another party, you may offer the deposition at trial as if you noticed it yourself.[158] Depositions taken in connection with other actions also may be offered if the witness is unavailable and if the party against whom the deposition is offered was present at the

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[156] *See* FED. R. CIV. P. 32. Parties may even be able to take their own depositions to preserve testimony for trial. This typically arises when parties realize in advance that they will not be available for trial. *See, e.g.*, Richmond v. Brooks, 227 F.2d 490 (2d Cir. 1955) (plaintiff allowed to offer her own deposition at trial against former husband); Chandler v. Scott, 427 S.W.2d 759 (Mo. Ct. App. 1968) (U.S. Marine on active duty in Vietnam had right to take his own deposition to be used as evidence in divorce suit filed by Marine against his wife). Such a deposition may be taken via a Rule 31 written deposition, as described in Chapter 8.

[157] *See also* FED. R. EVID. 804(a)(4), 804(a)(5); FED. R. CIV. P. 32(a)(4). Rule 32(a)(4) also contains a good cause exception, under which a party can apply to the court to allow deposition testimony to be used when "exceptional circumstances make it desirable-in the interest of justice and with due regard to the importance of live testimony in open court-to permit the deposition to be used." Live testimony is strongly favored, however, *see* Loinaz v. EG&G, Inc., 910 F.2d 1, 8 (1st Cir. 1990), and courts read this exception restrictively, *see, e.g.*, Griman v. Makousky, 76 F.3d 151, 153 (7th Cir. 1996). Note, of course, that even though "admission of deposition testimony as evidence under Fed. R. Civ.P. 32(a) is dependent upon meeting the requirements of the rules of evidence . . . the reverse is [not] true." Long Island Sav. Bank, F.S.B. v. United States, 63 Fed. Cl. 157, 163-64 (2004).

[158] *See* Savoie v. Lafourche Boat Rentals, Inc., 627 F.2d 722, 724 (5th Cir. 1980); Nichols v. Am. Risk Mgmt., Inc, 2000 WL 97282 (S.D.N.Y. Jan. 28, 2000) (party may use expert deposition of settling party against remaining opposing party); Weiss v. Wayes, 132 F.R.D. 152, 154 (M.D. Pa. 1990).

deposition and had a similar motive at that time to examine or cross-examine the witness.[159] Note, however, that you cannot use the deposition of a deponent who is unavailable at trial because you procured that witness's absence, although you may be estopped from objecting to the other side's use of the deposition.

If you think you may use a deposition in place of live testimony at trial, you need to be vigilant about meticulously following all procedural requirements when you notice and take a deposition. Otherwise, you risk losing the ability to use the deposition at trial even if the deposition goes forward in the face of an objection.[160] Similarly, if potentially valid objections are raised to the form of your questions, it is prudent to re-phrase; if the judge sustains the objection at trial, the opportunity to re-phrase no longer exists.

You also must meticulously follow certain pretrial procedures if you intend to use a deposition at trial. First, as part of your pretrial disclosures, you must designate all testimony you intend to present in the form of deposition rather than live witness testimony.[161] Your disclosure must identify not only the witnesses you intend to present through deposition testimony, but the specific

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[159] FED. R. EVID. 804(b)(1); *see, e.g.*, In re Beiswenger Enters. Corp. v. Carletta, 46 F. Supp. 2d 1297, 1299 (M.D. Fla. 1999); Leger v. Tex, EMS Corp., 18 F. Supp. 2d 690, 694 (S.D. Tex. 1998).

[160] *See, e.g.*, FED. R. CIV. P. 32(a)(5):

> (A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place--and this motion was still pending when the deposition was taken.
> (B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii)must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

See also Lauson v. Stop-N-Go Foods, Inc., 133 F.R.D. 92, 94-95 (W.D.N.Y. 1990).

[161] FED. R. CIV. P. 26(a)(3)(A)(ii).

passages you intend to introduce.[162] If the deposition was recorded other than stenographically, you must provide a transcript of your selected excerpts.[163]

Generally, a pretrial order will specify the sequence and timing of deposition disclosures. If not, however, keep in mind that the pretrial disclosure requirements are not triggered by request or demand but are required automatically under the federal rules,[164] and must be in writing, signed, served on all parties and filed with the court unless local rules or a court order directs otherwise.[165] If you do not properly disclose the deposition testimony you intend to use, you may be precluded from introducing it at trial.[166]

As a practical matter, you should seek rulings in advance on all objections to the testimony you intend to offer through deposition. That way, you can introduce it at trial without the distraction of objection interruptions.

At the trial itself, the deposition testimony is accepted as if the witness were present, subject to the same evidentiary objections that would apply were the testimony live.[167] When you present the testimony, it generally is most effective to have another person "act" as the witness, unless you are using a video deposition.[168] The person reading the part of the witness will take the witness stand, although the person will not be sworn. If possible, have a stand-in who is

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[162] As you select your deposition passages, you should be mindful of the right of the opposing party to require you also to offer portions of the deposition that, in fairness, should be offered with the portion you intend to introduce. *See* FED. R. CIV. P. 32(a)(6).

[163] FED. R. CIV. P. 26(a)(3)(A)(ii).

[164] *See* FED. R. CIV. P. 26(a)(3).

[165] FED. R. CIV. P. 26(a)(3)(A), 26(a)(4).

[166] *See* Advisory Committee Note to 1993 Amendment, FED. R. CIV. P. 26.

[167] FED. R. CIV. P. 32(b). As discussed in Chapter 4, however, certain objections will be deemed waived if not presented initially at the deposition itself. FED. R. CIV. P. 32(b), (d)(3).

[168] The Federal Rules allow a party to offer deposition testimony in stenographic or nonstenographic form, but if the trial is before a jury, any party may require that the testimony be presented in nonstenographic form, unless it is offered for impeachment or the court orders otherwise for good cause. FED. R. CIV. P. 32(c). Any party offering testimony in nonstenographic form must provide the court with a transcript of the portions offered. *Id.*

the same gender and approximate age as the deponent and who presents an image or demeanor that corresponds to the image you want the jury to have of the real deponent. Then read the questions you have marked, word-for-word, and have the witness read the answers, word-for-word. The person standing in as the witness may use normal inflections, which is one of the advantages of proceeding in this way, but the stand-in witness should not be overly dramatic (except in those unusual instances in which the real deponent was dramatic), or you will draw an objection and perhaps lose your opportunity to have someone read the witness's responses.[169]

If you anticipate at the time you notice a deposition that you may want or need to use it at trial as substantive evidence, you should consider the pros and cons of having it videotaped. While your initial inclination may be to have it videotaped, we do not necessarily recommend it. Deposition videos are not the kind of high quality video jurors are used to seeing, and they do not show a complete picture of the deposition room. In fact, the videos frequently are scratchy, they do not show you as the questioner, and the sound picks up the rustling of papers. The view of the witness will show him or her taking exhibits from someone's hands but without a full view, and there will be pauses as the witness reviews documents. All of this can add up to a distracting and not very persuasive presentation for the jury. Therefore, if the deponent is a good witness for you, it may be more effective to recreate the testimony with a stand-in witness than to present it through videotape. On the other hand, there may be situations in which the deponent is not a very appealing witness, and it is advantageous for the jury to see the real person in the real deposition. If you do use a video deposition at trial, you should produce an edited copy containing only the portions that you have been allowed to offer. Fast forwarding to relevant parts – even if done with pinpoint accuracy – tries everyone's patience and risks compromising the persuasive impact of the testimony.

If you are the party against whom deposition testimony is being presented, you also must be mindful of certain procedural requirements or you will waive your right to present otherwise valid objections.

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[169] Some lawyers hire a real actor to play the part of the witness. This is perfectly acceptable so long as the actor understands that this is not an opportunity to secure an Oscar nomination.

- Be careful to preserve your rights at the time of the deposition itself. Generally speaking, objections to questions or to procedural irregularities that if timely made would allow the other party to cure the defect, are deemed waived at trial if not made on the record at the deposition itself. [170] For example, objections to the form of the question, such as an objection to leading the witness, are waived if not made or otherwise preserved at the deposition itself.[171]

- Within 14 days of a party's pretrial disclosure of intent to use deposition testimony, you must serve and file your objections to such use. [172] You should include in this filing your designation of any additional portions of the deposition that you believe in fairness should be considered together with the part the offering party proposes to introduce. [173] In this way, if the offering party proposes to take passages out of context, you need not wait until cross examination to introduce testimony that provides a more accurate depiction of the witness's intent.[174]

- Unless the court rules in advance on objections to specific deposition questions, you must renew the objections at trial or they will be deemed waived.[175]

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[170] *SEE* FED. R. CIV. P. 32(d).

[171] *See* FED. R. CIV. P. 32(d)(3)(B)(i); *see also* Boyd v. Univ. of Md. Med. Sys., 173 F.R.D. 143, 147 n.8 (D. Md. 1997) (listing ten most common objections to form of question).

[172] FED. R. CIV. P. 26(a)(3)(B).

[173] *See* FED. R. CIV. P. 32(a)(6).

[174] *See* FED. R. EVID . 106; Trepel v. Roadway Express, Inc., 194 F.3d 708, 718-19 (6th Cir. 1999).

[175] *See* Advisory Committee Note to 1993 Amendment to Rule 26 of the Federal Rules of Civil Procedure.

b. Admissions of Party Opponent

You may use as substantive evidence depositions that contain admissions of a party opponent even though the deponent in such cases generally is in attendance at trial.[176] This applies to officers, directors and managing agents of a party organization, as well as to persons designated to testify on behalf of the organization.[177] The rule also applies to co-defendants with adverse interests. When using a deposition in this way, you typically will use a very brief passage, which you should reproduce for use as an exhibit.

c. Prior Inconsistent Statement

If a witness's trial testimony is inconsistent with the witness's deposition testimony, you may offer that portion of the deposition as substantive evidence at trial.[178] In such a situation, you need not have disclosed in advance of trial your intent to use the deposition.[179]

2. Deposition for Impeachment

Any party may use deposition testimony to impeach a witness when the witness's trial testimony contradicts the witness's deposition testimony.[180] Pretrial disclosure of your intent to use a deposition is not required when its use is solely

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[176] FED. R. CIV. P. 32(a)(3) ("An adverse party . . . may use for any purpose the deposition of a party . . ."); *see also* FED. R. EVID. 801(d)(2). Be mindful that you also may use a deposition from a previous case. One attorney did this, for example, to show a plaintiff's ever-changing account of why he was fired.

[177] FED. R. CIV. P. 32(a)(3).

[178] FED. R. EVID. 801(d)(1).

[179] *See* FED. R. CIV. P. 26(a)(3) (pretrial disclosures need not include evidence used solely for impeachment).

[180] *See* FED. R. CIV. P. 32(a)(2); *see also* FED. R. EVID. 613. "The credibility of a witness may be attacked by any party, including the party calling the witness." FED. R. EVID. 607.

for impeachment.[181] Follow the rules relating to impeachment and use the transcript as you would any other writing.

Example:

Q: *Ms. Smith, you said you fired Mr. Jones because you discovered he falsified information on his resume?*

A: *Yes, that's correct.*

Q: *There's no question in your mind that this was the reason you fired Mr. Jones?*

A: *Correct.*

Q: *You gave a deposition in this case, didn't you, Ms. Smith?*

A: *Yes.*

Q: *You attended the deposition with your lawyer, correct?*

A: *Yes.*

Q: *And you took an oath to tell the truth at the deposition, just as you took an oath to tell the truth today?*

A: *Yes.*

Q: *You did tell the truth at the deposition, didn't you?*

A: *Yes, I did.*

Q: *After the deposition, you had an opportunity to read your testimony to make sure it was accurate, didn't you?*

A: *Yes.*

Q: *And you, in fact, signed a statement verifying that the testimony as transcribed by the court reporter was accurate?*

A: *Yes.*

Q: *It is now a year-and-a-half since Mr. Jones was fired, isn't it?*

A: *Yes, approximately.*

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[181] FED. R. CIV. P. 26(a)(3). You may need to be a bit cautious, however, as courts apply different interpretations of the "solely for impeachment" requirement. *See generally* Hayes v. Cha, 338 F. Supp. 2d 470, 503-05 (D.N.J. 2004); Halbasch v. Med-Data, Inc., 192 F.R.D. 641, 648-50 (D. Or. 2000).

Q: *Your deposition was taken just six months after Mr. Jones was fired, wasn't it?*
A: *I suppose it was about six months.*
Q: *Your Honor, may I approach the witness? [Permission granted.] I am going to read from your deposition beginning on page 35, line 6. Please follow along while I read:*
Q: *Why did you fire Mr. Jones?*
A: *Because the quality of his work failed to meet my standards.*
Q: *Is there any other reason why you fired Mr. Jones?*
A: *No.*
Q: *Did I read the deposition transcript correctly?*
A: *Yes.*

3. Deposition to Refresh Recollection and as Past Recollection Recorded

A deposition transcript, when properly annotated for quick reference, is useful at trial as a tool for refreshing the recollection of a witness.[182] You can use a deposition transcript for this purpose in the same way you would use any other writing to refresh recollection. Similarly, a transcript may be used as a past recollection recorded if the witness was also the deponent and viewing the excerpted portion of relevant deposition testimony fails to refresh the witness's recollection.[183] Used in this way, you may read the relevant excerpt into the record, but may not offer the transcript as an exhibit.[184]

[182] *See* FED. R. EVID. 612.

[183] *See* FED. R. EVID. 803(5).

[184] *Id.*

C. Use in Settlement Negotiations

A less formal but extremely effective use of deposition testimony is in settlement negotiations. Do not be shy about citing and quoting particularly useful passages. Most cases settle, and they will settle more favorably if the opposing party is aware of the strength of your case and the weakness of their own. Do not make the mistake of assuming you need not cite your devastating deposition testimony because opposing counsel was present at the time. Sometimes the golden nuggets are buried in the middle of not terribly illuminating testimony and will have gone unrecognized or overlooked by opposing counsel; sometimes lead counsel for the opposing party will be unaware of the golden nuggets because less senior co-counsel will have been present and not have fully briefed lead counsel for the case; and sometimes it assists settlement negotiations if the opposing *party* understands that you have obtained helpful deposition testimony and that you know how to use it.

Uses of Deposition Testimony

- Evidence supporting a motion
- Testimony of unavailable witness
- Admission of party opponent
- Refresh witness's recollection
- Impeachment
- Settlement negotiations

In addition to the usefulness of citing favorable deposition testimony in written settlement offers, it is extremely useful to use such testimony in moderated settlement discussions. If a judge or mediator is overseeing pretrial settlement discussions, be prepared to use especially effective passages to educate the settlement intermediary of the strength of your case.