
FLORIDA, MIDDLE DISTRICT DISCOVERY HANDBOOK (2015)
SECTION II: DEPOSITIONS
[ALL-IN-ONE DOCUMENT]

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FLORIDA, MIDDLE DISTRICT DISCOVERY HANDBOOK | FEDERAL

SECTION II DEPOSITIONS

RULES: A-E

II.A | GENERAL POLICY AND PRACTICE

1 - Scheduling. An attorney is expected to accommodate the schedules of opposing counsel. In doing so, the attorney should normally pre-arrange a deposition with opposing counsel before serving the notice. If this is not possible, counsel may unilaterally notice the deposition while at the same time indicating a willingness to be reasonable about any necessary rescheduling. Rule 30(a)(2)(A), Federal Rules of Civil Procedure, limits each side to no more than ten depositions unless otherwise ordered by the Court. Additionally, Local Rule 3.02 requires the party noticing the deposition to give a minimum of fourteen days' written notice to every other party and the deponent, absent agreement or an order based upon some exigent circumstance. And giving substantially more than fourteen days notice is strongly encouraged. Rule 30(d)(1) limits a deposition to one day of seven hours unless otherwise authorized by the Court or stipulated by the parties. This is generally interpreted to mean seven hours of actual testimony, and does not include time spent for meals, rest, or refreshment.

2 - Persons Who May Attend Depositions. Each attorney may ordinarily be accompanied at the deposition by one representative of each client and, in technical depositions, one or more experts. Business necessity may require substitution for the representative of a party, but this privilege should not be abused. Attorneys may also be accompanied by records custodians, paralegals, secretaries, and the like, even though they may be called as technical witnesses on such questions as chain of custody, the foundation for the business record rule, or other technical matters. While more than one attorney for each party may attend, only one should question the witness or make objections, absent an agreement to the contrary. Those in attendance should conduct themselves in the manner expected during courtroom proceedings in the presence of a judge. Conduct during depositions should accord with Local Rules 5.03(b)(7), (8), (9), (12), (13), and (16), Middle District of Florida.

3 - Place Where Deposition May Be Taken. Local Rule 3.04(b), Middle District of Florida, provides that a non-resident plaintiff may reasonably expect to be deposed at least once in this district during the discovery stages of the case and that a non-resident defendant who intends to be present in person at trial may be deposed at least once in this district either during discovery in the case or within a week before trial, as the circumstances suggest. A non-resident is defined by Local Rule 3.04(b) as a person residing outside the state of Florida.

4 - Designations by an Organization of Someone to Testify on Its Behalf. In issuing or responding to a properly drawn notice of deposition pursuant to Rule 30(b)(6), Federal Rules of Civil Procedure, counsel should adhere to the following guidelines:

(a) Requested Areas of Testimony. A notice or subpoena to an entity, association, or other organization should accurately and concisely identify the designated area(s) of requested testimony, giving due regard to the nature, business, size, and complexity of the entity being asked to testify.

(b) Designating the Best Person to Testify for the Organization. An entity, association, or other organization responding to a deposition notice or subpoena should make a diligent inquiry to determine the individual(s) best suited to testify.

(c) Reasonable Interpretation Is Required. Both in preparing and in responding to a notice or subpoena to an entity, association, or other organization, a party or witness is expected to interpret the designated area(s) of inquiry in a reasonable manner consistent with the entity's business and operations.

(d) If in Doubt, Clarification Is Appropriate. A responding party or witness, who is unclear about the meaning and intent of any designated area of inquiry, should communicate in a timely manner with the requesting party to clarify the matter so that the deposition may proceed as scheduled. The requesting party is obligated to provide clarification sufficient to permit informed, practical, and efficient identification of the proper witness.

(e) Duty to Prepare Witness. Counsel for the entity should prepare the designated witness so that the witness can provide meaningful information about the designated area(s) of inquiry.

5 - If an Officer Lacks Knowledge. Whenever an officer, director, or managing agent of an entity is served with a deposition notice or subpoena that contemplates testimony on a subject about which the witness lacks knowledge or information, that individual may submit to the noticing party, reasonably before the date noticed for the deposition, an affidavit or declaration under penalty of perjury so stating and identifying a person within the entity, if any, having knowledge of the subject matter. The noticing party should then proceed with the deposition of the officer, director, or managing agent initially noticed or subpoenaed only after careful consideration and for a specific reason, provided to the deponent in writing in advance of the deposition.

6 - Consideration for an Organization's Senior Management. If information is sought from an organization, counsel ordinarily should not seek in the first instance to take the deposition of the organization's senior management if someone else in the organization can be expected to have more direct and firsthand knowledge or information. Depositions are not properly used as a mechanism to inconvenience or distract senior management who may not be immediately involved in the dispute.

II.B | OBJECTIONS

1 - Objection to the Form of the Question. Rule 32(d)(3)(B), Federal Rules of Civil Procedure, provides that an objection to the form of the question is waived unless asserted during the deposition. Many attorneys object by simply stating "I object to the form of the question." This normally suffices because it is usually apparent that the objection is, for example, "leading" or based upon an insufficient or inaccurate foundation. The interrogating attorney has a right to ask the objecting party to state a sufficiently specific objection so that any problem with the question can be understood and, if possible, cured. If the interrogating attorney chooses not to ask for clarification, the objecting attorney should stand on the objection without further elaboration; the objection is preserved.

2 - Instruction That a Witness Not Answer. Occasionally during a deposition, an attorney may instruct a deponent not to answer a question. Rule 30(c)(2), Federal Rules of Civil Procedure, expressly provides that an attorney may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation established by the Court, or to present a motion to show that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party.

The use of the instruction not to answer, absent the limited circumstances set forth in Rule 30(c)(2), Federal Rules of Civil Procedure, is disfavored by the Court. A party or an attorney who improperly instructs a deponent not to answer is subject to the expense and sanction provisions of Rule 37(a)(5).

3 - Attorney-Deponent Conference During Deposition. Except during routine recesses and for purposes of determining the existence of a privilege, an attorney and a deponent should not normally confer during a deposition. Likewise, attorneys should not attempt to prompt a deponent by suggestive or unnecessarily narrative objections.

4 - Attorney-Deponent Communication During a Recess. During a recess, an attorney for a deponent may communicate with the deponent; this communication should be deemed subject to the rules governing the attorney-client privilege. If, as a result of a communication between the deponent and his or her attorney, a decision is made to clarify or correct testimony previously given by the deponent, the deponent or the attorney for the deponent should, promptly upon the resumption of the deposition, bring the clarification or correction to the attention of the examining attorney. The examining attorney should not attempt to inquire into communications between the deponent and the attorney for the deponent that are protected by the attorney-client privilege. The examining attorney may inquire as to the circumstances that led to any clarification or correction, including inquiry into any matter that was used to refresh the deponent's recollection.

5 - Telephone Hearing to Resolve Disputes During Deposition. In unusual circumstances with material and adverse consequences, the parties involved in a deposition may telephone the chambers of the assigned Magistrate Judge for resolution of an intractable dispute that has arisen during the deposition. The Magistrate Judge, if available, will entertain such a request only if all parties are present. This procedure should be employed rarely (and only after counsel have made every effort to resolve the dispute).

II.C | PRODUCTION OF DOCUMENTS AT DEPOSITIONS

1 - Scheduling. Consistent with the requirements of Rules 30 and 34, Federal Rules of Civil Procedure, a party seeking production of documents and other matters from another party in connection with a deposition should schedule the deposition to allow for the production in advance of the deposition.

2 - Option to Adjourn or Proceed. If requested documents that are discoverable are not timely produced prior to the deposition, the party noticing the deposition may either adjourn the deposition until after such documents are produced or, without waiving the right to have access to the documents and to subsequently examine the deponent regarding the documents, proceed with the deposition.

3 - Non-Parties. For non-parties, a subpoena is required to obtain documents or testimony. (see section V)

II.D | NON-STENOGRAPHIC RECORDING OF DEPOSITIONS

Rule 30(b), Federal Rules of Civil Procedure, provides that parties are authorized to record deposition testimony by non-stenographic means without first obtaining permission of the Court or agreement from other counsel. Rule 30(b)(3)(A) states that the party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the Court orders otherwise, the testimony may be recorded by audio, audiovisual, or stenographic means, and the party taking the deposition shall bear the costs of recording. Rule 30(b)(3)(B) allows any party to designate an additional method to record the deponent's testimony so long as prior notice is provided to the deponent and other parties. The additional record or transcript shall be made at the designating party's expense unless the Court orders otherwise.

A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rules 26(a)(3)(A)(ii) and 32(c), Federal Rules of Civil Procedure, if the deposition is later to be offered as evidence at trial or in conjunction with a Rule 56 motion. Objections to the non-stenographic recording of a deposition may be presented to the Court under the provisions of Rule 26(c).

Parties using non-stenographic means to record deposition testimony shall refer to Rule 30(b)(4), Federal Rules of Civil Procedure, for specific procedures to ensure proper recording.

II.E | EXPERTS

1 - Disclosure and Reports of Expert Witnesses. Each party should disclose the identity of prospective retained expert witnesses and provide a complete expert report under Rule 26(a)(2), Federal Rules of Civil Procedure, within the time provided in the Court's Case Management and Scheduling Order (which often adopts the schedule proposed by the parties in the Case Management Report). This includes any expert witness retained by another party (such as a co-defendant's expert) who may be used by the disclosing party. The expert report is not required of a "hybrid" witness, such as a treating physician, who was not specifically retained for the litigation and will provide both fact and expert testimony (though non-retained experts must still be disclosed and are subject to regular document and deposition discovery). The parties are encouraged to communicate openly about all opinions that a treating physician is expected to render in support of a party's case.

Rule 26(b)(4)(C), Federal Rules of Civil Procedure, requires:

Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state: (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.

2 - Scheduling the Deposition. Pursuant to Rule 26(b)(4)(A), Federal Rules of Civil Procedure, a party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 26(a)(2)(B), the deposition shall not be conducted until after the report is provided.

APPENDIX

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