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DEPOSITIONS

- One form of Discovery available under the Court rules to allow parties to the action develop evidence to prove or defend their positions.
- Discovery is broad; Federal Rules of Civil Procedure were specifically liberalized in 1938 to:
 - Narrow issues to actually disputed matters;
 - Obtain evidence for trial; and
 - Obtain information about existence of evidence.

RULES OF CIVIL PROCEDURE

- Discovery is governed by the jurisdiction's Rules of Civil Procedure, typically modeled on the Federal Rules of Civil Procedure (Fed. R. Civ. Pro.).
- Federal Rules of Civil Procedure 26, 27, 30, 31 and 32 cover depositions.
- State Rules generally are modeled on the Federal Rules – numbering differs.
- Rules of Evidence apply to discovery. Federal Rules of Evidence are generally models for state jurisdictions.

GENERAL RULE - DISCOVERY

- Fed. R. Civ. Pro. 26(b)(1)
In General. 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 any other party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and identity and location of persons having knowledge of any discoverable matter. *The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (emphasis added).*

LIMITATIONS ON DISCOVERY

- The Court may limit the number of depositions, the length of the depositions under Rule 30 and the number of requests under Rule 36:
 - Unreasonably cumulative or duplicative or available from another source more convenient or less burdensome;
 - Party seeking discovery had ample prior opportunity to obtain discovery; or
 - The burden or expense outweighs the benefit.
- Protective Orders
 - Available by motion under Fed. R. Civ. Pro. 26(c)
 - Bar or limit discovery – Who applies for the Order??????

METHODS OF DISCOVERY

- Fed. R. Civ. Pro. 26(a)(5)
 - Depositions upon Oral Examination
 - Depositions upon Written Questions
 - Written Interrogatories
 - Production of Documents or Things
 - Permission to Enter upon Land or Other Property (Rule 34 or 45(a)(1)(C) for Inspection or Other Purposes
 - Requests for Admissions
 - Physical and Mental Examinations

DEPOSITIONS – TWO TYPES

1. Testimonial

- Used to Preserve Testimony for Trial for a Potentially Unavailable Witness
- Direct and Cross-Examination

2. Investigatory

- Used to Develop Evidence
- Used to Develop Information Leading to Evidence
- Information May Be Developed and Pursued that Is Inadmissible as Evidence at Trial
- All Information Not Privileged is Discoverable
- There is No Attorney-Expert Privilege
- Attorney Work Product Protection Not Available to an Identified Trial Witness

DEPOSITION PROCESS

- Calling the Deposition
 - Notice of Deposition – Usual for experts and parties (can specify documents)
 - Subpoena – Third parties
 - Subpoena Duces Tecum – Third Parties with specified documents
- Deposition Officer
 - Person Authorized to Administer Oaths
 - Court Reporter - if also a notary public
- Court Reporter/Videographer

DEPOSITION PROCESS (continued)

- One Bite of the Apple (without leave of Court)
- Can be Extended Over Days
- Expert Report Must be Produced Prior to Deposition
- Expert's Work File Available for Review
- Expert's Right to Read, Correct and Sign Transcript

DEPOSITION

THE DIVINE COMEDY - DANTE

- There are many levels of activity occurring simultaneously leading to the satisfaction of:
 - Primary Objectives
 - Secondary Objectives
 - Tertiary Objectives
 - Quaternary Objectives

DEPOSITION - PRIMARY OBJECTIVES

- Gather Information
 - What does the Expert know?
 - What does the Expert NOT know?
- Preserve Testimony
 - Narrow the scope of Expert's testimony
 - Preserve testimony for Expert's impeachment at trial
- Settlement
 - Expose Opposition's weak case
 - Demonstrate Your strong case

DEPOSITION – SECONDARY OBJECTIVES (THE AUDITION)

- Evaluate the Expert - Good or Poor Witness Material
 - Personal Demeanor (including dress)
 - Body Language (in response to questions)
 - Thinking Ability (quick on the feet)
 - Speaking Ability (polished, stumbler, rambler, bologna artist)
 - Honesty and Candor
 - Hot Buttons
- Evaluate Opposing Counsel
 - Reaction to question areas
 - Obstreperous
 - Calm/Cooperative

DEPOSITION – TERTIARY OBJECTIVES

- Test Expert's Responses to:
 - Friendly Approach (Mutt)
 - Hostile/Authoritative Approach (Jeff)
 - Clinical Approach (Nurse Ratched)
- Exhaust the Topic
 - Depth and Breadth of Expert's Knowledge
 - Probe for Expert's Strengths and Weaknesses

DEPOSITION – QUATERNARY OBJECTIVE

- Develop a Strategy for Cross-Examination at Trial Based on the Above Activities

DEPOSITION - THE EXPERT

- CREDIBILITY - IT'S ALL ABOUT YOURS
 - Demeanor
 - ❖ Preparation
 - ❖ Temperament
 - ❖ Confidence
 - Mindset
 - ❖ Maturity
 - ❖ Listen!!!!!!!!!!

DEPOSITION DEFENSE

- Objections
- Instructions not to answer
- Who's your attorney?????
 - Breaks
 - Conferences

DEPOSITION DEFENSE - OBJECTIONS

Two Types

1. Objections that **have to be made** at the deposition (curable error).
2. Objections that **do not have to be made** at the deposition (competency, relevancy, materiality – incurable error).

MUST OBJECTIONS

- Objections that have to be made Fed. R. Civ. Pro. 32(d)(3)(B) (not a complete list):
 - Vague Question – “What’s the annual income?”
 - Ambiguous Question – “How does the market compare?”
 - Unintelligible Question – Question makes no sense.
 - Complex or Confusing Question – Question too involved.
 - Compound Question – “Did you complete an income approach and inspect the property?”
 - Misleading Question – “Have you stopped beating your spouse?”
 - Question Calls for Speculation – “What was the zoning officer thinking when she advised you that rezoning was unlikely?”
 - Lack of Foundation – No basis for asking the question.

MUST OBJECTIONS (continued)

- Unfair Characterization –
 - ❖ Q -“How long did you inspect the property?”
 - ❖ A – “Two Hours.”
 - ❖ Q – “When you ran through the property on your inspection, did you notice?”
- Misstating prior testimony –
 - ❖ Q – “What was the condition of the property when you inspected it?”
 - ❖ A – “It was in average condition.”
 - ❖ Q (fifteen questions later) – “Now Mr. Smith, you testified that the property was in fair condition, . . . ?”
- Question assumes facts not in evidence – Question assumes a fact to which the witness never testified. “Mr. Smith, how does this site’s frontage of 100 feet compare with other sites in the area?” Mr. Smith never testified as to the site’s frontage.

MUST OBJECTIONS (continued)

- Argumentative Question - “You hurried through the property so quickly, weren’t you worried you missed some important features?”
- Question calls for a legal conclusion – “If a zoning variance were applied for, would the proposed use meet the negative and positive criteria?”
- Asked and Answered – Speaks for itself.
- Nonresponsive Answer – Usually made by the interrogator.

INSTRUCTIONS NOT TO ANSWER

- NOT YOUR PROBLEM!!!!!!!!!!!!!!!!!!!!!!
 - If you are instructed not to answer – don't answer; the attorneys will fight it out before the judge.

WHO'S YOUR ATTORNEY??

- NOT THE ONE SITTING NEXT TO YOU!!!
- Breaks – You can ask the inquisitor for a break at any time, but it's his/her call when it happens – usually granted after you answer, if asked mid-question.
- Conferring with Counsel – Not allowed during a question.

YOUR STRATEGY – YOUR ANSWERS

“Your typewriter is your weapon.”

Mrs. Klecka

US Army Intelligence School

Ft. Holabird, Maryland - 1970

- Your answers originate in your report, so write an excellent report.
- Choose your words carefully – Attorneys are wordsmiths.

ANSWER CHECKLIST

- DO:
 - Listen to the question carefully.
 - Pause & Deliberate before you answer.
 - Choose your words carefully.
 - Answer the question “asked,” not the question you “thought was asked.”
 - Ask inquisitor to rephrase the questions *as many times as* necessary.
 - Remember your testimony.
 - BE WARY – “Ms. Jones, you previously stated (said, testified, etc.)”

ANSWER CHECKLIST (continued)

- DO NOT:
 - DO NOT volunteer information.
 - DO NOT be helpful.
 - DO NOT be obstructive.
 - DO NOT lie. Illegal, Immoral and Impractical.
 - DO NOT agree to allow the inquisitor to assume anything from your answers.

CONCLUSION

- Establish and Preserve Your Credibility
 - Know your report.
 - Visit the property before the deposition.
 - Be fresh - Get a good night's sleep!!