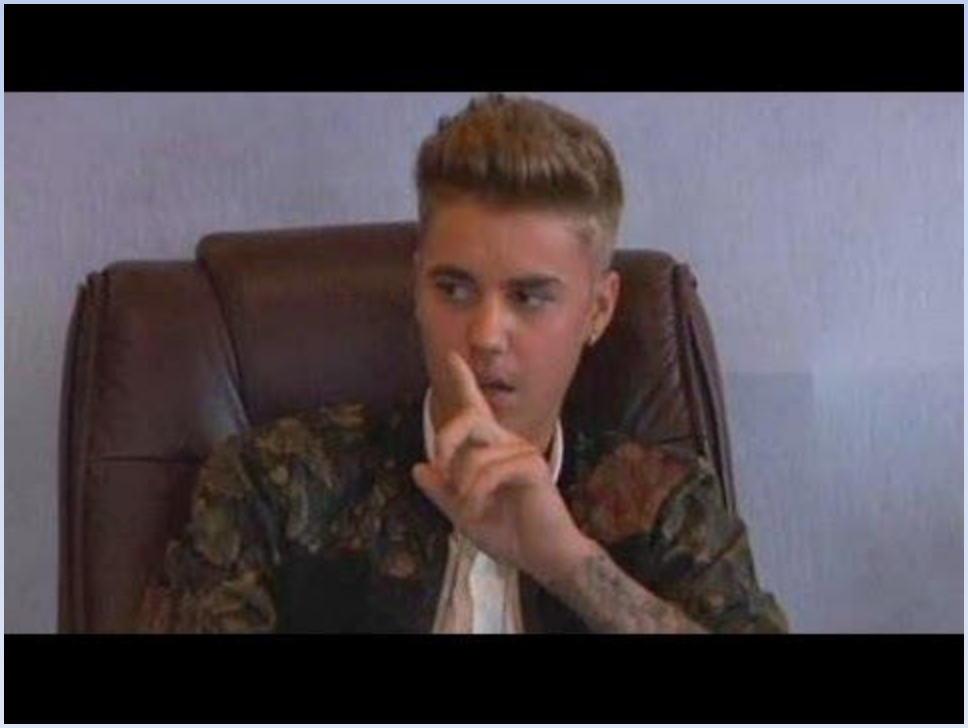
The Dope on Depos: Getting the Answers and Avoiding the Irritants

Group 1



Clearing Time/Place of Depo

- NOTICE:
  - Reasonable notice, stating time and place for depo (Fla. R. Civ. P. 1.310 (b)(1))
  - Reasonable written notice and a good faith effort to coordinate date, time, and location (Fla. R. Crim. P. 3.220(h)(1))
- Guidelines for Professional Conduct, Fla. Bar Trial Lawyers Section, §B and F
  - Provides specific direction on scheduling matters

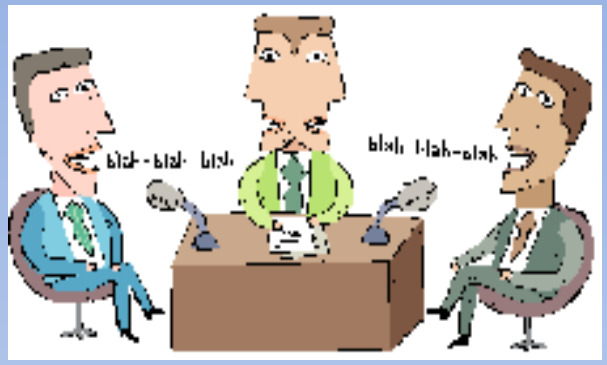
Clearing Time/Place of Depo

- LOCATION:
- Fla. R. Crim P. 3.220 (h) (3): County, where trial held, by agreement of the parties, or court ordered
- Civil:
  - Plaintiff: Forum where action is pending absent good cause (Ormond Beach First Nat'l. Bank v. Montgomery Roof Co., 189 So.2d 239 (Fla. 1st DCA 1966)).
  - Defendant: May not be a great distance or cause substantial expense (Fortune Ins. Co. v. Santelli, 621 So.2d 546 (Fla. 3d DCA 1993))

Speaking Objections

- Fla. R. Civ. P. 1.310 (c): Any objection during a deposition should be stated concisely and in a nonargumentative and nonsuggestive manner.
- Guidelines for Professional Conduct, Fla. Bar Trial Lawyers Section, §E :
  - Most objections are preserved and objections need only be made when the form of the question is defective or privileged information is sought.
  - Give the basis for objection only if requested by opposing counsel.

Speaking Objections



- What is your recourse for improper objections?
  - Fla. R. Civ. P. 1.310 (d): A litigant may terminate a deposition where a lawyer improperly uses speaking objections to prevent meaningful discovery.
  - Sanctions
- Exception: Substantive Objections—Make Them or Waive Them!
  - Clarison Int'l v. Rose, 718 So.2d 210 (Fla. 1st DCA 1998)

Right to Judicial Assistance

- Judicial assistance during a deposition is not guaranteed. Judges can exercise their discretion as they see fit and as their schedule allows.
- Practical tip:
  - Don’t be THAT lawyer - only call the judge as a last resort. If you wouldn’t set the issue for formal hearing before the judge, don’t call.
  - Consider your options and circumstances and inconvenience (or lack thereof) of having to resume the deposition at a later date.

Right to Assistance of Counsel

- Conversations between attorney and witness during recess – Protected?
- Yes – Attorney-client privilege applies to discussions held during deposition recess. The Haskell Co. v. Georgia Pacific Corp., 684 So. 2d 297 (Fla. 5th DCA 1996)

Right to Assistance of Counsel

- Are mid-deposition discussions ethical?
- "Witness coaching is generally treated as unethical…but it is hard to distinguish between ***witness coaching*** and ***legitimate witness preparation***". Florida Bar Journal 2009 Article by Judge Tom Barber

Right to Assistance of Counsel

- Would it “facilitate the discovery of truth’ to prohibit discussions between attorneys and witnesses during depositions?

Right to Assistance of Counsel

- F.S. §90.612, provides in relevant part:
  - "The judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence, so as to: (a) **facilitate**, through effective interrogation and presentation, **the discovery of the truth**; (b) avoid needless consumption of time; (c) protect witnesses from harassment or undue embarrassment."

Instructing Witness Not to Answer

- If an objection on the basis of privilege is raised, an attorney **may** instruct the witness not to answer.
- Fla. R. Civ. P. 1.310 (d): A party may instruct a deponent not to answer only when necessary to preserve a privilege, or to enforce a limitation on evidence directed by a court or a motion to limit examination.

To Suspend, Adjourn, or Terminate

- Fla. R. Civ. P. 1.310(d): Any party seeking to terminate or otherwise limit a deposition must do so by motion to the Court. During a deposition, the party wishing to make such a motion may demand that the deposition be suspended for purpose of bringing the motion before the Court

To Suspend, Adjourn, or Terminate

- Grounds for Terminating a Deposition:
  - Fla. R. Civ. P. 1.310(d):
    - Examination being conducted in bad faith, or in such a manner to unreasonably annoy, embarrass, or oppress the deponent or party; or
    - That objection and instruction to a deponent not to answer a question are being made in violation of rule 1.310(c), Florida Rules of Civil Procedure.
- Beware of fees!
  - Rule 1.380(a) – motion to terminate must be justified and movant must include certificate of good faith attempt.

Expert Payment Problems

- An expert **cannot** refuse to testify when the attorney refuses to pre-pay or agree to the expert's charges. Lyle v. Lyle, 167 So.2d 256, 257 (Fla. 2nd DCA 1964).
- Fla. R. Civ. P. 1.390(c): An expert…whose deposition is taken shall be allowed a …fee in **such reasonable amount as the court may determine**. Any reasonable fee paid to an expert or skilled witness may be taxed as costs.
- Fla. Stat. §92.231(2): any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee.

Expert Payment Problems

- Can’t agree on a fee?
  - Upon specific objection to the setting of an expert witness fee without an evidentiary hearing, the prevailing party will have to present testimony concerning the necessity and reasonableness of the fee;
  - If no specific objection is made, judge has the authority to set the amount of the expert witness fee based upon his experience in the matters together with his observation of the witness' testimony or his review of the record.
  - Lafferty v. Lafferty, 413 So. 2d 170, 171 (Fla. 2d DCA 1982).

Instructing Expert Witness Not to Answer

- General rule: If it is not privileged, witness must answer.
- "We construe these provisions (Fla. R. Civ. P.) to mean that the oral examination of any deponent shall proceed to completion, subject to recorded objections subsequently to be resolved by the court, **and all reasonably relevant questions, leading or otherwise, must be answered unless privileged whether or not such answers themselves, or other evidence toward which they may lead, would be admissible at trial.** Again, the distinction between acquiring evidence and using it must be emphasized toward the end that the rules of discovery are interpreted and applied in light of their well known purposes. Discovering evidence is one thing, admitting it at trial is quite another".
    - Jones v. Seaboard Coast Line R. Co., 297 So. 2d 861, 864 (Fla. 2d DCA 1974)

What about HIPAA?

- 45 C.F.R. §164.512(e): A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
  - (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
  - (ii) In response to a **subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal**, if:
  - (A) The covered entity receives satisfactory assurance…from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
  - (B) The covered entity receives satisfactory assurance….from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of … this section.