USE OF DEPOSITIONS IN FEDERAL COURT

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Federal Rule of Civil Procedure 32 governs the use of depositions in court proceedings. Who may use a deposition and for what purpose will vary depending on the circumstances. Rule 32(a)(1) provides:

> At a hearing or trial, all or part of a deposition may be used against a party on these conditions:
>
> (A) The party was present or represented at the taking of the deposition or had reasonable notice of it;
> (B) It is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
> (C) The use is allowed by Rule 32(a)(2) through (8).

Thus, the use of the deposition must be permitted by both Rule 32 and the Rules of Evidence.

Key Provisions of Rule 32

A deposition may be used by any party to contradict or impeach the testimony given by the deponent as a witness or for any other purpose allowed by the Federal Rules of Evidence. Fed. R. Civ. P. 32(a)(2). This would include refreshing the recollection of a witness at the trial or hearing.

An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4). Fed. R. Civ. P. 32(a)(3). A plaintiff could use an excerpt of the deposition testimony of a defendant's officer, in the plaintiff's case.

A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds the witness is unavailable due to one of several possible grounds. A key provision here is that if the witness is more than 100 miles from the place of hearing or trial, the deposition can be used, even if the person remains employed by a party organization. Fed. R. Civ. P. 32(a)(4). *See also* Fed. R. Civ. P. 45(d)(3) (providing the grounds to quash or modify a subpoena).

If a party offers into evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. Fed. R. Civ. P. 32(a)(6).

Substituting a party does not affect the right to use a deposition previously taken. Fed. R. Civ. P. 32(a)(7). A deposition lawfully taken may be used in a later action involving the same subject matter between the same parties or their representatives or successors in interest. Fed. R. Civ. P. 32(a)(8).

The use of a deposition taken on short notice or where a party could not obtain an attorney may be limited. Fed. R. Civ. P. 32(a)(5).

Rule 32(d) sets forth what objections are waived if not timely made and what objections may be made at a later time. Objections to the notice or the qualifications of the officer taking the deposition are generally waived if not made promptly. Rule 32(d)(1) & (2). An objection to the deponent's competence, or the competence, relevance or materiality of the testimony, is not waived, unless it might have been corrected at the time. Rule 32(d)(3)(A). An objection to an error or irregularity during the deposition is waived, if it relates to the manner of taking the deposition, the form or a question or answer, the oath or affirmation, a party's conduct, or other grounds that might have been corrected at the time, is waived if not timely made during the deposition. Rule 32(d)(3)(B).

Rules of Evidence

When a deposition is used to contradict or impeach a witness while testifying, the proper practice is to elicit the testimony or refer back to the testimony given earlier, lay the foundation for the deposition testimony (by establishing the date the prior testimony was given, that it was under oath, the witness was accompanied by a lawyer, the witness intended to tell the truth, and related foundational questions) and then read aloud the deposition question that was asked and the answer that was given.

Opposing counsel should be notified of the page and line number prior to reading the testimony to the witness, and typically the witness is shown the testimony, though that is not required. *See* Fed. R. Evid. 613(a).

Extrinsic evidence of a prior inconsistent statement is admissible, but only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it. Fed. R. Evid. 613(b). Rule 613(b) does not apply to an opposing party's statement admitted under Rule 801(d)(2). Thus, unless it is an opposing party's statement, the deposition testimony may only be used when the witness is testifying at the hearing or trial.

When using the deposition to refresh a witness's memory, the deposition testimony is not read aloud. The proper practice after a witness claims not to remember is to lay the foundation and then show the witness the relevant deposition testimony for the witness to read it to herself. Opposing counsel should be notified of the page and line numbers. After the witness reads the deposition testimony to herself, then ask if that refreshes the witness's memory or recollection, and, assuming that it does, ask the witness again to answer the question about which she said she could not recall.

A party may offer in its case-in-chief a portion of the deposition testimony given by the opposing party or the opposing party's representative. It is not necessary to call the opposing party or the corporate representative to testify; it is sufficient, and may be more effective, to play the video of that person's deposition or to have a person standing in to read the answers while counsel asks the questions from the deposition. *See* Fed. R. Evid. 801(d)(2).

A party, most likely a corporate party, may introduce testimony from its own witnesses. Fed. R. Evid. 804(b)(1). Former testimony is not excluded by the hearsay rule if the declarant is unavailable as a witness. Testimony given at a "lawful deposition" in a current or different proceeding that "is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination," is not excluded by the hearsay rule. Thus, a corporation may introduce the deposition testimony of its former employee or even an employee who cannot be subpoenaed to trial. This raises the question whether counsel should ask questions at the deposition of their client's witness, where traditionally counsel would refrain from asking questions.

Local Rules

If a party intends to use deposition testimony in its case-in-chief, this must be addressed in the final pretrial statements. Local Rule 16.2(a)(4) requires a list of all depositions which may be read into evidence, with page/line designations filed ten (10) days prior to trial, counter-designations filed five (5) days prior to trial, and objections filed two (2) days prior to trial. Counsel should consult Rule 32(d), which sets forth what objections are waived if not timely made.