DEPOSITION PRACTICE

FOR MAGISTRATE JUDGE DAVID E. JONES

The following guidance is provided to counsel to assist them in understanding the Court's views on various issues that arise in depositions. The parties are free to discuss any desired deviations from or additions to this guidance during the Rule 16 conference or thereafter as discovery progresses.

1. *Place of deposition*

   The parties are free to negotiate where they will conduct depositions. If agreement cannot be reached, then the following will apply: All depositions, fact and expert, will take place at an appropriate location selected by the examining counsel.

2. *Copies of exhibits*

   Examining counsel must have at least three copies of each exhibit (unless the nature of the exhibit makes this impossible); one to be marked by the court reporter and used by the witness, one for defending counsel, and one for examining counsel, who should not try to use the witness's copy in framing questions. This three-copy rule applies to exhibits marked in prior depositions unless waived by defending counsel.

3. *Preparation questions*

   Examining counsel is entitled to an answer from the witness as to what the witness did generally to prepare for testimony, the identity of any

individuals (including lawyers) with whom the witness spoke, the length of time spent preparing, and other non-privileged areas of inquiry. Examining counsel is not entitled to ask a witness to identify all the documents that defending counsel used to prepare the witness, but Fed. R. Evid. 612 does require a witness to identify any documents that refreshed recollection for purposes of testifying, regardless of who provided the document to the witness. For witnesses testifying pursuant to Fed. R. Civ. P 30(b)(6), the Court construes Fed. R. Evid. 612 as encompassing materials or information that provide the bases for the witness's testimony.

4. *Objections to make*

Counsel are to object as they would at trial in all respects, including form, frequency, and comportment of counsel. Stating "objection as to form" is minimally acceptable (even though it would not be permitted at trial), but the better practice is for defending counsel to use the terminology that would be used at trial. This makes for a cleaner record, assists those responsible for making and objecting to deposition designations, and allows counsel to practice their trial craft. The following (and there may be others) are all proper objections to be made at deposition and trial, though of course a deposition witness must still answer the objected-to question if able to do so unless an issue of privilege/protection applies:

a. Vague/ambiguous (should not be overused)

b. Vague, timeframe (when the question seeks qualitative as opposed to quantitative information, such as whether an event occurred "recently" or "long ago")

c. Compound

d. Argumentative/harassment

e. Asked and answered/cumulative

f. Assumes facts not in evidence

g. Misstates testimony/the evidence

h. Foundation (in the sense of Fed. R. Evid. 602)

i. Hearsay, you may answer (Foundation may be the better objection at a deposition, but it is proper for counsel to make a hearsay objection as long as the witness is made to understand that hearsay testimony is acceptable at a deposition)

j. Calls for expert testimony/legal conclusion

k. Unintelligible

l. Calls for narrative

m. Attorney-client privilege/protected communication (the only objection that will justify an instruction not to answer)

n. Document speaks for itself

o. Completeness (in the sense of Fed. R. Evid. 106; should be followed with a reference to the materials that, in fairness, ought to be reviewed by the witness before answering)

p. Incomplete hypothetical

q. Beyond the scope (to be made only if and after the defending counsel asks the witness questions—in such a case, any further questioning by the examining counsel must be limited to the subjects inquired about by the defending counsel (which subjects are not themselves limited to the areas addressed in the deposition by the taking counsel))

5. Objections not to make

Counsel shall not object using the term "speculation." The proper objection in such an instance is likely "foundation." Objections as to relevance should be rare, though an objection that a question is beyond the scope of a Rule 30(b)(6) topic is appropriate. Similarly, a leading objection is rarely appropriate, but it may be correct if used during deposition of a third party. If an objection takes more than four or five words to utter (none of the examples in paragraph 4 above did), then the objection is likely improper. Coaching will not be tolerated.

6. Professionalism

Counsel are to treat each other and the witness as if at trial; that is, with courtesy and respect. For example, counsel should avoid using first names with opposing counsel and the witness and instead use the appropriate honorific and last name. Firm questioning is certainly permissible, but it must remain respectful. Witnesses may ask for a break at any time except during the pendency of a question (unless the question

triggers a privilege/protection issue). Of course, the seven-hour rule encompasses testimony-time only, not break time, and breaks should not ordinarily take more than five or ten minutes.

7. *Conduct during breaks*

Defending counsel are free to talk to witnesses during breaks about anything except the substance of the witness's testimony. During a break, defending counsel may give a deposition witness a general reminder to keep answers concise, to slow down and keep calm, to permit the examining counsel to finish a question before answering, and to listen carefully to the question, but no more. *NB*: counsel's discussions with a witness during break are not privileged or protected from disclosure. Upon returning from a break, examining counsel is entitled to inquire whether the witness discussed the substance of testimony during the break, and if so, the details of what was discussed.

8. *Irreconcilable differences*

If counsel have reached a point of contention that, unless resolved, will jeopardize the continuation of the deposition in a professional manner, then counsel should call the Court and have the issue resolved on the record. Counsel should keep handy the telephone numbers for Courtroom Deputies Katina Hubacz (414.297.1200) and Tony Byal (414.297.3373), who will assist in promptly setting up a call. If counsel cannot reach one of the Courtroom Deputies, counsel should call my chambers directly at 414.290.2261.