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Introducing Exhibits at Depositions; Asking for Specifics of Objections.

At depositions, of your witness or theirs, there are two actions you almost always should take (whether you represent the deponent or are adverse to the deponent).

If a physical or electronic item produced at the deposition is important to your side of the case, say:

"I offer Deposition Exhibit X into evidence."

Do that anytime after the exhibit that is important to your case is produced at the deposition by any attorney and identified or used by the witness. If it has not been marked as an exhibit, have the court reporter mark it, then make your offer.

Notice that the offer does not need to be made at the time the exhibit is identified or used by the witness. You can make your offer anytime before the opportunity to ask

questions has ended, even for example at the end of what is apparently all the questions anyone has of the witness and you make the offer in an off-hand way as all attorneys are packing up to leave the room but before anyone says the deposition record is ended. All that is necessary is that the offer be made on the record, at the deposition. Unless you want to ask some questions of the witness in an attempt to cure the objection, it does not even have to be at a time when any objecting party will have the chance to ask more questions of the witness.

Why should you do this? You do it because making the offer at the deposition flushes out any trial surprises, and causes the other side to waive objections (often unknowingly). In most jurisdictions, failure of the adverse parties to raise foundational objections will waive their objections.

Notice, even if you offer an exhibit at a deposition, you still can offer it again at trial.

This technique, of offering the exhibit at a deposition, usually prevents you from being surprised at trial by unknown foundation problems. Don't risk waiting until the trial to find out what the foundation objections are to your important evidence or exhibit.

If the objecting attorney simply makes the general objection of "Lack of foundation," say:

"Please specify in what respect the foundation is lacking."

The objecting attorney must identify what is necessary to correct the lack of foundation for the admission of the exhibit into evidence. *Cf., United States v. Wagoner*, 713 F.2d 1371, 1377 (8th Cir.1983) ("Foundation objections require specificity."). A specific and focused objection to foundation is necessary to allow the opponent a reasonable opportunity to correct the insufficiency. *Cf., People v. Bynum*, 257 Ill.App.3d 502 (1st Dist. 1994).

If any attorney believes a more detailed objection is necessary but could coach or guide the witness, then any attorney can have the deponent excused during the making of the objection. At a deposition, there is no right of the objector to argue his/her objections. If the objector starts to argue, try to cut them off by saying: Please state your objection specifically but without arguing it."

Although *Fed. R. Civ. P.*, Rule 30(c) requires "An objection must be stated concisely in a nonargumentative and nonsuggestive manner," an objection to foundation or to form can include the specification of wherein the foundation or form is insufficient. It just needs to be done in a manner not intended to suggest the proper answer for the deponent to give. Specifying the exact ground for an objection is *not* arguing an objection.

In common law evidence theory, if the lack of foundation could be cured at the deposition, the objection is waived if all there is a general foundation objection, and upon being asked to do so, the objector fails to be specific. The common law theory is that the opponent must be given a reasonable opportunity to correct the insufficiency of foundation. It almost always can be argued at trial that the witness possibly could have testified to sufficient facts to form the foundation (if asked questions on the subject which was not specified by the objector). Hence the deposition exhibit can be introduced into evidence at the trial even if there is a lack of foundation for the exhibit.

This evidence law theory, requiring the objector to be specific — if asked to be specific --- applies not only to exhibits; it also applies to testimony. As to testimony, the common law theory is embedded in *Fed. R. Civ. P.*, Rule 30 (d)(d). See, e.g., *Collom v. Pierson*, 411 N.W.2d 92 (N.D. 1987). *Collom* is a good example of what you should do. Attorney Zuger, taking the deposition of his own expert to introduce at the trial, did the right thing, persisting even against the attempt of a well-meaning co-party counsel (Schreiner, below) to have Zuger ask foundation questions. It's worth while reading to note the technique.

"Q. [By MR. ZUGER, examining their own expert and seeking a "no" answer.] The bottom line is, do you find any evidence of malpractice or negligence, if you will, whatsoever, on the part of either Dr. Lutz or Dr. Pierson in this case?

MR. SAEFKE: We're going to object on the basis of no foundation.

MR. ZUGER: In what specific regard?

MR. SAEFKE: You asked him whether there was any negligence on their part. My objection is there's no foundation for him to answer that question.

MR. ZUGER: And can you be more specific so I can have an opportunity to cure your objection?

MR. SAEFKE: No, I'm not going to try your lawsuit, counsel.

MR. ZUGER: And so that I have an opportunity to cure this before I conclude this deposition, where is he lacking in foundational qualifications?

MR. SCHREINER [representing Dr. Pierson]: May I suggest

MR. ZUGER: If he's not going to be specific, I can't cure it, so I guess, Dr. Eisenberg, go ahead. You can answer the question. . . . Go ahead.

A. I don't find any evidence of negligence or malpractice."

The result of this exchange between counsel resulted in the *Collom* court ruling, at 411:

"...an objection to foundation at a deposition is futile unless it is sufficiently specific to afford the opposing party opportunity to cure it.,,,, *Collom's* counsel failed to specify what was lacking. Therefore, we cannot consider *Collom's* deposition objection to foundation for any of Dr. Eisenberg's testimony."

Summary:

1. At a deposition always offer your own important exhibits into evidence.

2. If during a deposition, your adversary makes a general objection to either testimony or an exhibit favorable to you, always say: "Please be more specific".

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