

The Deposition of the Adjuster:
Developing Consistency Across the Company

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Clay Crawford
Baker Sterchi Cowden & Rice
Kansas City, MO

Evelyn Fletcher Davis
Hawkins Parnell & Young LLP
Atlanta, GA

Andrew B. Downs
Clyde & Co. US LLP
San Francisco, CA

I. INTRODUCTION

The deposition of the claim professional is a critical event in the course of any coverage lawsuit. If it goes well, the insurer's case may be slightly improved; if it goes badly, even a defensible case becomes a problem. Anecdotally, there are a few, usually relatively senior, claim professionals who have sat for multiple depositions, while the overwhelming majority of any insurer's claims staff has never been deposed, and never will be.

The purpose of this paper is to discuss the opportunities and pitfalls presented by claim professional depositions, and to offer some strategies to improve the outcome and improve consistency so that company witnesses do not contradict each other.

II. WHAT KIND OF DEPOSITION IS IT?

Claim professional depositions fall into two categories, percipient witness depositions and corporate representative depositions, what we call Rule 30(b)(6) depositions in federal court. While they have more in common than not, there are some significant differences:

Percipient Deposition	Corporate Representative Deposition
<ul style="list-style-type: none">• The insurer does not get to choose the witness.• The witness is testifying from his or her personal knowledge.• Frequently the witness is testifying about claims which exceed the individual's reserving or payment authority.• The witness is the subject of personal criticism by the policyholder.• Frequently, the witness is less experienced. This may be the individual's first deposition.	<ul style="list-style-type: none">• The insurer defendant gets to choose the witness.• The witness is testifying to what the corporate party knows, not his or her personal knowledge.• The witness often is more senior, either a manager or a higher level claim adjuster with greater authority.• The witness <i>may</i> have had no role in the events leading to the lawsuit.• The witness has most likely been deposed before, probably several times.

A. Where Will the Deposition Be?

In most jurisdictions depositions of percipient witnesses must be taken within a certain radius of the residential or work address of the witness. For example, in federal court, witnesses who are not parties or the officers of parties generally cannot be compelled to travel more than 100 miles one way for a deposition. State laws vary.

For corporate designee witnesses the rules vary. In federal court, the opposing party *generally* cannot force a corporate designee witness to travel out of state. F.R.Civ.P. 45. In some states, California for example, the corporate designee can be forced to appear in the forum state even if he or she is a non-resident. California Code of Civil Procedure § 2025.250.

In addition to the city and state, other considerations include whether the witness will be deposed at the insurer's place of business, a law office, reporter's office, or some other neutral site. As discussed more fully below, typically claims professionals and particularly corporate representatives should be deposed at counsel's office, another law office, or a neutral location. Similarly, since nearly all claims professionals have remote access to the claim system and other corporate resources, they typically should not have access to a laptop during their deposition.

B. How Will the Deposition Be Conducted?

Today, there are more permutations of how depositions are taken than was the case ten years ago:

- In person, recorded stenographically (or digitally);
- In person, recorded stenographically (or digitally) and by video;
- Remote (i.e. Zoom), recorded stenographically;
- Remote (i.e. Zoom), recorded stenographically and by video; or
- Some combination of the above.

How the deposition will be conducted affects how the witness should be prepared.

III. BEFORE THE DEPOSITION

Most states have corporate designee deposition provisions in their court rules or statutes. This paper, however, will focus on federal court depositions under F.R.Civ.P. 30(b)(6).

A. Minimum Qualifications of the Witness

Rule 30(b)(6) requires that the corporation (or other business entity) “must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf.” Some states, such as California, have statutes which refer to the person “most qualified” to testify on the organization’s behalf and you may encounter policyholder attorneys who use that nomenclature, or its shorthand “PMK” (for “Person Most Knowledgeable”) in federal actions. It’s important to note that in federal court, some courts will apply a variant of the local state standard. See, *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003) *abrogated on other grounds*. The better standard is that the witness chosen need not be the most knowledgeable so long as the witness is able to testify fully as to the matters designated. *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003).

The minimum requirement, however, is that the witness designated must be able to testify fully as to the information known by the corporate party. The corporation is obligated to prepare the witness(es) to fully and unequivocally answer questions about the topics of examination. *Risinger v. SOC, LLC*, 306 F.R.D. 655, 663 (D. Nev. 2015). Rule 30(b)(6) requires “The persons designated must testify about information known or reasonably available to the organization.” Frequently this means that significant effort must be devoted to educating the designated witness. The witness or witnesses’ ability to meet the applicable rules and to be effective often depends on their preparation.

B. Choosing the Witness

The first question is whether the company is better served with someone who is involved in the matter in dispute, as opposed to someone who is a stranger to the dispute. There is no correct answer to this question – the answer depends on the particular characteristics of the candidates for the witness role.

There are several factors that go into this analysis. They include:

- **Witness Experience:** Does the witness have experience with the type of activities and issues about which testimony will be sought?
- **Witness Temperament:** Is the witness calm and non-reactive? Will the witness avoid becoming defensive under attack?
- **Witness Intelligence:** Is the witness smart enough to be able to stay on theme and to pivot if necessary without prompting by the defense attorney?
- **Witness Testimonial History:** Has the witness testified before? How did it go? Are deposition transcripts likely to be available to the opposing lawyer?

- **Witness Public History:** Is the witness named in opinions and orders issued by other courts that are accessible via a Westlaw or Lexis search?
- **Witness Social Media Presence:** Is there anything in the witnesses social media presence, not just LinkedIn, that might present an issue.
- **Time and Availability:** Not just is the witness available on the day of the deposition, but does the witness have the time to prepare and will the witness actually devote the time necessary to preparation?
- **Witness' Job Title and Past Experience:** What is the title of the witness? Does it match what the witness really does – beware of corporate America's tendency to engage in title inflation. Is the witness a lawyer (whether or not practicing) or have a law degree?
- If the witness was involved in the underlying claim, can and should counsel seek an agreement that the witness will be deposed just once, both individually and as the corporate representative.

The defense attorney needs to be part of the process. Some clients will simply say "X is our corporate designee witness." That person may be the ideal witness, but the attorney still needs to engage in the analysis outlined above, and be prepared to challenge respectfully the orthodox position if counsel believes the witness chosen is not the right person for the role.

C. Preparing the Lawyer

It's not just the witness who needs preparation. The defending/preparing lawyer needs to be prepared too. That involves, to the extent possible, assessment of the following:

- Are other claim professional depositions taken by opposing counsel available for review? If so, are there particular patterns to how opposing counsel conducts a deposition?
- Has the witness been deposed before? Attempt to get copies of those depositions from someone other than the witness (you want to avoid refreshing the witness' memory about those prior depositions).
- Conduct a Google and social media search on the witness. Pay particular attention to the witness' LinkedIn profile. Competent policyholder lawyers will almost always mark and examine the witness on the LinkedIn profile.
- Review all the documents on which the witness is likely to be examined.

D. Preparing the Witness

1. Actions Common to Both Percipient and Corporate Designee Witnesses

The witness needs thorough preparation. That means multiple preparation sessions starting several weeks before the deposition if possible. Multiple shorter sessions work better than fewer longer sessions. It is easier for the witness to give you the time and it allows the lessons learned to sink in. For percipient witnesses to events which may have happened several years before, this is particularly important because the preparation sessions will trigger memories.

In the post-COVID world there is no reason that most of the preparation sessions can't be done via video conference on either Zoom or Teams. This makes them easier to schedule and there is little loss of effectiveness. However, counsel needs to be prepared to share documents in advance and during these remote preparation sessions.

Consider how you are going to handle documents. Depending on the size of the file and the particular comfort zone of the witness you may be able to avoid sending paper copies to the witness (which are unlikely to be read that thoroughly), by sharing electronic copies on your screen during the Zoom/Teams preparation session. Whatever you do, remind the witness at every juncture **not** to look at the original file materials in the company's computer system. There is too great a risk that the witness will look at a privileged document, which you may then need to produce because it was used to refresh the witness' recollection.¹

Help the witness understand what is speculation so he/she can avoid speculating. Most people are very uncomfortable looking "dumb," and have an emotional need to avoid admitting ignorance on a particular subject. Depending on the witness training the witness to avoid these impulses can be a significant task. It may be helpful to prepare a witness to avoid answers beginning with phrases such as "what would have happened" or "usually what happens", when was what occurred in a given situation. This may help the witness identify when they are about to guess what actually happened.

Plan on conducting a mock examination during the last or next to last preparation session. If you can arrange for one of your colleagues to play the role of opposing counsel for the mock deposition, do so. Also, give serious consideration to recording the segments

¹ This rule varies by jurisdiction. In Missouri, for instance, documents used to refresh a witness's recollection *before* their deposition are not subject to discovery, merely based on their review during deposition preparation. "The Missouri rule advances the attorney-client and work product privileges by prohibiting discretionary disclosure. When a witness uses a document to refresh recollection while testifying, opposing counsel may examine the part used in order to verify that the testimony is drawn 'from . . . memory of the facts as they occurred,' not 'from what [is seen] in the memorandum.'...When a witness uses a document to refresh recollection before testifying, the testimony is based on personal recollection 'not then aided and assisted by . . . notes in hand.'" State ex rel. Polytech, Inc. v. Voorhees, 895 S.W.2d 13, 15 (Mo. App. 1995).

of the mock deposition so you can play them back for the witness. Delete those recordings at the end of the mock deposition. If you are using Teams or Zoom make sure you know how to delete the recordings. Make sure that you have time at the end of the session or preferably in a follow-up session to critique the mock session both substantively and substantially. But, the critique should be followed whenever possible by a wrap up in which the key evidence and points are reviewed as the witness's final "swing thoughts" before the deposition.

Instruct the witness **not** to take notes. Many witnesses want to take notes, but if the witness does take notes, there is a risk that the witness will disclose that during the deposition and you may then have to fight a discovery motion regarding their production. Tell the witness you will take any notes the witness feels are necessary.

Finally, is the witness attentive, cooperative, and listening to you? If not, you have a problem. At this point, stop and contact the individual at the client to whom you report and discuss the issue – whether this requires changing the witness, or simple management reinforcement to the witness that he or she has an obligation to listen to you and cooperate, the individual(s) managing the litigation on the part of the client need to be involved, and this needs to happen before the deposition.

2. Particular Preparation for Corporate Designee Witnesses

First and foremost, the corporate entity has a duty to educate the witness to the extent of corporate knowledge regarding the examination topics. Normally this is done with documents, but there are times when the witness may need to speak with someone else internally to get the necessary information. Understand that discussion may not be privileged even if you are present.

Give the witness, particularly one who was not involved in the claim at issue, sufficient time to learn the case. That is measured in weeks, not days, if at all possible. Make sure that the witness' supervisors give the witness the time needed to study and prepare.

3. Particular Preparation for the Percipient Witness

The percipient claims witness needs to know the claim file inside and out. Sometimes if the witness was only involved briefly at the outset of a claim, you may not want the witness reviewing the file regarding what happened after the witness ceased to be involved. Reviewing later material may make the witness insecure and defensive, both of which are undesirable. Further, as a percipient witness, they should not be compelled or even expected to testify to events outside of their personal knowledge.

Unlike the corporate designee witness, the percipient witness should not speak with **anyone** (other than the lawyer) about what happened or the probable content of his/her testimony.

The percipient witness should also understand that his/her job is not to criticize the conduct of any other company employee or the company itself. Insurers, like all companies, can be territorial. It is at best unhelpful for claims professionals to criticize underwriters, administrative staff, or managers in an effort to avoid personal responsibility or perceived responsibility for action or inaction that is the subject of criticism during their cross-examination.

Where possible, give the percipient witness tools to manage difficult questions without appearing evasive or uncooperative. Typically, the claims professional will have a better understanding of the file and certainly their role than opposing counsel. However, when it comes to the law or reptile theory, they are almost always outmatched. Fending off legal or public interest questions requires significant preparation. When it comes to legal issues, most claims professionals have access to in-house or outside counsel and, if true, it should be comfortable testifying that they would refer to those resources if a legal issue presents itself during their claims handling.

With respect to “reptile” questions, witnesses should be prepared to avoid absolutes and hyperbole. There are very few actions or decisions which should “always” or “never” be made. In a coverage or bad faith situation, the insured’s financial future was placed at risk by their alleged conduct, not claims professional’s response to the claim. In almost every case, opposing counsel will be able to hypothesize additional or more timely actions that could have been taken. If the claims professional admits, for instance, that they must “always do everything possible to protect the financial interests of an insured”, in the abstract, anything else opposing counsel can conjure, which was not done, may appear to the jury to have been a negligent failure by the claims staff.

If the deposition is going to be by Zoom, conduct a “technical rehearsal” with the witness. Most insurers don’t use Zoom; today the most common video conferencing platform is Teams (because it’s part of the Microsoft subscription with no marginal cost). Zoom works differently. You also want to make sure the witness has good lighting and an inoffensive not overly busy virtual background.

For remote depositions, find out how opposing counsel is going to mark and display exhibits. Some send the exhibits shortly before the deposition, some simply screen share during the deposition, and some use exhibit presentation software such as Veritext’s Exhibit Share, or AgileLaw which is used by some other reporting firms. Prepare the witness for how to view, scroll and change the zoom for the document.

IV. DURING THE DEPOSITION

A. Logistics

If the deposition is being taken by remote means, should you be in the room with the witness? In most cases, the answer is yes. This is an issue you need to discuss early with your client contact so that the cost-benefit analysis can be performed.

Unless the witness has available a private place in a company office for a deposition with you present, consider renting a conference room in executive suite space. Where the witness is a remote employee this is almost always necessary. Witnesses should never be produced at the insurer's office unless a court order requires it. If they are, the witness will almost assuredly be asked to look up something or ask a manager or co-worker to find something out, which is otherwise beyond their personal knowledge.

Whatever kind of deposition it is, make sure the witness gets a good night's sleep. Also, if the deposition is remote, push to have it conducted during regular business hours where the witness is located, not where the lawyers and lawsuit are located.

If the in person deposition is being videotaped view the videographer's screen before the deposition starts to confirm the view is appropriate, that you will not be in it, and that there is nothing distracting behind the witness. Likewise, talk to the witness in advance regarding their attire, hands, and posture. Find an appropriate outfit and comfortable hand placement that allows them to anchor themselves, without appearing nervous or tense.

Plan on taking breaks roughly every 50-70 minutes.

If you have reason to expect the deposition may go close to or over the 7 hour (420 minute) limit, keep a detailed record of the start and stop times and be prepared to stop the deposition when the 7 hours are consumed. The videographer and court reporter should also have information regarding the time on the record.

B. Objections

In federal court speaking objections (that is objections where the content of the objection can be used to coach the witness) are improper. F.R.Civ.P. 30(c)(2) requires objections be stated concisely in a nonargumentative or suggestive manner. See, *Specht v. Google, Inc.*, 268 F.R.D. 596 (N.D. Ill. 2010) (discussing speaking objections by attorney defending deposition, including instructing a witness not to guess). In most instances, the objection should be more than just "Objection, form" and should state the ground in general non-coaching terms – ambiguous, leading, compound, calls for narrative, or argumentative. In many federal jurisdictions, objection to "form" may be sufficient to preserve an objection, but in some state jurisdictions, the objecting lawyer must state the basis for the objection to give the other lawyer a chance to "cure" the objection.

During preparation discuss with the witness that except for questions calling for the disclosure of privileged information the witness will still need to answer the question if the lawyer taking the deposition does not withdraw or change the question.

C. Opposing Party Misconduct

Sometimes the opposing lawyer will engage in misconduct or incivility – be it yelling at the witness, or something else. This is where a video record can be a great aid *provided that the defending attorney keeps his or her cool*. Counsel has to protect the witness, but must do so in a manner which will not expose the witness or counsel to sanctions because that would reward the bully. Witnesses should understand that even if the lawyers engage in heated discussion, that is not license for the witness to do so. Such arguments are typically edited out of any excerpts that might make their way to a jury, because they are irrelevant and statements by counsel are not evidence. Not so, with respect to the witness's testimony and even their demeanor, which may pertain to credibility. Do not terminate the deposition and walk out unless you believe the court would find you had no alternative – because if you do, the odds are the court will be evaluating everyone's conduct in the future.

D. Endurance

Almost no defending lawyer wants to come back for a second session of questions, but you need to monitor constantly the physical and mental well being of the witness. If the witness is getting tired and the quality of the testimony appears to be deteriorating, take a break, confirm the witness genuinely is exhausted, and then return and adjourn the deposition. This is not a desirable outcome – opposing counsel may take a much better deposition the second time, but it may well be the lesser of two evils.

E. The Court

Some courts and some judges offer, and even encourage, the parties to recess a deposition and telephone the court if an issue arises that requires judicial intervention. Often the mere threat of calling the court for a telephone conference is enough to cause one party to back down.

Before the deposition starts know the court, or your particular judge's, procedures for deposition disputes. In federal courts that requires review of not only the District's Local Rules, but also the individual judge's (and sometimes Magistrate Judge's as well) standing orders and chambers rules (different courts have different names for these documents).

In addition to knowing the procedures, study the judge's previous discovery rulings on deposition conduct. Some judges are very hands off, while others are more exacting. Knowing which type of judge you have is important. For example, if in the Northern District of Iowa be aware that at least one judge there takes a very hard line on general objections in written discovery responses.²

² *Liguria Foods, Inc. v. Griffith Laboratories, Inc.*, 320 F.R.D. 168 (N.D. Iowa 2017).

F. Questioning Your Own Witness

Most attorneys do not question their own witness in depositions. There are several reasons for that including: (a) not desiring to educate an opposing counsel who took a bad witness; (b) getting the deposition adjourned before the witness says something harmful; and (c) concluding that it is unnecessary to do so.

On occasion, the defending lawyer needs to ask questions. Those occasions tend to fall into the following categories:

- A need to clarify an important point which will be material to motion practice or at trial.
- With experts, the need to get a clear expression of an opinion not covered in the deposition, but which is important to your case.
- Where an explanation now, not at trial, will reduce the risk of later impeachment.
- Where the witness may be unavailable at trial (for example a non-resident former employee) and the attorney needs testimony that can be used in lieu of direct examination.

Generally, however, the best question the defending lawyer asks the adjuster witness is the one the lawyer does not ask. Because the examining lawyer gets to ask follow up questions and the witness is frequently tired and impatient at the end of the deposition, effective follow up by opposing counsel can more than undo all the gain that might have come from your examination.

V. CONCLUSION

Claim professional depositions are not to be taken casually. They require a lot of effort, and often more time than you may have readily available. Handled properly they are at worst a neutral factor, and at best they bolster your case. Handled badly, and the case just got measurably worse.