



DISCOVERY GOES TO TRIAL: USE AT TRIAL OF DEPOSITIONS, ADMISSIONS, AND INTERROGATORIES

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I. DEPOSITIONS

Deposition testimony may be used at trial as substantive evidence and for impeachment purposes. The use of such testimony is governed by various civil rules, evidentiary rules, and statutes and case law. As a procedure matter, there have been changes that alter the traditions of moving to publish a deposition and having the court reporter ceremoniously open the sealed envelope that contains the filed transcript. CR 5(i) was amended in 1988 to provide that a deposition transcript is no longer filed with the court ‘unless for use in a proceeding or trial or on order of the court.’ This rule change, much welcomed by court clerks, eliminated the need to store countless deposition transcripts that were seldom published and used at trial.

There is no longer any automatic confidentiality of a deposition transcript, and no need to “publish” the deposition before using it. Under CR 26(h), a party may file only those portions of a transcript to be used, and may file a copy. CR 26(c) was amended in 1989 to allow the court to order that the contents of a deposition not be disclosed.

There is no single rule that governs the use of a deposition transcript at trial, although CR 32(a) contains the most - used provisions. As a general matter, a deposition constitutes hearsay if it is offered to prove the truth of the matter stated by a deponent, unless it falls with-

in one of the exceptions to the hearsay rule or is otherwise admissible under the rules. There are, of course, numerous exceptions to the hearsay rule.

1. Deposition of a party. A deposition of a party opponent (or managing agent or designated person under CR 32 b)(6)) may be used “for any purpose” under CR 32(a)(2). This is true even if the party or witness is present at court.
2. Prior inconsistent statement. Under ER 801(d)(1), a prior statement in a deposition may be used to impeach the witness. This will be discussed in more detail later.
3. Prior consistent statement. Under ER 801(d)(1), if a witness’ truthfulness is attacked, under certain circumstances a prior consistent statement may be used to rebut that attack.
4. Former testimony. ER 804 provides that former testimony, including that in a deposition, may be used if the witness is unavailable to testify at trial.
5. Civil Rule 32(a)(3) contains specific circumstances in which deposition testimony may be used as substantive evidence:

- (a) *The witness is dead.*
- (b) *The witness resides out of the county and more than 20 miles from the place of trial.*
- (c) *The witness is unable to testify because of age, illness, infirmity, or impairment.*
- (d) *A party is unable to procure the attendance of the witness at trial by subpoena.*

(e) *There are other “exceptional circumstances” for allowing the use of a deposition rather than live testimony.*

The unavailability of a witness under CR 32(a) is to be determined at the time the deposition is offered into evidence. Hammond v. Bredin, 16 Wn.2d 773, 775, 559 P.2d 1357 (1977). But a party seeking to use a deposition on that ground may have to show due diligence in attempting to procure the witness’s appearance. Sutton v. Shufelberger, 31 Wn.App. 579, 643 P.2d 920 (1982).

NOTE: 1993 Amendments On Use of Deposition Testimony at Trial

In 1993, CR 32(a) was amended to (a) limit the ability to use the deposition of an expert witness, and (b) broaden the ability to use the deposition of a health care provider.

A. Expert’s Deposition.

Under the prior rule, a discovery deposition of an out-of-state expert could be used at trial. This was a “trap” for the adverse party who deposed the expert, since the questions and answers designed to simply provide discovery information could then be used as trial testimony. The opportunity for the adverse party to cross-examine the expert, utilizing the information gained through discovery, was eliminated through this maneuver by the party who hired the expert. In an effort to eliminate this unfair utilization of

discovery depositions, the rule was amended to provide that the expert's deposition could only be used at trial if the adverse party has a chance to conduct a discovery deposition:

CR 32(a)(5)(A). The discovery deposition of an opposing party's rule 26(b)(5) expert witness, who resides outside the state of Washington, may be used if reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again.

B. Health Care Provider's Deposition.

Under the prior rule, the deposition of a health care provider could be used at trial only if one of the factors found in CR 32(a)(3) were present: the witness is deceased, resides out of the county, etc. The 1993 amendment added a special provision for the trial use of depositions of health care providers: they can be used to preserve trial testimony of the witness, regardless of the presence of the 32(a)(3) factors, if the adverse party is given a reasonable opportunity to first depose the witness. The purpose of the rule was to eliminate some of the expenses of bringing physicians and other health care professionals to trial, and to ease some of the conflicts between the medical and legal community that occurred when the medical professional's schedule was disrupted by the need for trial testimony and the inevitable trial delays.

CR 32(a)(5)(B). The deposition of a health care professional, even though available to testify at trial, taken with the expressly stated purpose of preserving the deponent's testimony for trial, may be used if, before the taking of the deposition, there has been compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i), 33, 34, and 35 (as applicable) and if the opposing party is afforded an adequate opportunity

to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

CR 32(a)(3) also contains a provision allowing the use of depositions from other cases, if the same issues and subject matter and same parties (or their representatives or successors in interest) were involved in that case.

If a deposition is to be used for substantive evidence purposes, and only part of the deposition is introduced, any other party may introduce other parts in order to avoid any misleading impressions. CR 32(a)(4) and ER 106. Symes v. Teagle, 67 Wn.2d 867, 410 P.2d 594 (1966). The court has broad discretion in determining what other parts of a deposition may be admissible for that purpose. Young v. Liddington, 50 Wn.2d 78, 309 P.2d 761 (1957).

Objections to the admissibility of particular deposition testimony may be made at the time of trial, except as to matters relating to the form of the question or answer (i.e., those matters that can be corrected at the time of the deposition testimony). Objections relating to competency, hearsay, relevancy, etc., can be asserted at trial.

If a deposition is admitted, changes and corrected answers are also admissible as substantive evidence. Seattle-First Bank v. Rankin, 59 Wn.2d 288, 293, 367 P.2d 835 (1962).

Note that there are very specific and detailed rules with regard to arranging and using a videotaped deposition at trial, CR 30(b)(8). Given the practical difficulties of "editing" a videotape to delete inadmissible portions and/or to present only portions of such a deposition, it is important to have advance rulings made on the basis of the transcript so that actual

editing of the film can be done before presentation.

If a deposition is to be read into evidence at the time of trial, as substantive evidence, thought should be given as to how to effectively present that testimony. Should you use a staff person or other attorney from your office; should you hire an actor to read the testimony; should it be interspersed among more interesting testimony so the jurors maintain their attention? The judge should be asked to read WPI 6.09, which explains to the jury about deposition testimony.

Use of Deposition for Impeachment

Trial attorneys love to use prior deposition testimony to impeach a witness. The problem, however, is that often the prior testimony is not as directly contradictory of the trial testimony as the attorney wishes. The result can be a dull "thud" as your effort at impeachment falls flat and the jury is puzzled about why the attorney is making such a big deal about the deposition testimony. Pick and choose the instances when impeachment by deposition will really work to discredit a witness on a significant factual issue.

The use of a deposition to impeach a witness is governed by CR 32(a)(1), but it should also be read in conjunction with ER 801(d)(1) (prior inconsistent statement). The procedure for doing so is fairly well established:

- *Be sure the deposition or relevant parts are filed.*
- *Provide the witness with a copy of the portion to be used.*
- *Specify the page and line so that the witness, counsel, and the court can follow the testimony.*
- *Lay a foundation for the questioning. Ask the witness, in effect, "On, in the*



office of, were you asked the following question(s) and gave the following answer(s)?"

- Read the precise question and answer.
- Try to have the witness answer only "yes" or "no."

Opposing counsel may read other questions and answers or may ask the witness to explain his prior testimony, on direct examination. Engler v. Woodman, 54 Wn.2d 360, 340 P.2d 563 (1959). Avoid the trap of picking out one item of testimony that is out of context, because you will only allow opposing counsel to insert other deposition testimony that may corroborate or otherwise strengthen the witness' direct testimony.

II. INTERROGATORIES

CR 33(b) provides as follows:

(b) Scope: Use at Trial. Interrogatories may relate to any matter which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

The most significant rule of evidence is ER 801(d)(2) – admission by a party-deponent – which is one of the exclusions to the hearsay rule. Absent that rule, most interrogatory answers would constitute hearsay if offered to prove the truth of the matter asserted. ER 801(d)(2) allows the admission of statement of a party opponent (or one authorized to act for a party) because the adversarial nature of the legal system provides assurance as to the truthfulness of the statements.

To the extent that the statements were against interest at the time they were made, they have the same basis for reliability as declarations against interest ... To the extent that the statements were self-serving when made, the party is estopped from preventing their admission at trial. Aronson, The Law of Evidence in Washington, p. 801-15.0.

Interrogatory answers, in order to be used as substantive evidence at trial, must be introduced into evidence as part of the record. Esborg v. Bailey Drug Co., 61 Wn.2d 347, 378 P.2d 198 (1963). One procedure for admitting the answers, after securing the court's permission, is to read the questions and answers before the jury so that they are in the trial transcript.

Whether to admit interrogatory answers is within the discretion of the trial court, just as with any other evidence, and a trial court's refusal to admit such evidence will only be reversed upon a showing of manifest abuse of that discretion. McConnell v. Seattle, 44 Wn.App. 316, 722 P.2d 121 (1986).

III. ADMISSIONS

Requests for Admission under CR 36 can be useful for two purposes: first, a denial can be used as a basis for a post-trial request for attorneys fees under CR 37(c) if the fact is proven at trial and, second, the matters being admitted may establish facts at trial. Under CR 36(b), "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

Prior to 1989, it was not proper to use a request for admission to try to establish major disputed facts. The 1989 amendments to CR 36 provided that a party who considers a matter to present a central fact in dispute may not, on that ground alone, object to the request.

Requests for Admission under CR 36 can be most useful as a means of establishing facts that, although not stipulated to by the opposing party, are really not in serious dispute. Included

are such matters as genuineness of certain documents, such as medical records; the amount of medical expenses paid; a party's prior earnings as reflected in tax returns; etc. It is unlikely that an opposing party will deny the request for admission as to such matters because it could require payment of legal fees to the propounding party if the fact is proven at trial. Such admissions can avoid the need for peripheral witnesses to establish facts that are less than central to the case.

Drafting requests for admission is almost an art form. If the request is vaguely worded, it can be safely denied because of lack of clarity of the matter dealt with in the admission. If too narrowly worded, it also may be safely denied because the choice of a particular word or phrase may take the matter outside the specific fact that may be proven at trial. One solution, if it can be called that, is to state the request in a number of alternative forms, so that if one request is denied, the next variation is more difficult to deny. In my own practice, I have occasionally started with the general and worked down to the specific so that, at some stage in the sequence of statements, I'll hit the one that cannot be denied in good faith.

Requests for Admission are not used as often as the probably should be in litigation, since they are a most useful tool in narrowing issues and eliminating fact disputes that otherwise clog the trial day. Used properly, they put pressure on the opposing party to agree to basic facts for which the propounding party has the burden of proof.