

# NJAJ Meadowlands 2013

## LAW OF DEPOSITIONS



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# EXPERT DEPOSITIONS

## PARAMETERS OF THE '4 CORNERS' OF REPORT

4:10-2 (a) – Broad Scope: permits discovery of any non-privileged matter relevant to the subject matter and reasonably calculated to lead to discovery of relevant evidence

4:10-2(d)(2) – Limited Scope: expert may be deposed “as to the opinion stated therein”

FRCP 26 (a) (2) and FRCP 26 (b)(4)



# EVIDENCE RULE 702

If scientific, technical or other specialized knowledge will assist the trier of fact:

Expert...may testify thereto in the form of an opinion or otherwise.

[emphasis supplied]

# BROAD ABILITY TO FLESH OUT OPINIONS & CONCLUSIONS

- Expert should be permitted to testify regarding any information reasonably calculated to lead to relevant and admissible evidence
  - Geweke v. Valarsky 186 N.J. Super. 166 (Law Div. 1988)
- Must examine expert on his knowledge regarding causation or basis for opinion

# MUST QUESTION EXPERT ON EVERY FACT IN REPORT

- Expert will be allowed to testify regarding opinions and conclusions based on facts in report, even if no express opinion
- No surprise or prejudice for failure to delve into all facts
  - Westphal v. Guarino, 163 N.J. Super. 239, aff'd 78 N.J. 308 (1978)
  - Velasquez v. Portadin, 321 N.J. Super. 558 (App. Div. 1990)

“While the experts had not fully disclosed their theories in their reports, had they been deposed by plaintiffs, their depositions might have fully revealed the bases for their eventual testimony”

Congiusti v. Ingersoll-Rand Company, Inc., 306 N.J. Super. 126  
(App. Div. 1997)

Although an expert may be limited by his report, “...the logical predicates for and conclusions from statements made in the report are not foreclosed.”

McCalla v. Harnischfeder Corp., 215 N.J. Super. 160 (App. Div),  
*certif. den.* 108 N.J. 219 (1987)

Bowersfield v. Suzuki Motors Corp., 151 F. Supp. 2d 625 (E.D. Pa. 2001)

- Engineer permitted to offer opinion on defect outside of report
- Court relied on FRE 104(a), NJ Evid. R. 702
- Daubert Hearing

## 4.14-3 (c) : OBJECTIONS

No objection other than:

- Form of question
- To assert a privilege
- A right to confidentiality
- Prior court order limited testimony

“Subject to R. 4:14-4 [calling the court], an attorney shall not instruct a witness not to answer a question unless the basis of the objection is privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.”



# DECISION TO PRECLUDE AT TRIAL DISCRETIONARY

Mauro v. Owens-Corning Fiberglass Corp., 255 N.J. Super. 196 (App. Div), *aff'd, sub. nom.* Mauro v. Raymark Industries, Inc., 116 N.J. 126 (1989)

Conrad v. Robbi, 341 N.J. Super. 424 (App. Div. 2001).

# WHO CAN BE DEPOSED FROM A CORPORATION/ORGANIZATION

CIV. R. 4:14-2(c)

Entity must designate an “officer, director, or managing agent,” or “other persons who consent to testify on its behalf”

4:14-1 “The attendance of witnesses may be compelled by subpoena...”



# IS THE DEPOSITION TESTIMONY OF A CORPORATE EMPLOYEE AUTOMATICALLY BINDING ON THE CORPORATION?

# NO

- Must have been designated by the entity to bind the entity
- An employee of an entity must be an officer, director or managing agent
- Plaintiff must demonstrate that the employee has authority to speak for corporation

# WHO IS AN OFFICER, DIRECTOR OR A MANAGING AGENT?

- Designated officer or director
- Authority to make decisions and act upon them
- Exercise judgment and discretion on behalf of the entity
- The interests of the witness coincide with the employer
- Responsibilities over the subject matter which is the subject of the litigation
- Higher authorities responsible for the decision making



Panasonic Industrial Company v. Emerson  
Quiet Kool Corporation,

269 N.J. Super. 502 (Law Div. 1993)

- National sales manager was not “managing agent”
- National sales manager was not authorized by company to speak on their behalf
- Deposition testimony was Inadmissble Hearsay

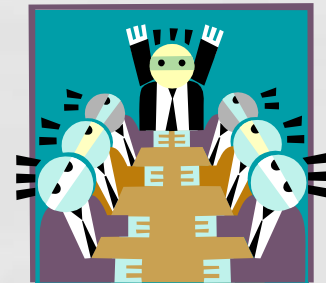
Luther v. KIA Motors of America, Inc.,

2009 WL 1727909 (W.D. PA. 2009) –

Sales manager not Managing Agent

# Dempsey v. Bucknell University, 2013 WL 5352284 (M.D. Pa. Sep 13, 2013)

- Provost - Officer
- Faculty members – Managing Agents
- Associate Registrar – Managing Agent
- Board of Directors & Trustees – Officers/Directors



# Philadelphia Indemnity Insurance Co. v. Federal Insurance,

215 F.R.D. 492 (E.D. Pa. 2003)

- Status as a Managing Agent to be broadly construed in favor of the party seeking the deposition; however, testimony can be precluded if statements found not to bind the corporation
- Witnesses who cannot bind corporation must be subpoenaed
- Vice President of Claims - Officer or Director
- D & O Claims Manager – not a managing agent, not authorized to act for corporation

# NOTICE VS. SUBPOENA OF WITNESS WHO IS A CORPORATE EMPLOYEE

- Employees are not automatically subject to notice
- Only officer, director or a managing agent can be noticed
- Other employees must be subpoenaed
- Entity is required to designate a person with knowledge



# SUBPOENA UNNECESSARY FOR MANAGING AGENT

Dempsey v. Bucknell University, 2013 WL 5352284 (M.D. Pa. Sep 13, 2013)

Luther v. KIA Motors of America, Inc.,  
2009 WL 1727909 (W.D. PA. 2009) –  
Subpoena required for Sales Manager

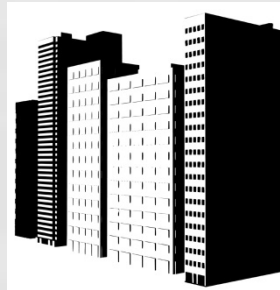
Philadelphia Indemnity Insurance Co. v.  
Fed. Ins. Co.

# WHERE MUST AN OFFICER, DIRECTOR OR MANAGING AGENT BE DEPOSED?

General rule: Place of business of the employer

Factors to consider:

- Financial capabilities of the parties
- Place where the acts took place
- Place where the records are kept
- Importance of the witness
- Disruption to business operations
- Expense and inconvenience



Luther v. KIA Motors of America, Inc.,  
2009 WL 1727909 (W.D. PA. 2009) –  
Subpoena required for Sales Manager

Philadelphia Indemnity Insurance Co. v.  
Fed. Ins. Co.

D'Agostino vs. Johnson & Johnson, 242  
N.J. Super. 267 (App. Div. 1990)

# WHEN DO YOU GET TO DEPOSE THE CEO?

- Must have individual or unique knowledge of issues/facts
- Must attempt lower level executives first
- Personal involvement in the decision making



Ford Motor Company v. Edgewood Properties, Inc.  
2011 WL 2517133 (D.N.J. June 23, 2011)

General Star Indemnity v. Platinum Indemnity  
210 F.R.D. 80 (S.D.N.Y. 2002)

Travelers Rental Co., Inc. v. Ford Motor Company  
116 F.R.D. 140 (Dist. Mass. 1987)

CBS, Inc., v. Ahern  
102 F.R.D. 820 (S.D.N.Y. 1984)

# GENERAL STAR INDEMNITY

## CAN YOU OBTAIN THE INFORMATION FROM A LOWER RANKED EXECUTIVE?

“Courts have granted protective orders for high-level executives where a party seeking to take a deposition had not yet attempted to obtain information from lower level executives.”

“[H]ighly placed executives are not automatically given special treatment which excuses them from being deposed,” and a “busy schedule” is not a basis for foreclosing proper discovery.



# PARENT COMPANY REQUIRED TO PRODUCE EMPLOYEE OF SUBSIDIARY

D'Agostino vs. Johnson & Johnson, 242 N.J.  
Super. 267 (App. Div. 1990)

- Parent exercises control over subsidiary
- Common identity of officers
- Common stock ownership
- Other employees must be subpoenaed

*Foreign nationals were ordered to attend deposition in NJ by  
notice as Officers, Directors or Managing Agents*

# D'AGOSTINO:

"We are satisfied ...that there is a sufficiently close relationship between J & J and its wholly-owned subsidiaries to require it to produce the requested foreign-based executives. There is a common identity between officers...It is undisputed that J & J owns all the stock of the subsidiary corporation...The requisite element of control is beyond dispute."



# DEPOSITION OF HIGH-LEVEL GOVERNMENT OFFICIALS

- Need proof of direct involvement or knowledge
- Cannot be deposed on thought processes regarding promulgation of law
- Showing that deposition needed to prevent substantial injustice

N.J. Turnpike Authority v. Sisselman, et.als.,  
106 N.J. Super. 358(App. Div.), *certif. den.*, 54 N.J. 565 (1969)

Hyland v. Smollok,  
137 N.J. Super. 456 (App. Div.), 71 N.J. 328 (1976)

## 4:14-7 – LOCATION OF DEPOSITION AND FEES

- Subpoenaed witnesses – may include corporate representatives
- Fact witnesses - reasonable and convenient time
- In the county of residence or employment or within 20 miles of residence or employment
- Non-resident – reasonable and convenient time and in the county where served within 40 miles
- Witnesses shall be reimbursed for out of pocket losses including lost pay
- Expert witnesses – out of state all expenses to be paid by the propounding party

# USE OF DEPOSITIONS

## DEPOSITION IS HEARSAY ABSENT EXCEPTION

- N.J. Evid. R. 801, 802 – hearsay
- N.J. Evid. R. 803(b) – admission
- N.J. Evid. R. 803(c) (25) – statements against interest

*Rule 4:16-1 governs the use of depositions at trial: F.R.C.P. 32*

- Deposition of a party can be used for any purpose;
- Impeachment of any deponent/witness

# USE OF DEPOSITIONS (Cont.)

- Witness if unavailable
  - Death, Age, illness, infirmity, jail
  - Unable with due diligence to procure attendance
  - Absent but not unavailable – exceptional circumstances
  - All parties must have opportunity to depose/cross examine

Witter by Witter v. Leo, 269 N.J. Super. 380 (App. Div.), *certif. den.* 135 N.J. 469 (1994)

# YOU CANNOT USE YOUR OWN PARTY'S DEPOSITION TO REHABILITATE



Alves v. Rosenberg, 400 N.J. Super. 553 (App. Div. 2008)

# PARAMETERS FOR UNAVAILABLE WITNESS

Evid. R. 804 – Hearsay exception; declarant unavailable

- Prior testimony permitted if adversary had opportunity to cross-examine
- Expert opinion testimony to be excluded if expert available and if there are other experts “of a like kind” generally available

CAN YOU USE A DEPOSITION OR A STATEMENT  
OF A DEAD PERSON WITHOUT ADVERSARY  
HAVING AN OPPORTUNITY TO CROSS-EXAMINE?

**YES**

Evid. R. 804(b)(6): "A statement made by a person unavailable as a witness because of death [is not excluded] if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy."

# FOUR FACTOR TEST

- Declarant is dead
- The statement was made in good faith
- The statement was made upon declarant's personal knowledge
- Probability of trustworthiness under the circumstances

**Absolute trustworthiness is not required; Standard is the probability of trustworthiness**

Estate of Hanges v. Metropolitan Property & Casualty Ins. Co., 202 N.J. 369 (2010)

Ramos v. Community Coach, 229 N.J. Super. 452 (App. Div. 1989)

Ayala v. Lincoln, 147 N.J. Super. 304 (App. Div. 1977):



Avis Rent-A-Car, Inc. v. Cooper, 273 N.J. Super. 198  
(App. Div. 1994)

Witter v. Leo, 269 N. J. Super. 380 (App. Div.  
1994)

Mandal, M.D. v. Port Authority of NY & NJ, 2013 WL  
1337397 (App. Div. April 4, 2013)

Rios v. Crowe, 2012 WL 2401652 (App. Div. June  
27, 2012)

# DEPOSITION TRANSCRIPTS FOR IMPEACHMENT

- Use of depositions for substantive evidence on your direct case are not the same as use for impeachment.  
*Substantive = Admissible*
- The scope of discovery is limited to relevancy, meaning that it is either:
  - Going to be admissible
  - or reasonably calculated to lead to admissible evidence

Rule 4:10-2; N.J. Evid. R. 401;

Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997);

# DEPOSITION TRANSCRIPTS FOR IMPEACHMENT (2)

- Impeachment materials are not offered for purposes of admissibility and are therefore not discoverable
- **Rule 4:10-2(c)**, the Work Product Privilege, does not permit discovery of materials prepared in anticipation of litigation without a showing of substantial need
- **N.J. Evid. R. 613** – extrinsic evidence of prior inconsistent statements to be used to impeach, not as substantive evidence
- **Rule 4:10-1** and pre-trial discovery rules are stated to be “substantially the same as **Fed. R. Civ. P. 26(a)**, and “generally follow the federal discovery rules, 26-37.”
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# DEPOSITION TRANSCRIPTS FOR IMPEACHMENT (3)

- **Fed. R. Civ. P. 26 (a)(1)(A)** states that a party must, without awaiting a discovery request, provide to the other parties:  
  
...all documents, electronically stored information, and tangible things...in its possession [it] may use to support its claims or defenses, *unless the use would be solely for impeachment*
- Potential confusion with criminal law which requires that the State produce all evidence that could be used to impeach defense witnesses at trial. The “Brady” Rule, **Crim. R. 3:13-3**.
- Therefore, materials to be used solely for impeachment are NOT discoverable

# Questions?



*The witness had been doing so well  
at his deposition when suddenly...*

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