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MESSAGE FROM XEROX 7024: (702) 385-1655

DATE: February 22, 1993

TO: Ralph Bradley
c/o Marriott Pavilion
Room 606

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FROM: Lynda Garfinkle

CLIENT/MATTER: Nevada Power v. Monsanto

CLIENT/MATTER NO.: 11927.2

DOCUMENT(S) DESCRIPTION: Deposition research; 30(b)(6) notices for Monsanto and Westinghouse

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MESSAGE:

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9.4 DEPOSITION TRANSCRIPTS

There are two principal uses to be made of deposition transcripts at trial: (1) to cross-examine an adverse witness by impeaching him or her with prior inconsistent statements made under oath at a prior deposition, and (2) to substitute entirely for the personal appearance of a witness. Occasionally it will also be useful to offer a summary of the deposition testimony of a witness who is not central to the case. The use of deposition transcripts should be planned carefully before trial so that the technical requirements of the rules can be met and the transcripts themselves can be handled with ease in the courtroom.

Because all deposition transcripts contain out-of-court statements, they are governed by the hearsay rules. Special exceptions have been created, however, for deposition transcripts. Some of these are in the Federal Rules of Civil Procedure and others are in the Federal Rules of Evidence.¹⁸

The rules have a number of technical requirements that are important to master.

- *whose deposition*: some rules distinguish between the deposition of a party to the action (including various kinds of employees and agents) and the deposition of a witness who is not a party.
- *whose use of the deposition*: some rules permit the use of a deposition by any party; others permit use only by an adverse party.
- *what use of the deposition*: some rules permit use for any purpose once the requirements as to the deponent and the party using the deposition are met; others permit use only for a specified purpose.

18. The rules are easily distinguished by their numbering system. The Federal Rules of Civil Procedure, first adopted in 1937, are numbered 1 through 86. The Federal Rules of Evidence, adopted in 1975, are numbered 101 through 1103.

Each of these technical requirements is discussed below with respect to specific examples. The examples, however, do not cover all possible uses of depositions at trial.

9.4.1 Cross-Examination

The most common use of deposition transcripts is in cross-examination. The witness gets on the stand and during direct examination says something directly contrary to a statement he or she made at deposition some months earlier. Rule 801(d)(1)(4) applies here:

A statement is *not* hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... *inconsistent* with his testimony, and was given under oath subject to the penalty of perjury ... in a deposition. (Emphasis added.)

The deposition transcript can be used for impeachment as soon as a foundation can be laid that this witness was the one who appeared at the deposition from which the transcript you are using was produced.

Example #1

- Q. Ms. Witness, weren't you heavily in debt at the time you executed the document that has been marked as plaintiff's Exhibit 6?
- A. No.
- Q. Ms. Witness, on October 5, 1988 you appeared for your deposition in your lawyer's office at 1700 Pennsylvania Avenue, N.W. in Washington, D.C., right?
- A. Yes.
- Q. At that time you were put under oath and you swore to tell the truth, did you not?
- A. Yes.

Q. At that time I asked you the following question (*reading from the transcript*):

“Weren’t you heavily in debt at the time you signed the letter to Mrs. Vulture?”

and you said in response to that question:

“Yes.”

You remember that, don’t you?

A. Yes, I said that.

Q. And that was the truth, wasn’t it?

A. Yes.

When the witness admits that she said something different at deposition and does not argue about what it was, it is not necessary (or proper) to put the deposition transcript into evidence as an exhibit.

Sometimes a witness will be reluctant to say he or she remembers saying something different. In that case the deposition transcript is used.

Example #2

(Same circumstances as above)

Q. You remember that, don’t you?

A. I don’t remember that.

Q. Your Honor, I request that this excerpt from the deposition transcript, duly attested by the court reporter, be marked as plaintiff’s Exhibit 13 and admitted in evidence.

Court: Admitted.

Counsel: Your Honor, may I read what has been marked as plaintiff’s Exhibit 13 to the jury?

Court: You may.

Counsel: *(Reads excerpt again)*

Rule 613(a) does away with any requirement that the witness be shown his or her prior statement before being examined on it. The rule does require, however, that the prior statement be shown to counsel on request. This can be done by referring during questioning to the page and line number of the deposition transcript where the witness's statement appears, assuming that opposing counsel has his or her own copy of the transcript.

9.4.2 Substitution for a Live Witness

There are a number of situations where deposition transcripts would be helpful at trial because the witness is not going to appear at all. This occurs when: (1) the witness is busy and would prefer not to appear as a matter of convenience; (2) the witness refuses to appear; (3) the witness cannot appear because he or she is dead, ill or incapacitated; (4) the witness is adverse and you would prefer that he or she not appear as a part of your case because you don't want to take that risk. In each of these cases, helpful portions of the deposition transcript can be used at trial. In planning for such situations, if the deposition transcript to be used at trial will require more than 10 minutes to read, consideration should be given to videotaping the deposition. It is very difficult to read from a transcript for more than 10 minutes and sustain the attention of any but the most avid juror.¹⁹

If your witness is busy and would prefer not to appear at trial, you are entitled as a matter of right to use his or her deposition if the witness is located more than 100 miles from the place of the trial (as long as you didn't temporarily send him or her there).²⁰ If the witness is closer than 100 miles, you must make a motion to get permission to use the deposition in place of live testimony.²¹ This method is often used for expert testimony from medical doctors or other specialists who are needed to meet emergencies or other important commitments that would be interrupted if they were called to testify.

The format is quite simple:

19. See discussion of videotaped depositions in section 5.3.

20. Fed. R. Civ. P. 32(a)(3)(B).

21. Fed. R. Civ. P. 32(a)(3)(E).

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20 Attorneys for Plaintiff
NEVADA POWER COMPANY,
21 a Nevada Corporation
22

23 UNITED STATES DISTRICT COURT

24 DISTRICT OF NEVADA

25	NEVADA POWER COMPANY, a Nevada	)	CASE NO. CV-S-89-555-LDG
	corporation,	)	(LRL)
26		)	
	Plaintiff,	)	
27		)	
	vs.	)	
28		)	

1 MONSANTO COMPANY, a foreign)
2 corporation; GENERAL ELECTRIC)
3 CORPORATION; a foreign corpora-)
4 tion; WESTINGHOUSE ELECTRIC)
5 CORPORATION; a foreign corpora-)
6 tion; and DOES I through XXV,)
7 inclusive,)
8 Defendants.)

PLAINTIFF NEVADA POWER
COMPANY'S NOTICE OF TAKING
DEPOSITION OF DEFENDANT
WESTINGHOUSE ELECTRIC
CORPORATION PURSUANT TO
FRCP 30(b)(6) BY VIDEOTAPE
AND/OR STENOGRAPHIC
RECORDING

8 TO DEFENDANTS MONSANTO COMPANY, a foreign corporation; GENERAL
9 ELECTRIC COMPANY, a foreign corporation; WESTINGHOUSE ELECTRIC
10 CORPORATION, a foreign corporation; and to their attorneys of
11 record herein:

12 PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(6) of the
13 Federal Rules of Civil Procedure, plaintiff Nevada Power Company
14 will take the deposition of defendant Westinghouse Electric
15 Corporation at 1:00 p.m., on February 26, 1993, at Westinghouse
16 Electric Corporation's corporate headquarters located at 11 Stanwix
17 Street, Westinghouse Building, Pittsburgh, Pennsylvania 15222. The
18 deposition will be taken upon oral examination before a Notary
19 Public or before some other officer authorized by law to administer
20 oaths until completed, and by video tape. You are invited to
21 attend and cross-examine.

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1 The individual(s) produced shall be the ones who can testify
2 concerning the subjects listed on Attachments "A" and "B" to this
3 Notice.
4

5 DATED: February 11, 1993

BRADLEY & MERRELL
RALPH A. BRADLEY
PAUL E. MERRELL

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7
8 By:


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BRADLEY & MERRELL
c/o JONES, JONES, CLOSE & BROWN
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12 Attorneys for Plaintiff
13 NEVADA POWER COMPANY
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2 ATTACHMENT "A"
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4 Any and all warnings or representations regarding the actual
5 or potential hazards of PCBs (including any and all contaminants,
6 degradates, metabolites, environmental byproducts, etc.) that you
7 contend were given to Nevada Power Company, or to any other person
8 or entity, such as, but not limited to, trade associations,
9 constituting notice to Nevada Power of such warnings or
10 representations prior to or at the time of purchase of each item of
11 equipment at issue in this case. The person or persons you produce
12 should be knowledgeable about the specific communications involved,
13 including but not limited to their contents, dates, and surrounding
14 circumstances.
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ATTACHMENT "B"

Any and all documents which demonstrate warnings, communications and representations regarding the actual or potential hazards of PCBs (including any and all contaminants, degradates, metabolites, environmental byproducts, etc.) that you contend were given to Nevada Power Company, or to any other person or entity, such as, but not limited to, trade associations, constituting notice to Nevada Power of such warnings or representattions prior to or at the time of purchase of each item of equipment at issue in this case.

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23 UNITED STATES DISTRICT COURT

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TO FRCP 30(b)(6) BY
VIEOTAPE AND/OR
STENOGRAPHIC RECORDING

8 TO DEFENDANTS MONSANTO COMPANY, a foreign corporation; GENERAL
9 ELECTRIC COMPANY, a foreign corporation; WESTINGHOUSE ELECTRIC
10 CORPORATION, a foreign corporation; and to their attorneys of
11 record herein:

12 PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(6) of the
13 Federal Rules of Civil Procedure, plaintiff Nevada Power Company
14 will take the deposition of defendant Monsanto Company at 3:00 p.m.
15 on February 22, 1993, and, if necessary continuing at 8:30 a.m. on
16 February 23, 1993 at Monsanto Company's corporate headquarters
17 located at 800 North Lindbergh Boulevard, St. Louis, Missouri
18 63167. The deposition will be taken upon oral examination before a
19 Notary Public or before some other officer authorized by law to
20 administer oaths until completed, and by video tape. You are
21 invited to attend and cross-examine.

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6 DATED: February 11, 1993

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TRANSMIT CONFIRMATION REPORT

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