

## **REQUESTS FOR PRODUCTION**

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### **TASK 35**

#### ***Depose Custodian of Records***

##### **I. WHAT AND WHY**

- A. A records custodian is a person with knowledge of an entity's record maintenance and retention policies and practices. Depose an entity's records custodian to learn:
  - 1. The types of records the entity generates, e.g., telephone messages, internal memoranda, meeting minutes.
  - 2. The types of records the entity keeps.
  - 3. The entity's record filing system, e.g., whether the entity files consumer complaint letters in a single complaint file or separately by product.
  - 4. The entity's record identification system, e.g., by title, file number, subject or author.
  - 5. The locations of records.
  - 6. How the entity maintains records, e.g., on hard copy, computer disk or microfiche.
  - 7. The entity's record destruction policy.
  - 8. Who is in charge of maintaining records.
  - 9. Who is in charge of distributing records internally and determining the distribution path.
  - 10. How the record system actually works versus how it is supposed to work.
- B. This information may help you obtain documents you need because you can:
  - 1. Draft more specific document requests
  - 2. Properly identify documents

3. Know what documents the entity has
- C. Deposing a records custodian can help you impeach the entity's credibility.
1. A motion to compel production of documents (see Task 81) will be more effective because you will have strong evidence that the entity maintains the documents at issue.
  2. If the entity does not produce requested documents, at trial you may show what types of documents the entity usually maintains and that the entity's failure to produce them suggests it is hiding something.
- D. Deposing a records custodian can help you qualify the entity's documents as business records under FRE 803(6) and allow you to offer them into evidence without further authentication and without many hearsay objections associated with documentary evidence.
- E. A records custodian can also provide information about additional witnesses, documents and other facts you may need to prove your case.
- F. You may also depose a records custodian about the entity's efforts to locate responsive documents and to verify that the entity produced all its responsive documents.
- G. You may depose a party's or nonparty's records custodian.
- H. You need not identify the custodian by name or job title. Your deposition notice (see Task 57) may simply be directed to the "custodian of records" of the responding party.

## II. WHEN

- A. Without a court order or written stipulation, you may not take records custodian depositions before the FRCP 26(f) initial meeting (see Tasks 20-22). FRCP 30(a)(2).
- B. You may take records custodian depositions before the meeting only:
1. If the parties stipulate in writing.
  2. By court order, if you can show good cause. FRCP 26. For example, if the witness is in poor health or imminently departing the jurisdiction or you need the deposition for a TRO or preliminary injunction.

3. When the witness is leaving the country and will be unavailable after the initial meeting, FRCP 30(a)(2)(C). An order or stipulation is not required.
  4. If local rules allow.
- C. If the FRCP 26(a) initial disclosure requirements do not apply to your case (see Task 19), check local rules and court orders for any hold on depositions.
- D. As a practical matter, consider deposing a records custodian before you draft your document requests or to authenticate the documents at a document production. Parties frequently stipulate to authenticity and do away with the need for any deposition on that issue.

### III. HOW

- A. Determine whether to depose an entity's records custodian.
1. A records custodian deposition is most desirable when:
    - a. You are unfamiliar with the entity's or industry's record-keeping practices.
    - b. The entity is large, has many files, branches or management tiers and its record-keeping practices are complex.
    - c. You want testimony about the records the entity normally retains because you believe the entity may not produce all its responsive documents and you may make a motion to compel.
    - d. You want to authenticate and qualify the documents as business records for admission at trial.
  2. You may not need to take a records custodian deposition when:
    - a. You have access to an expert or other person knowledgeable about the entity's record-keeping practices.
    - b. You seek only specific, identifiable documents from the entity.
    - c. Your resources are limited or you have other more important depositions to take and you do not want to use up your deposition allotment.
- d. You intend to depose other witnesses who can authenticate and qualify the documents as business records.

- B. If you decide to take a records custodian deposition, draft and serve a deposition notice pursuant to FRCP 30(b)(6). See Task 58.
1. Name the entity's "records custodian" as the deponent.
  2. Define "records custodian" as the person or persons most knowledgeable regarding the entity's record maintenance and retention policies and practices.
  3. You may specify a records custodian for a certain department, division or branch.
- C. To depose a nonparty's records custodian, serve a subpoena pursuant to FRCP 45. See Task 40.
- D. Review your annotated proof of fact (Task 4) to determine what documents you need to prove your case.
1. Prepare for the deposition with an eye towards documents you need. First ask general questions, such as the types of records the entity maintains. Then ask more specific questions about the records that may relate to your case. Ask about:
    - a. Employees' office, desk and personal files
    - b. Legal and accounting records
    - c. Advertising and marketing files
    - d. Consultants' and former employees' files
    - e. Computer disks and electronic mail
    - f. Records at plants or branch offices
    - g. Stored files
  2. Elicit detailed information about the existence, form, maintenance and retention of each type of record you need.
  3. Ask how the documents listed in the entity's FRCP 26(a) initial disclosure and other available documents fit into the entity's record system. This may provide more concrete information about the entity's record-keeping system and may trigger additional testimony.
  4. If any documents are available before the deposition, review them for information suggesting the existence of other documents.