

Understanding the Civil Action Deposition

[The following is the first installment in a two-part series examining the role of deposition in the American legal system.]

One of the most useful, and misunderstood, procedures in civil litigation is the deposition. Known as “examination before trial” (EBT) in various state court systems, deposition serves an essential fact-finding role in the pre-trial search for truth known as “discovery.”

The Federal Rules of Civil Procedure afford litigants the opportunity to orally examine opposing parties and non-party witnesses. The scope of the deposition is limited to those topics reasonably calculated to elicit relevant testimony. In practice, attorneys have wide latitude to ask questions on a variety of matters.

For parties to the action, the process begins with the issuance of a deposition notice. The document contains the caption of the case, *e.g.*, “Smith, Plaintiff versus Jones, Defendant.” The notice also identifies the date, time and location of the deposition. (Although not required by the Federal Rules, oral examinations are often held at the law office of the attorney “taking” the deposition.) The subsequent page(s) of the notice are known as the “Rider.” That portion identifies the topics to be covered and the relevant documents to be produced.

If a corporation is a litigant, it must produce what is known as a Rule 30(b)(6) witness. Contrary to the belief of most business people – and many attorneys – the corporate witness need not be the individual most knowledgeable about the company; rather, anyone –including non-employees- can testify on behalf of the company. In fact, it has even been suggested that an actor hired for that engagement may appear. The sole consequence is that the company is bound by the statements, or omissions, of the witness.

From the first days of law school, attorneys are taught the Cardinal Rule: Never ask a question to which you do not know the answer. Depositions are the notable exception. The goal of an oral examination is not to win the case, but rather to flesh out all of the relevant factual background details. Less adept attorneys forget this objective and engage in an acrimonious exchange with the witness simply to establish control. Often, though, more productive results can be achieved by adopting a pleasant, non-confrontational tone than by engaging in a gladiatorial contest of will between witness and examiner. The primary purpose of the deposition is to lock a witness into her or his account of the matter. At trial, a skilled attorney can use the deposition testimony to impeach the credibility of a witness through prior inconsistent statements. In some movies, the lawyer will dramatically confront a witness by asking, “Were you lying then or are you lying now?”

Depending upon the acoustics of the room or the availability of audio equipment, the witness will often be seated beside the court reporter (stenographer). The court reporter is an individual who records a verbatim transcription of the proceedings. Although originally taken in shorthand, today's court reporters use a machine which resembles a small typewriter. Each key stroke represents a word or phrase. The transcript is preserved on a continuous piece of paper which resembles a calculator slip. Newer versions of the equipment are paperless. Although unintelligible to the untrained, a court reporter is able to "read back" the record if asked to do so. In some instances, the attorneys are also able to read a real-time account of the deposition through the use of "Live Note" software. The attorney attaches a cable between her or his laptop computer and the court reporter's machine. The transcription then appears on the laptop. Those passages of particular interest to the attorney can be marked for later reference during the deposition. While some clients may find "Live Note" to be a prohibitively expensive luxury, the program provides a significant tactical advantage.

Some depositions may also be videotaped. Such examinations add an additional facet to the testimony. Not only will the witness's words be recorded, but the individual's facial expressions and body language will also be preserved. Skilled attorneys often use videotaping to convey a witness's personality to a jury. Did the deponent seem alert, interested and engaged? Did she appear inattentive, apathetic and aloof? If the witness is unavailable to provide subsequent testimony at trial, the videotaped deposition will serve to convey the witness's personality to the jury. Behavioral psychologists have concluded that most people absorb more of what they see than what they hear. Accordingly, even the best deposition testimony can be undermined by a slovenly attired or poorly postured witness.

Next week, we will examine the mechanics of a deposition and offer tips for success.

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