How to Give a Successful Deposition

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

Last week, we examined the role of deposition in the discovery phase of a federal civil lawsuit. Today, we provide insight into the deposition itself and practical tips to achieve success.

The oral examination begins with the administration of an oath or affirmation to the witness. This is done to impress upon the witness the solemnity of the proceeding and ensure the truthfulness of the testimony. Violation of the oath or affirmation is punishable by perjury. The oath or affirmation is administered by the court reporter. The witness is asked to raise her or his right hand and is asked, "Do you swear or affirm that the testimony you shall give shall be the truth, the whole truth and nothing but the truth?" The witness replies, "I do."

The attorneys assume one of two roles. The lawyer who asks the initial questions is said to "take" the deposition, while the one who represents the witness is said to "defend" the deposition. The attorney "taking" the deposition indicates to the court reporter that she or he is prepared to "go on the record" and greets the witness. Ground rules are explained to facilitate the session. Customarily, these will include an instruction to vocalize responses rather than provide a nod or shake of the head, actions which cannot be recorded by the court reporter. Witnesses may request a break at any time, provided a question is not pending. As a matter of professional courtesy, the attorney "defending" the deposition will not request a break until opposing counsel has completed a line of inquiry.

The witness is obligated to answer each question. If the "defending" attorney believes a particular question is improper, she or he may interpose an objection. Under the Federal Rules of Civil Procedure, and the governing rules of most states, objections are said to be "limited to form." This means that an attorney may only state, "I object to the form of the question." To say anything more would be deemed a "speaking objection," a practice strictly proscribed because of the inherent danger of witness coaching. All objections are subject to a ruling by a judge at the time of trial. In all but the rarest of instances, an attorney may not direct a witness to not answer a question. Such direction would frustrate the purpose of the deposition – the search for truth.

A common misconception is that a party can "win" a deposition; they can't. Oral examinations generally elicit uncomfortable, seemingly damning testimony. Few, if any, lawsuits are so one-sided as to fully protect the interests of one party. The best result which can be hoped for is to minimize the damage by observing well-settled best practices. Here are several I have observed in my practice:

-Project confidence. A witness must trust that her or his attorney has provided thorough preparation. To accomplish this, many attorneys will invest an amount of time equal to or greater than the estimated duration of the deposition.

-Remember that a deposition is an interrogation, not a conversation. Regardless of how pleasant the opposing counsel may seem, she or he has a single goal: To inflict as much damage upon you as they possibly can. Assassins can smile too.

-Actively listen to the question. If you do not understand the question, ask the attorney to repeat or rephrase it.

-Never interrupt the examiner. Listen to what she or he asks, process the question in your mind, then respond. The extra moment of reflection provides clarity and a reasoned response.

-When possible, limit answers to either "yes" or "no." The deposition is not a place to volunteer information. For example, if asked, "Do you know what time it is?" the reply should be "yes" or "no," not "10:30." Make the other side's attorney earn her fee by asking probative questions. An attorney asks inarticulate or imprecise questions at their own peril.

-Do not speculate. A witness is asked to provide facts, not conjecture.

-Correct mistakes at the earliest opportunity. Unless revised at the deposition, a witness's responses are permanent.

-The witness should immediately leave the room upon conclusion of the deposition. No good can come of small talk between the witness and opposing counsel. This advice holds true for breaks as well.

Within a week or two following the deposition, a deponent will receive the court reporter's transcript. The witness is asked to carefully examine the document and note any errors. Although this does not afford a witness to improve prior testimony, the review process does reduce the likelihood that typographical mistakes will appear in the permanent record. Changes are noted on the "Errata Sheet" above the deponent's signature. Once signed, the document is finalized.

In most instances, a deposition is not an outcome-determinative event. A poor deposition, however, can inflict significant damage on a party. Individuals who are considering the filing of a lawsuit or who find themselves defending against a civil action are advised to retain the service of a competent legal professional.

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