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News for Associates and Young Lawyers

Career Development

More Effective Deposition Preparation

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For many reasons, depositions are often among the most important events in the life of a lawsuit. A deposition usually provides the first opportunity for counsel to directly question an opposing party regarding damaging facts and other significant aspects of the case. If the deposition is effective, an opposing party's overall evaluation of the merits of its case or defense may be altered dramatically, perhaps facilitating a faster settlement on more beneficial terms for the deposing party than would have been possible prior to the deposition.

Conversely, a party who "escapes" a deposition relatively unscathed by the questions and unimpressed by the admissions solicited by the examiner is apt to become entrenched in his prelitigation positions, leaving a prompt settlement on favorable terms for the examining party unlikely.

Depositions are also a valuable tool because they provide the deposing attorney with an opportunity to obtain admissions and other evidence that may aid the client in successfully obtaining, or defending against, summary judgment.

A deposition also locks a witness into a sworn account of events, as a practical matter preventing the witness from credibly providing contradictory testimony either at trial or in connection with dispositive motion practice.

Finally, many times deposition testimony is published to the jury at trial, either as direct evidence or for impeachment during cross-examination.

Given the important role depositions play in the litigation process, following are several steps junior attorneys can take in advance of the deposition to maximize the likelihood of a beneficial outcome for counsel and client.

Some may find it surprising that proper deposition preparation begins in the law library. Effective examination of a witness requires an examining attorney to possess a complete understanding of the elements of the claims and defenses which are presented in the action. For example, an attorney pursuing a civil fraud claim who is scheduled to depose the defendant needs to be cognizant of the legal elements of fraud in order to insure that questions are asked that solicit testimony regarding the required showings of intent to deceive and reliance.

Conversely, defendant's counsel's understanding of the relevant law allows it to probe the plaintiff at deposition for factual admissions necessary to demonstrate that plaintiff cannot meet its burden of proof, and to gather evidence essential to the defendant's affirmative defenses.

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The attorney should form a predeposition game plan that results in a demonstration to the witness early on in the deposition that it is the attorney who is in control of the proceedings. This means the attorney should plan to ask leading questions that demonstrate his mastery of the case facts toward the beginning of the deposition.

How the examining attorney presents himself both before the deposition begins, and during the initial stages of the deposition, can make a meaningful impression upon a witness and impact how the witness responds to questions.

Prior to the deposition, the attorney should make a strategic decision whether to treat the witness in a manner that will be perceived as friendly, serious, angry, intimidating and the like. The attorney's mannerisms, gestures and overallattitude is likely to impact the rhythm, rapport and trust established between questioner and answerer. How the attorney decides to present himself should not be left to chance, but should be carefully considered before the deposition.

Further, maintaining control at a deposition means the examining attorney should not permit herself to be unduly distracted by opposing counsel. The examining attorney's priority should be to focus on the dialogue with the testifying witness, with the end result being the production of a usable deposition transcript, not a transcript filled with attorney colloquy.

Documentary Evidence

Controlling the witness requires the examining attorney to develop a mastery of the underlying facts of the case before the deposition. Numerous sources may be available for the attorney to review, including the pleadings, prior affidavits, earlier deposition transcripts, witness interviews, investigative reports and documentary evidence. While each source is important and requires the attorney's full attention, the documentary evidence deserves special mention.

Documents often provide a contemporaneous account of events central to the lawsuit, and when authored before a lawsuit is contemplated documents are deemed by many to be more credible than deposition testimony or lawyer-drafted interrogatory responses.

Predeposition mastery of the documents (as well as the other source materials referred to) provides an opportunity for the deposing attorney to control a witness who is exaggerating or manufacturing facts. A witness that is embarrassed early on at a deposition when caught testifying in a manner inconsistent with the contemporaneously prepared documents is likely to be more circumspect as the deposition continues, lest the witness be caught stretching the truth again.

Understandably, inexperienced counsel often will fixate on having his next question ready rather than carefully listening to the witness' answer to the pending query. This is a mistake for several reasons. First and foremost, counsel is deposing the witness to obtain the sworn testimony of an individual whose account of events may impact the ultimate result of the lawsuit. Listening to the answer of the pending question allows the attorney to ask follow up questions that are appropriate to the witness' testimony.

Moreover, there is nothing improper about the examiner taking time after the witness answers the question to formulate and articulate the next question. Remember, the final product of the deposition, the deposition transcript, typically does not indicate that there has been a delay in the witness being provided with the next question. Instead, the transcript makes it appear as though the questions were asked in rapid fire sequence. Thus, any delay falls under the heading, "no harm, no foul," and the junior attorney should not be overly concerned about such delays.

This column is by no means an exhaustive listing of the requirements for proper deposition preparation. Indeed, many books have been published on the topic, and there are many worthwhile continuing legal education courses on the subject. A junior lawyer should consider the ideas presented here as a platform from which to begin upon building a strong set of deposition taking skills.