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HEADLINE: Depositions: An Important Tool for Trial

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BODY:

Depositions are to the outcome of a lawsuit what a foundation is to a building ;lay it out properly and you have all the support you need for success. An improperly taken deposition, however, like a weak building foundation, can result in a crumbling disaster. Many practitioners believe that a deposition can make or break a case, and therefore, knowledge of the governing rules, together with careful planning and thorough preparation are pivotal to conducting a productive deposition and consequently, a successful case.

The rules governing the conducting of depositions are set forth in CPLR 3101-3117. Effective Oct. 1, 2006, a new section of the Uniform Rules for Trial Courts, Part 221, titled "Uniform Rules for the Conduct of Depositions" was added. These "new" rules, if followed, are designed to provide for a wide range of uninterrupted questioning: "A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person."

Notwithstanding these rules, directions not to answer questions are still widely used by those defending depositions to prevent and obstruct a legitimate area of inquiry. So rampant have violations of these rules become that it is commonplace for those defending depositions to ignore the rules, refuse a request to call the court and make clear on the record that an adversary should "make a motion" if there is disagreement. Not only is this a waste of precious court time but it serves to undermine the efficacy of the judicial process itself. Needless motion practice serves only to burden an already overworked court. Unfortunately, the uniformity with which the courts have enforced these rules has been anything but consistent. It is hoped that the courts will soon provide for uniformity of the application of these new rules and direct sanctions, where appropriate, for disobedience.

The Attorney's Role

The role of the attorney at the deposition is dependent upon whether the attorney is "taking" or "defending" the deposition. The examiner, or attorney taking the deposition, is the one asking the questions and generally would seek to get as much information from the witness as the governing rules permit. The defending attorney is the one who produces the witness to be deposed and will generally, within the rules, try to limit the areas of inquiry and scope of the examination.

Careful planning requires the examiner to pre-determine the purpose of his deposition. Determinations must be made as to whether it is best to move in for the kill at deposition or wait for trial to bring forth a crucial piece of proof or to expose a lie. Consideration must be given not just to the type of case at hand, but the goals you hope to achieve by taking the deposition. For example, is the purpose of the deposition to acquire information and discover both favorable and unfavorable facts? Is it to obtain a commitment from the deponent for favorable or supportive facts? Is it to punch holes in those facts that hurt? Is it to perpetuate testimony or to avoid the perpetuation of testimony? Or, is it merely an opportunity to view the deponent's demeanor, to assess his credibility or to determine whether the witness will hold up on direct or cross-examination at trial. The ability of the deponent to articulate his position must be continuously reevaluated during the course of the deposition.

The age, health and availability of the deponent must be considered at the outset. This is especially relevant when the examiner will be asking open-ended questions. If the deponent is old or in poor health and likely to be unavailable at trial, conducting an exploratory deposition through the use of open-ended questions might well serve to perpetuate harmful answers which may well be used against the examining attorney and in support of his adversary at trial. Clearly, when dealing with a frail, old, or unhealthy witness, or one likely to be unavailable at trial, counsel will be well served by conducting a short, to the point deposition, seeking only confirmation of helpful and known facts.

Videotaping the Deposition

When contemplating the future availability of a deponent, one consideration is to record the deposition through videotape. In this electronic age, videotaping has become more and more common. While trial lawyers have for years sought to impeach a witness on cross by their own prior inconsistent testimony taken at a deposition, nothing is more powerful than viewing the inconsistency on a large screen showing the very witness giving two different answers to the same question. CPLR 3113(b) permits the taking of depositions by videotape and 22 NYCRR 202.15 of the Uniform Rules provides a uniform procedure for videotaping depositions. Although court permission is not necessary to videotape a deponent, proper notice is a prerequisite to such taping. Interestingly, an employee of the attorney conducting the deposition may serve as the videographer and more than one camera may be used to record the deposition.

Types of Questioning

Pursuant to CPLR 3113(c), examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court. Thus, if the witness is adverse or exhibits hostility to the examiner, the same rules that apply at trial, apply at deposition. What this means is that the examiner deposing the adverse witness may "cross-examine" the witness using leading, "yes or no" questions (see, Becker v. Koch, 104 NY 394).

A leading question is, simply put, a question that suggests an answer or one that severely limits the universe of potential answers. The following questions, designed to restrict the

answer, are clearly leading:

Q: The sidewalk was cracked, true? or

Q: You knew the sidewalk was cracked, right?

Another example of a leading question is where the answer is suggested without any opportunity for a 'meaningful' choice:

Q: Was the sidewalk broken or cracked at that time? or

Q: You knew the sidewalk was either cracked or broken, true?

Needless to say, in both examples the witness is, in reality, given no choice. The questioning attorney is merely seeking confirmation to his statements in Q&A format.

We know that we can ask leading questions ;the rules permit that. The more important consideration is whether or not we should. In other words, is it strategically advisable to lead during the deposition?

There are no crystal balls and the experienced practitioner knows the basic tenet of cross-examination ;"never ask a question on cross unless you know the answer." While this is unquestionably true at trial, the reasoning behind this statement does not always hold true at deposition. Depositions present an opportunity to explore substantive matters in detail that counsel might otherwise be reluctant to explore at trial. Exploring such areas at deposition might open up a new and fertile area of attack that would otherwise go unknown.

Consider the following example. Imagine the scenario in which a defective sidewalk caused your client to trip and fall and suffer serious injuries. At the deposition of the building's maintenance manager the following exchange could take place by leading the witness:

Q: You knew the sidewalk was cracked?

Q: You knew the sidewalk had been broken for more than two months, true?

Q: You did not order it to be repaired?

While these questions might serve you well, the use of leading questions intertwined with open-ended questions in this same example might well provide an even more powerful line of attack for trial:

Q: You knew the sidewalk was cracked?

Q: When did you first know this?

Q: When you learned it had been cracked for more than two months, what did you do?

A: I complained to the owner of the building.

Q: Why did you complain?

A: Because I thought someone might get hurt.

Q: What did the owner say?

A: "Don't worry about it, I'll take care of it."

Q: Can we agree you were trying to prevent this exact type of accident from occurring?

Q: How many times did you ask the owner to repair the broken sidewalk?

Even if the questioning doesn't go your way, as in the above example, the use of open-ended questions intertwined with leading questions will undoubtedly provide you with powerful insight ;you now know what areas of inquiry to avoid at trial.

On the converse, many times your deposition is your only chance to prove your case at trial. Take for example a medical malpractice case where you depose an employee of the hospital who was a resident at the time of the malpractice. By the time the trial arrives, the former resident is half way around the world, unavailable and outside the subpoena power of the court. In this scenario, the deposition must contain all the proof you need, and be a "no-holds barred" deposition:

Q: You said earlier that the baby was fine in the nursery, true?

Q: That her condition was good?

Q: Yet, to reflect that her condition was good, you wrote in the chart that she was grunting, right?

Q: And to reflect that she was doing well, you wrote in the chart that she had turned blue, correct?

Q: You'd agree that her condition at that time was not good, right?

Q: As a matter of fact, nothing could be further from the truth, right?

When dealing with people who probably will not be available at a future date, doing a thorough, yet adverse deposition, is the more cautious way to proceed.

At the same time, one defending a deposition must do so with an eye toward the future trial. Will your witness be available at that time? Take for example a situation where you represent a terminal patient in a case involving failure to diagnose cancer. The prudent

defense attorney will intentionally refrain from asking questions involving pain and suffering. In this case the plaintiff's attorney should conduct a videotaped deposition perpetuating the testimony. The plaintiff's attorney should question his own client on these matters, including pain and suffering and loss of enjoyment of life, at the conclusion of the defense questioning.

After the Deposition

Once the deposition is concluded, the attorney's job is not over. Suppose the deponent made an error in his testimony. Can he change the answer given at deposition? The short answer is yes. However, changes, often made through the use of errata sheets, are, at times, fraught with peril. This is so because both the original answer and the change may be read to the jury (see, Steiger v. Mason, 509 N.Y.S.2d 112 [2d Dept. 1986]). Consider the following scenario for illustrative purposes.

Suppose a witness testifies at deposition that he was driving at 35 mph at the time he struck a bicyclist. The speed limit was 30 mph. An errata sheet with only one change is submitted which changes the speed from 35 mph to 25 mph. While the cross-examining attorney could simply read the original question and answer to the jury, an experienced attorney will milk this inconsistency for all it is worth, casting doubt on the integrity of the witness and on the defending attorney himself:

Q: You're aware the speed limit is 30 mph, correct?

Q: You were asked about speed at your deposition, true?

Q: That deposition was taken closer in time to the accident, right?

Q: At a time when your memory of the events was fresher, true?

Q: You knew the answers given were under oath, right?

Q: The same oath you took today, right?

Q: At the time of the deposition you stated something different than you said in Court today, correct?

Q: For some reason, the speed you were driving at is now lower than the speed limit, correct?

Q: You would agree if you were speeding that would cast blame on yourself, right?

Q: You filled out an errata sheet, correct?

Q: Where you can change your answers, true?

Q: But you only made one change, right?

Q: Did something happen to cause you to make that change?

Q: Did anyone suggest making that change?

Q: You did it on your own, right?

Q: Or was it with help from someone?

Another issue that often comes up is the adversity of the witness himself. Let's assume you took the deposition of an employee of an adverse party. That deposition was taken three years ago. At trial you seek to read the deposition, but your adversary objects, stating "the witness is no longer employed and is therefore not adverse." Can you read the deposition to the jury? The answer is yes. CPLR 3117(2) makes clear that if the witness was adversely interested at the time the deposition was taken, the testimony may be read to the jury.

Conclusion

Preparing to conduct a deposition is similar for both the taking and defending attorneys. Counsel should bear in mind the claims and defenses in the lawsuit as set forth in the pleadings and bills of particulars. Both parties should review all of the previously exchanged disclosure materials and any other non-disclosable investigatory materials. Knowledge of all the applicable rules is essential. Behind every great trial is a well taken or defended deposition.

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