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The Dreaded Deposition?

In this quarter's newsletter, Elan E. Weinreb, Esq., Managing Member of The Weinreb Law Firm, PLLC, addresses deposition preparation from both offensive (a/k/a "taking a deposition") and defensive (a/k/a "defending a deposition") perspectives.

Offensive Deposition Preparation

I have been fortunate enough to have taken and defended a variety of depositions over a decade of practice. While every case involves different legal issues and nuances, I have found three core principles underlying deposition preparation to remain constant.

- **Know the Case and Its Documents —** Except in relatively simple cases, depositions are usually noticed after the parties make document requests and exchange documents. To adequately prepare to take a deposition, one must be familiar and fluent with a case's pleadings, motion papers, and significant documents. Allow adequate time for review and analysis; the eve of a scheduled deposition is generally **not** the time to be starting this work.

  In addition, clients who have had no experience with depositions should be informed in advance and in writing that preparatory document review and analysis is absolutely necessary to represent their interests. As the oft-repeated saying goes in dealing with billing questions, "An ounce of prevention is worth a pound of cure."

- **Draft a Deposition Outline Based Upon Litigation Objectives —** Regardless of whether one is representing a plaintiff, defendant, cross-claimant, or even a non-party, the next step in preparation is the same: draft a comprehensive outline of topics for questioning based upon a written, specific list of litigation objectives ("LLO"). The LLO should be drafted with this key question constantly kept in mind: "What answers to questions at the upcoming deposition will best serve client interests?"

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The specific order of proposed topics for questions is something that is case-specific and a matter of attorney preference. However, generally speaking, a chronological order is preferred for two reasons: (a) because many people have an innate desire to participate in the telling of a story or narrative, a chronological order facilitates a witness "anticipating" questions before they are asked, thereby providing potentially fertile ground for additional questioning; and (b) even if a witness has been prepared to be "tight-lipped" in answering questions, the chronological order enables one later on to more easily locate answers in what often is a voluminous transcript than if the order is not used.

- **Prioritize Topics in Anticipating Legal Obstacles —** Often, court rules, other relevant law, a bothersome opposing counsel, or practical limitations will restrict one's ability to ask questions. Know in advance—and prioritize your LLO-based questioning topics upon—whether time limitations are or will be (if more than one day of deposition practice is anticipated) an issue, whether topics are likely to draw "do not answer" instructions based upon the attorney-client privilege or prior court orders, and whether opposing counsel has a reputation for shenanigans.

  In this regard, while it is true that one can often obtain favorable rulings on opposing counsel "do not answer" instructions, if it takes two hours on the phone to obtain such rulings, they can come at too great a practical cost of lost time and momentum. Most of the time, it pays to simply mark "do not answer" instructions as they are given for a later application or motion to the Court for rulings or sanctions, re-prioritize questioning topics, and proceed accordingly.

Defensive Deposition Preparation

I have found that with the possible exception of neutral non-party witnesses who do not have ties to litigants, defending a deposition is more difficult than taking it. First, the defending attorney is ultimately not in control of a witness' responses. Second, in the same vein, the defending attorney cannot do much to prevent a witness from having to respond to questioning. Third, in cases involving many contentions or documents, it is impossible for any attorney without a true photographic memory (which includes me) to recall and prepare the witness for every possible avenue of questioning based upon such contentions or documents. The prospect of the witness "flying blind" is very real in such cases.

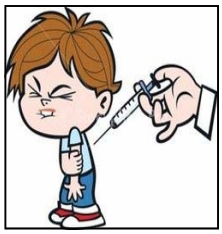
However, like a deposing attorney, a defending attorney can rely upon some core principles in preparing to defend a deposition.

"Defensive Deposition Preparation" — *cont. from Page 2*

- **Draft a "Counter" Deposition Outline Based Upon the Questioning Attorney's Potential Litigation Objectives —** It is a virtual certainty that the questioning attorney will draft an outline of topics for questioning. To prepare a witness or witnesses for such questions, one should put himself or herself in the questioning attorney's shoes and draft the same type of outline that he or she will most likely be drafting. Specifically, one should draft an outline that focuses on the questioning attorney's potential litigation objectives for his or her client(s), which will in turn serve as the basis for his or her questions.

  For example, assume that one is defending the deposition of a defendant who is sued for breach of contract. Establishing: (a) the formation of the relevant contract, including but not limited to supporting consideration; (b) the conduct of the parties (as reflected by documents or testimony) concerning the contract; and (c) the nature and quantity of any resulting damages are all potential litigation objectives for the questioning attorney.

- **Use the "Counter" Deposition Outline to Substantively Inoculate the Witness —** Once the "counter" deposition outline has been drafted, one should meet with the witness in-person and take on the role of the questioning attorney. If possible, in questioning the witness, one should attempt to mimic the questioning style of the questioning attorney. Otherwise, one should default to being as aggressive as possible in questioning (within reason, especially when dealing with a sensitive witness).

  Before adopting the often antagonistic role of a questioning attorney, a witness' attorney should explain the need to assume such a role to the witness. Here, an analogy may be drawn to a child who is being inoculated against rubella: while he or she may dislike the initial discomfort of the inoculating injection, when he or she eventually comes to understand the consequences of contracting rubella, any lingering resentment over the initial discomfort is replaced with a sense of gratitude.

  After thirty to forty-five minutes of "sparring" with the witness, a break should be taken to evaluate the witness' responses against the potential litigation objectives of the questioning attorney that are reflected in the "counter" deposition outline. Are those potential objectives being met? If "yes," then **within the bounds of the law**, are there any damage control options available?

"Defensive Deposition Preparation" — *cont. from Page 3*

- **Anchor the Witness —** As part of preparation sessions, it is essential to provide a witness (even if experienced in testifying) with procedural "anchors"—guidelines for answering questions. There are at least two reasons for doing so: (a) anchors serve to calm the witness and mitigate the mental fatigue that comes along with being in the proverbial "hot seat" for hours; and (b) anchors provide protection against aggressive questioning.

Here is my standard set of anchors for witnesses:

1) **ABOVE ALL, ALWAYS TELL THE TRUTH**.

2) 95% of deposition questions can be answered with one of the following responses:

   - "Yes."
   - "No."
   - "I don't know."
   - "I don't remember."

3) **Do NOT** volunteer information gratuitously. Respond "proportionally" only to that which is asked.

4) Feel free to ask for a break at any time but also remember that no breaks are allowed while a question is pending.

5) You must answer all questions unless they implicate one of these three categories, in which case I will instruct you not to answer:

   - Privilege (e.g., Attorney-Client, Fifth Amendment, Physician-Patient, Clergy, etc.)
   - Palpably Improper
   - Court Order Precluding Questioning

6) Wait at least **TWO (2) seconds** before responding to ANY question.

7) **Do NOT** speculate, guess, assume, or confabulate.

8) **Do NOT**, as tempting as it might seem, try to "score points" against the other side. That's my job, not yours.

"Defensive Deposition Preparation" — *cont. from Page 4*

9) Periodically, I will object to form and state, "The witness may answer." The objection here is designed to break the questioning attorney's rhythm and any rapport that he or she may be attempting to establish with you. But just as importantly, the objection should alert you to my belief that there is something wrong with the way the question has been asked. Therefore, pay close attention to the exact question being asked and then answer accordingly.

10) Should you ever feel the need to make a clarification or correction of testimony, please tell me, and I will arrange for it to occur. **Do NOT** wait until the deposition concludes.

Finally, remember that at the end of the day, **YOU ARE ALWAYS IN CONTROL** for the simple reason that the questioning attorney cannot move on to his or her next set of questions without first getting your responses to pending questions.

In conclusion, while every case has its own nuances and special substantive requirements, the fundamentals of deposition preparation, as outlined above, remain constant. Irrespective of whether one finds himself or herself in an offensive, defensive, or neutral position, proper preparation on the part of both attorney and witness is a prerequisite for success. Proper preparation can also serve to counter the popular misperception of the deposition as being something to dread. There is no question that depositions are stressful, time-consuming, and expensive, but there is also no question that with proper preparation, they can facilitate resolution of a case (either via settlement negotiations or a subsequent motion for summary judgment). Dread not that which may be a blessing in disguise.