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Chapter 5

Taking the Plaintiff's Deposition

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The deposition of the plaintiff is one of the most important parts of discovery. Whether an individual plaintiff or a 30(b)(6) designee for a corporate plaintiff, the deposition of the plaintiff is critical to preparing your case for a summary judgment motion or for trial. In addition to collecting information to confirm facts you believe you already know and to discover information you do not know, the plaintiff's deposition allows the defendant to test out legal and factual theories, to develop impeachment material for trial, and to elicit facts that may help facilitate a settlement. The deposition is also where you can size-up the plaintiff and assess his or her credibility and how they might be perceived at trial. While attorneys have many different styles, methods and techniques when deposing a plaintiff, there are several general approaches and considerations that will help the deposing attorney achieve his or her objectives of the deposition and ensure that no surprises surface at trial.

Taking the Plaintiff's Deposition

Civility

Regardless of the attorney's approach or technique, the goal of any deposition is to find out everything the witness knows that helps or hurts your theory of the case. Accordingly, it is important to encourage the witness to be conversational and to tell their story in complete factual detail. It is wise

to be assertive and effective in the deposition, but it is equally important to be professional and to employ a demeanor that encourages the witness to be conversational.

For example, rather than opening the deposition with aggressive and intrusive questioning, you should try to establish a rapport with the witness with general, preliminary background questions in the beginning of the deposition (*e.g.*, education, work history of the Plaintiff or 30(b)(6) designee). While some witnesses may cave to an aggressive tone and cross-examination style at the start of the deposition, most witnesses will be reluctant to be conversational and forthcoming under this approach. Adopting a pleasant and courteous tone—even in the face of an aggressive attorney defending the deposition—at the start of the deposition will likely garner a more cooperative and conversational witness and a greater flow of factual information.

Additionally, beginning with open-ended questions rather than closed-ended questions will not only encourage the witness to provide more detailed answers, it will demonstrate to the witness your willingness to let the witness speak without interruption. As the old adage goes: "you get more with honey than you do with vinegar."

Forming Artful Questions

Deposition questions generally can be distilled down to two types: (1) questions designed to gather information and (2) questions that seek admissions. The effective deposing attorney should utilize both types.

Gathering Information

When attempting to gather factual information in the deposition, one simple rule applies: you want the witness to feel encouraged to speak openly and broadly so that you can learn as much information as possible. This is not where you want to use leading questions designed to elicit a "yes" or "no" answer. Rather than showing the witness how much you know about the case through closed-ended questions, ask open-ended questions to let the witness educate you about his or her knowledge. Once educated with new facts from the witness, you can then ask questions that clarify and/

or expand on the information you learned from the witness's answers to the open-ended questions. As you narrow your questioning through this clarification phase, you can then exhaust or close-off the topic with more controlling questions that pin the witness down to certain details or other information. This technique is widely regarded as the "funnel approach."

Under the "funnel" approach, your questions are broad and wide open to start with. This is the top of the funnel where the typical questions begin with "who, what, where, when, why, and how." Your objective here: encourage the witness to speak freely about the specific topic or issue. Questions asking the witness to "describe" or "explain" or "tell me" can help achieve this objective. Consider the following questions of the plaintiff in a product liability case involving an off-road vehicle:

Q: Tell me what you were doing just before the accident?

Q: What were you looking at?

Q: What did you see?

Q: Describe the trail for me?

Q: When did you first see the turn?

Q: Tell me everything that happened after you made the turn?

As discussed in more detail in the next subsection, it is critical that the deposing attorney listen carefully to the witness's answers. The effective deposing attorney will listen to the information supplied by the witness and ask follow-up questions designed to clarify and/or expand on certain details provided by the witness. Consider the following answer to one of the previous questions:

Q: When did you first see the turn?

A: About 50 yards away.

Q: How fast were you going when you first saw the turn?

A: About 45 miles per hour.

Q: How do you know you were going 45 miles per hour?

A: I looked at the speedometer about 10 seconds prior to seeing the turn.

Q: Had your speed changed between the time you looked at the speedometer and when you saw the turn?

A: No.

Most of these questions are still open-ended, but they become narrower and more focused on certain details. As the questioning continues on this topic, the effective attorney will continue to narrow the scope by asking questions that start with "did" or "do" to elicit more closed-ended answers such as "yes" or "no":

Q: Did you slow down before you made the turn?

A: Yes.

Q: How soon before the turn did you slow down?

A: As soon as I saw the turn.

Q: How fast were you going when you made the turn?

Q: I don't know.

Q: Did you skid through the turn before crashing?

A: Yes.

Q: Did you have your seatbelt on when you crashed?

A: No.

Q: Did you have a helmet on when you crashed?

A: No.

Often, the clarification phase will uncover new facts that require the deposing attorney to go back and ask broad, open-ended questions. The lesson here is that an effective attorney will maneuver back and forth through the funnel when appropriate before proceeding to exhaust or close-off the witness's knowledge of the particular topic or issue.

In addition, closing off or exhausting the witness's knowledge is critical to preventing the witness from surprising you and your client with new information at trial. Each topic or issue should be effectively closed-off before moving on. That means not only exploring the topic or issue to the point of learning everything that you want and need to know, but also

cutting off the witness's ability to add new information at trial. You can close-off the witness by asking questions in forms such as "what else", "was anyone else present", "have you told me every person you spoke with about the incident", or "did you attend any other meetings," until you are satisfied that the witness has not reserved or withheld any information for use at trial.

Eliciting Helpful Admissions

After gathering information, clarifying and/or expanding on information and exhausting the witness's knowledge of the topic or issue, the effective attorney will proceed to the narrowest part of the funnel to elicit admissions that help prove your theory of the case and debunk Plaintiff's theory. Consider our previous example regarding the off-road vehicle accident:

Q: You knew the vehicle had a seatbelt, correct?

A: Yes.

Q: You knew that wearing a seatbelt can help prevent injury, correct?

A: Yes.

Q: Your vehicle came with an owner's manual, correct?

A: Yes.

Q: Did you read the owner's manual?

A: Yes.

Q: When did you read the owner's manual?

A: When I purchased the vehicle.

Q: You understood that the owner's manual contained important safety information, correct?

A: Yes.

Q: So you knew that you should not operate the vehicle without wearing a helmet?

A: Yes.

Q: And you knew that you should not operate the vehicle without wearing your seatbelt, correct?

A: Yes.

Liberal use of leading questions is effective in this phase because you are no longer trying to discover new information, but are pinning the witness down to specific details that are critical to your case. Non-leading questions can also be used when they are more likely to cause the deponent to give you the answer you are looking for, such as the question in the foregoing example asking if the plaintiff read the vehicle's owner's manual.

Listen, Listen, Listen!

Listening and concentrating on the witness's answers, especially during the information gathering and clarification phases of the deposition, cannot be overemphasized. A critical mistake that younger lawyers often make is their tendency to follow the deposition outline so closely that they lose focus of the witness's answer. If the deposing lawyer is too focused on the next question in their outline, it is more likely that the attorney is not listening to the witness's answer and will fail to follow up on new information or an incomplete answer. For example, the question may lead the witness to a new issue or topic that you were not prepared to ask the witness about. The attorney who is more focused on asking his next question in the outline runs the risk of missing this new topic or issue and the potential information that could be helpful or harmful to your case. Indeed, if the information is harmful and the attorney fails to explore it, the information could come as an unwelcome surprise at trial.

There is no possible way to envision every question or answer as you prepare for the deposition. Accordingly, use your outline as a checklist of the issues or topics that you need to cover, with the assumption that you will likely uncover new issues or topics during the deposition. More often than not, the deposing attorney will have to deviate from his or her outline for one reason or another, including where a new issue or topic is uncovered. Use your outline as a checklist to make sure you come back and cover all topics and issues in your outline.

Another critical reason to avoid focusing on your outline during the witness's answer is so that you do not miss any non-verbal communications taking place, such as tone, demeanor, hesitation, gestures between the witness and opposing counsel, or other signs that might cause a deposing attorney to probe the issue further. Use your outline effectively, but never forget the most important deposition skill: listening to the witness.

Objections and Privileges

Objections

The golden rule of listening to the witness's answer applies with equal force to objections from opposing counsel. The deposing attorney should listen and determine whether the objection is valid or not. An invalid objection can be ignored, while a valid objection can be cured by rephrasing the question. It is not necessary, however, to immediately rephrase the question to cure the objection. For example, the deposing attorney can ask the witness to please go ahead and answer a question that elicited a "compound question" objection. If the witness answers both parts of the question, and the answers are useful, the attorney can go back and break apart the answer and rephrase the question in two parts to render them non-objectionable.

Furthermore, there is no need to quibble with opposing counsel if you determine that the question is proper. Telling counsel his or her objection is noted and asking the witness to please go ahead and answer is appropriate. There is no point in wasting time trying to convince opposing counsel that his or her objection is invalid. That determination will be made by the court if there is an attempt to use the deposition testimony at trial or on summary judgment.

In addition, when taking a deposition it is not uncommon to be faced with an obstructionist defending counsel that tries to prevent the disclosure of relevant information. This type of behavior is discussed in the next subsection. Often, however, the defending lawyer will simply be obnoxious, but will not obstruct your ability to elicit testimony from the witness. For example, the defending lawyer may make long-winded objections that do

not necessarily coach the witness, but are nonetheless irritating. In this situation, do not engage the obnoxious lawyer. Ignore him or her and focus on the goals of your deposition by pressing the witness for an answer. In fact, more often than not the obnoxious lawyer will be inclined to back down if you do not even acknowledge or look at them. The best approach is to keep your focus on the witness and politely ask the witness to please answer your question. Commenting on the objections or debating them with counsel will only fuel the obnoxious lawyer. You want counsel to know that his or her behavior will not prevent you from obtaining information from the witness. And, finally, one of the best ways to deter defending counsel is to ask good questions, thinking beforehand about the form of your questions.

Privileges

Federal Rule of Civil Procedure 30 restricts an attorney from instructing the deponent to not answer a question unless it is "*necessary to preserve a privilege*, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Fed. R. Civ. P. 30(c)(2) (emphasis added). Moreover, Rule 26(b)(5) requires that when instructing a witness not to answer based on a claim of privilege or work product, the attorney must do so expressly and must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."

Ethical Considerations and the Obstructionist Defending Counsel

Unlike the irritating defending lawyer, the obstructionist defending counsel that prevents you from discovering necessary information cannot simply be ignored. You cannot ignore the opposing counsel that persists in coaching the deponent through suggestive and argumentative objections or instructing the witness not to answer a legitimate question.

First, videotape the deposition if you anticipate problems with defending counsel. For example, you may have prior experience with a particular attorney that engages in improper behavior during a deposition, or defend-

ing counsel may have a reputation for being an obstructionist. Knowing that the video can be shown to the Judge can be a huge deterrent for the obstructionist lawyer that engages in improper behavior when only a court reporter is present.

Second, be sure to document the obstructionist behavior by noting each instance on the record. For example, remind counsel of his or her obligation not to lodge objections that are suggestive or argumentative, and ask counsel to please discontinue such objections. Additionally, make sure the record reflects that, for example, counsel is again conferring with the witness prior to the witness answering the question. Likewise, for instructions not to answer that are not based on any of the three grounds in Rule 30(c)(2), be sure to ask opposing counsel to state on the record each reason for the instruction.

If counsel persists with coaching objections or continues to engage in prohibited conduct that impedes your ability to fairly examine the deponent and obtain necessary information, you should make sure the record notes the amount of deposition time being taken up by counsel's disruptive behavior. Having a detailed record will be critical to any motion under Rule 30(d) for additional time to depose the witness and/or sanctions based on counsel's or the deponent's efforts to impede, frustrate or delay the fair examination of the deponent. While Rule 30(d)(3) permits you to suspend the deposition and seek an order of the court if the deposition is being conducted in bad faith, this option should be used only in the most extreme cases. Finally, keep your emotions in check and do not engage the obstructionist lawyer or argue with him or her. By keeping your emotions in check and making a record of counsel's disruptive behavior, you keep your client in a credible position.

Using Documents Effectively at the Deposition

If a deponent is unavailable at trial, the deposition transcript may be necessary to lay the proper foundation for documents to be admitted into evidence at trial. If opposing counsel objects to a document on foundation grounds during the deposition, the deposing lawyer should use the deposition to lay the foundation for the document if he or she believes that

additional information is necessary for the document's admission at trial. In other words, you can use the deposition to gather the facts necessary to establish the foundational elements of the document for use at trial (*e.g.*, identification of the document—the witness can properly identity the document and knows what it is—and authentication of the document.) Similarly, the deposition can be used to establish the elements of the business-record exception to the hearsay rule.

Documents can also be used to refresh the witness's recollection during the deposition, especially if you are not certain that you have exhausted the witness's knowledge of a particular issue or topic. Finally, in addition to premarking your deposition exhibits, you should make sure to bring copies of your exhibits for the court reporter, the witness, and defending counsel. Providing copies to defending counsel will avoid delay associated with counsel taking time to review the deponent's copy before the deponent reviews it.

Conclusion

While defense attorneys have a number of discovery devices available to them, the plaintiff's deposition is the most effective tool for learning and testing the plaintiff's legal and factual theories. The opportunity to probe, follow-up and challenge the plaintiff is critical to preparing your case for summary judgment or for trial, or to facilitating a settlement. Each attorney will have his or he own styles and techniques for deposing the plaintiff, but the general approaches and considerations discussed in this chapter will assist the attorney in achieving his or her objectives and maximizing the effectiveness of the deposition.

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