

Practice makes perfect

How to prepare for a deposition **Interviewed by Chelan David**

Although depositions may seem like they are less formal than a trial, they are a critical part of a lawsuit. The answers given at a deposition are legal testimony and, in essence, it is no different from testifying in court.

“A lawyer is entitled to depose an opposing party and all witnesses with knowledge relevant to the lawsuit,” says Andrew Fleming, a partner at Novack and Macey LLP. “Typically, depositions are conducted at the office of the attorney taking the deposition, and the witness is placed under oath to answer questions.”

Smart Business spoke with Fleming about how to properly prepare for a deposition for the best possible outcome.

What is the purpose of a deposition?

Depositions have two primary purposes. First, the examining lawyer often will use the deposition to learn the facts relevant to the case. For example, in a typical breach-of-contract case, the plaintiff’s lawyer asks a series of questions designed to determine if, in fact, the contract was breached. In that regard, the examining lawyer will depose the parties and other witnesses involved in the transaction to discover what each person involved in performing the contract did or did not do. The process provides a very important and useful procedure for obtaining evidence.

Second, a deposition gives the examining lawyer an opportunity to obtain admissions that support his or her case. To obtain this information, examining lawyers frequently use cross-examination techniques when questioning a witness. In many instances, cases can be won or lost at the deposition stage, and as a result, thorough preparation is key.

How can a witness prepare for a deposition?

One of the most important things that a witness must do is to understand the deposition process and make sure that he or she is comfortable with testifying. A witness must first become familiar with the pertinent facts of the case. Oftentimes, this requires a review of the documents relevant to the dispute, such as emails, correspondence, contracts and the like.

Next, the witness needs to review with his or her attorney the ground rules for the deposition — rules that are very important no matter what the case involves. Often, it helps to go through a mock deposition with the attorney to not only become more comfort-



Andrew Fleming
Partner
Novack and Macey LLP

able with the deposition process but also to give the witness and the attorney a chance to identify and correct bad habits before the deposition takes place.

What are some key deposition ground rules?

The first rule to make sure the witness understands that every question must be answered truthfully. If it is not, the witness may be subject to sanctions and criminal penalties. The witness must also listen carefully to the question and answer only the question that is being asked. Also, as a general rule, witnesses should not guess at an answer.

While these may sound like straightforward rules, they are easier said than done. It takes tremendous concentration and focus to sit for hours and answer only the questions that are being asked. And while it is natural during a normal day-to-day conversation for people to assume that certain events have occurred and to speak about them as if they have, in the deposition setting, it is important that a witness focus only on what he or she actually knows has occurred.

What are some common mistakes made during depositions and how can they be avoided?

In addition to losing concentration and guessing, mistakes frequently occur when a witness is shown a document and asked

questions about it. All too often, witnesses will not read the document at the deposition even though they are asked to do so by the examining lawyer. Instead, they will skim through the document thinking they know what it says.

But, often in this situation, a witness will give inaccurate testimony when questioned about the meaning of a particular document. And worse, the examining attorney might exploit this mistake by getting the witness to agree to a particular spin that he or she places on the meaning of the document — a spin that is always in favor of the examining lawyer’s client.

It is easy to avoid this mistake. When asked to read a document at a deposition, a witness should slow down and do just that: Read the document.

In addition, a witness should never let the examining lawyer put words in his mouth. Be especially alert when asked typical cross-examination questions because those are invariably designed to get the witness to agree with the examining lawyer’s view of the case. These questions are not hard to spot, as they usually begin with phrases such as, ‘Isn’t it fair to say?’ Or, ‘Wouldn’t you agree that?’ When you hear such questions, think long and hard before answering, and resist the urge to casually agree with the examining lawyer.

What other traps should a witness look out for?

An examining lawyer will be so cordial that the witness may think the deposition is just a friendly conversation. This is not so. Even though such depositions are more pleasant, a witness must still not let his or her guard down and must always follow the rules discussed.

On the flip side, examining lawyers take a more aggressive approach at depositions, to the point of making the deposition an unpleasant experience. It is important in these situations that the witness maintain a calm demeanor. Becoming upset or even angry at an examining lawyer because of the manner in which he or she is asking questions can never benefit the witness. In fact, if you allow yourself to get upset, you often can lose your concentration and break some of the rules discussed. That is why it is always important that the witness maintain a calm and professional demeanor at the deposition, no matter how the examining lawyer behaves. <<

ANDREW FLEMING is a partner at Novack and Macey LLP. Reach him at (312) 419-6900 or andrewf@novackmacey.com.

Insights Legal Affairs is brought to you by Novack and Macey LLP