UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT:

2016 Winning at Deposition: Skills and Strategy

August 26, 2016
Austin, Texas

Deposition Lessons I've Learned Through the Decades

David J. Beck

Author Contact Information:
David J. Beck
Beck Redden LLP
1221 McKinney Street, Suite 4500
Houston, Texas 77010
Telephone: (713) 951-3700
Fax: (713) 951-3720
DBECK@beckredden.com

Deposition Lessons I've Learned Through the Decades

David J. Beck

I. Scope

This article addresses various points that I have found helpful in taking depositions over my years of practice. The aim of the article is to provide practical advice and tips on how to prepare and execute a thorough deposition for use at trial, as well as how to effectively defend a deposition. The article therefore makes suggestions for pre-deposition discovery, offers tips for creating a useful deposition record, and provides a few examples of applicable techniques.

II. Introduction

It is important that one's focus at the deposition phase – whether taking or defending –be on preparation. It would be a serious mistake to think that depositions are merely an opportunity for further discovery. Indeed, I have learned that lawsuits are frequently won or lost during the discovery stage, and, in particular, during depositions. What witnesses say during depositions can impact key pre-trial events, such as dispositive motions and the parties' positions during mediation. Witnesses' statements during deposition are also critical for shoring up your position at trial. If you have been ineffective in taking or defending depositions, you might be faced with the possibility of little or ineffective cross-examination at trial, or of your opposition undermining your theory of the case by confronting your witnesses with poor testimony from their depositions. For these reasons, in the deposition phase of a case you must allow sufficient time for preparation, both for planning your examination of adverse witnesses, and for preparing your witnesses for their own depositions.

III. How to Prepare for Taking and Defending Depositions

A well-known rule of thumb for cross-examination *at trial* is: do not ask a question if you don't already know the answer, or don't care what the answer is. A deposition is not trial, so inevitably, some portion of the time you spend in deposition will involve asking questions to which you do not know the answer. These questions are necessary and important for several reasons, not the least of which is that it is difficult to ask questions at trial you *know* the answer to if you have *never heard* the answer before.

Similarly, you will not be able to anticipate every question that opposing counsel might ask one of your witnesses. You also might not know how your witness will respond, emotionally and otherwise, to the deposition process. The deposition phase is a useful time to get a preview.

But a deposition is not merely a discovery tool. Unlike other forms of pretrial discovery, you only have one opportunity to generate a useful deposition transcript for each witness. Because that transcript may be critical to conducting a successful cross-examination at trial, or to helping your witnesses provide credible, knowledgeable trial testimony that bolsters your case, you need to prepare for depositions with trial in mind. Moreover, the outcome of depositions can impact either side's confidence in its theory of the case and valuation of the case as a whole, which can have a significant influence on pre-trial issues such as dispositive motions and settlement negotiations. In short, depositions are important and deserve significant thought and preparation. The following list suggests specific goals for your pre-deposition discovery and case development that will help you maximize the utility of your depositions.

1. Familiarize Yourself with the Case

It is unlikely you will know everything about your or your opponent's case when the deposition phase commences. However, you should have a good idea of the important issues in the case and have some knowledge of the witnesses you will be deposing and defending. That knowledge will help you develop your theory of the case, at least preliminarily, and maintain confidence and control during the depositions.

Know your case as thoroughly as possible before taking or defending depositions. This means not only understanding your theory of the case and supporting themes, but also understanding the other side's theory of the case and supporting themes.

First, learn the legal issues in your case. Study the elements of the claims, counter-claims and any affirmative defenses. Review the elements and governing legal standards set forth in the relevant pattern jury charge, if applicable. Study applicable case law to familiarize yourself with how courts are currently interpreting and applying the governing legal standards. And identify what key statutory and case law will fundamentally influence the case.

Second, investigate your client's side of the case. Determine the key witnesses on both sides and their respective roles in the events underlying the dispute. Consider the motivations and emotions of the key actors and whether and to what extent you want to emphasize those motivations and emotions as themes in your case. Interview your own witnesses, review your client's documents, and organize this information in notes, a factual narrative or a chronology.

Third, serve a request for disclosure and interrogatories on the other side to gain an early understanding of the other side's positions. Requests for disclosure under Rule 194 of the Texas Rules of Civil Procedure require the responding party to provide, among other things, the legal theories and general factual bases of the responding party's claims or defenses, as well as the amount and method of calculating any economic damages and a list of persons with knowledge.[1]

[1] Tex. R. Civ. P. 194.2(c), (d) & (e).

Title search: Deposition Lessons I’ve Learned Through the Decades

Also available as part of the eCourse
2016 Winning at Deposition: Skills and Strategy eConference

First appeared as part of the conference materials for the
2016 Winning at Deposition: Skills and Strategy session
"Deposition Lessons I’ve Learned Through the Decades"