PRACTICE POINTERS

A Difficult Deposition

Scenario

The scenario centers around depositions in a personal injury suit. The plaintiff, a man in his early 20s, broke his hip when he fell in the parking lot of a popular ski resort. In the complaint, the plaintiff said the parking lot was a dangerous condition because of the mixture of ice coating the parking lot and numerous potholes. The plaintiff, a delivery person for a parcel company, alleges the injury left him unable to work anymore.

It's time for the plaintiff to be deposed by the ski resort's attorney. The defense attorney and the plaintiff's attorney have "clashed" previously during depositions.

The defense attorney doubts the parking lot was filled with "hills and ridges," and thinks the plaintiff simply fell on the ice. In addition, the defense attorney thinks the plaintiff is exaggerating the effect the injury has had on him.

The defense attorney asks the plaintiff about the condition of the parking lot. The plaintiff answers in a manner the defense attorney thinks is circuitous. Then the defense attorney asks the plaintiff about the condition of the ice. The plaintiff's attorney objects on the grounds that the defense attorney already asked that question.

Depending on whom you represent, what would you do?

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I am assuming that the case is in a federal court or in a state jurisdiction that assigns either one judge from the beginning of the case or has a motions judge on hand during or after the deposition.

In the hypothetical, the defense lawyer who is taking the deposition has "clashed" with plaintiff's counsel in the past and knows, to a certain extent, what to expect. This is a deposition likely to generate a motion to compel under federal Rule 37(a) (or any of its state counterparts).

BEFORE THE DEPOSITION BEGINS

Make sure there is a notice of deposition even if the deposition is done on a consensual basis. Rule 30(b). It will help to legitimize and serve as an exhibit in any motion to compel before the judge.

If you expect problems with the defending counsel, do what usually goes without saying — get your opponent to agree that objections to questions, except for those that need to be obviated or cured right away, are preserved until trial. Rule 32(d)(3). Maybe add that this is a deposition for discovery, so a liberal standard applies under Rule 26(b).

EVERYTHING ON THE RECORD

Get everything on the record. Everything. Have the assigned judge's phone number on hand.

DURING THE DEPOSITION

Remind the opponent that this is a deposition for discovery and most objections are preserved until trial. Most objections should be as to "form" only. Objections, if possible, should not be speeches and are required, under Rule 30(d)(1), to be concise and non-argumentative.

COACHING OBJECTIONS ARE IMPROPER

Although there is some authority to the contrary in Pennsylvania, it is none of my business if and when my opponent confers off-the-record with his client. That is why he or she is there. However, "coaching objections" are always improper. Rule 30(d)(1). Interruption of the deponent's answering is generally also improper.

EVASIVE OR "CIRCUITOUS" ANSWERS

Under Rule 37(a), evasive or incomplete answers are treated as failure to disclose.

MOTION TO COMPEL

In some jurisdictions, you can call the judge and/or go right to that judge on a motion if only one or two key areas are objected to (i.e. "I won't let the witness answer questions concerning pre-existing injuries or what he did right after the incident").

However, in the hypothetical given, the questioner knows in advance that there may be several problems. Get objections, coaching objections and evasive answers on the record; obtain the transcript; and go to the court with one overall motion to compel and/or for sanctions at once.

TRIPS TO THE JUDGE MAY BE INEFFICIENT

In some depositions, piecemeal calls or trips to the judge are inviting, but may be inefficient. A judge with an uneven temperament, may be upset with your repeated "complaints" even though you are just "representing your client."

"ASKED-AND-ANSWERED"

"Asked-and-answered" is probably not a valid objection unless it is on the basis of wasting time. There's no procedural rule on it. If the plaintiff's lawyer cries asked-and-answered, explain this and ask the question again. After all, the plaintiff sued your client and you're entitled to know about the plaintiff's case.

If the plaintiff's counsel instructs the deponent not to answer, refer to Rule 30(d)(1). Unless very unusual circumstances are presented, instructions not to answer should be based on a recognized privilege, an order of the court, or a motion for a protective order or to terminate the deposition.

FOLLOW-UP AFTER DEPOSITION

After the deposition, check the transcript carefully to make sure no one has "polished" it. This happens at an alarmingly high rate in some areas — particularly in smaller towns or where local "folkways" somehow allow the practice.

TAKE OPPOSING COUNSEL TO LUNCH

Take the plaintiff's attorney to lunch. As you are leaving, pull out of your coat pocket your latest junk mail brochure from the National Institute for Trial Advocacy (NITA) on the one-day seminar "How to Take and Defend a Deposition." Remember to split the cost of lunch.

Then go to the seminar yourself. ■