

## President's Column

### *Depositions – The Joys of Asking People Questions*

by Scott Levine

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As litigators, we all get the opportunity to take depositions and/or watch someone else take a deposition. I have had my fair share over the last 45 to 60 days and was thinking about all of the different people we get to encounter. We have all seen the “good” witnesses and the “bad” witnesses. But I thought I would compile a short summary of some of the interesting things that can happen in a deposition. Maybe you have a story to share too!

#### **The Expert Deposition – Your Key Expert**

We meet with our experts long before there is even a deposition. We work with them as they develop their opinions. They tell us their opinions long before we have them sit for their depositions. We confirm their opinions before their deposition or in the days leading up to their deposition. Sometimes we are surprised to find out that their opinions have changed between our last phone call or meeting and the one right before they have to testify under oath. Sometimes we wonder what happened between the last meeting or phone call and today to cause that opinion to change.

Sometimes we get through that final preparation with our experts and their opinions sound rock solid and consistent with the opinions that they have been expressing all along. Then, while sitting in the deposition, we have all had that sinking feeling as the other attorney is leading up to the ultimate opinion question(s). Sometimes the expert comes through with the same opinion. Other times the opinion is different than what they told us hours earlier.

Sometimes when you think you have vetted your expert's experience and educational qualifications, you learn, as you sit through the deposition, something about your expert that you never knew before. Sometimes it is good and sometimes it is a problem! You get to sit there in agony while you think about how you are going to salvage your case with another of the witnesses yet to testify. Did you forget to ask your expert these questions or did the expert simply alter your vetting to cause you to miss these areas?

Fortunately, we still get to take the deposition of the defense experts! The things that happen to us with our experts often happen with the defense experts too. In addition, the defense experts are often placed under severe restrictions of what work they can and cannot do by the insurance company that pays their bills. Often the defense experts are working on so many cases that they neglect to spend any time your case. Sometimes the first time the testifying expert has done any work on the case or “file” turns out to be the night before his or her deposition. Is this because the expert was too busy or because his or her opinion is always the same?

I like to ask experts about their qualifications and experience. Rarely does that mean we get to exclude them

at trial, but sometimes the effort pays dividends in other ways. Once I deposed an expert whom I thought was not qualified to testify about the areas he was attempting to offer opinions about. For some reason, I kept his transcript and to this day have his transcript on my shelf. About 10 years later, he was about to testify in one of my cases – in trial -- and I realized that his resume looked different. I cannot say that the testimony was perfect in the original deposition (I had only been an attorney for a couple of years and had not taken many depositions). However, it was enough to show that the experience he now professed to have was certainly different than what he had when I first deposed him. Fortunately, he decided that earlier experience is more important than simply adding experience along the way! A Perry Mason moment in trial was hatched. That was a lot of fun, but those moments are few and far between.

### **The Percipient Witness**

These are sometimes boring and sometimes very entertaining. A construction defect case that I was working on which involved windows (defective product and installation). While deposing the person in charge of the window installation crew, I started, as with most depositions (after the admonitions), going through his education and job experience. All of his jobs leading up to this job were working for a landscaper. He even worked for a developer (which I figured would have involved window installation), but that was in the landscaping department! So you must ask how he got this job as the head of the crews that installed windows on mass production homes. The answer was that his girlfriend owned the company!

In one of the depositions I took in the last couple of months, the attorney for the deponents suggested that my question was objectionable. Hard to believe it is true, but let me lay the foundation for you. I was inquiring as to whether or not the witness knew if his company ever installed a window below the standard of care. The foundation was already there for his knowledge and understanding to express such an opinion. However, the objection was, “I am instructing the witness not to answer on the grounds that the Fifth Amendment applies.” Frustrated at best, I suggested that maybe the Fifth Amendment applies to criminal cases and this was but a civil action. “The objection stands and my instruction to the witness stands,” the attorney insisted. At that point I stopped the deposition and contacted the Special Master.

### **SUMMARY**

In summary, the lessons I have learned are as follows: (1) follow your routines and ask questions about education and background; (2) know the rules of the deposition and the objections that can be made (defense lawyers are sometimes not trained and supply a long list of objections that don't apply and that are flat out inappropriate); (3) stand your ground. If you know you are right and the other side is being a problem, ignore them or stop the deposition and go to see a discovery referee (if you have one). If not, then if the problem is big enough, go see the judge!