

Keeping ‘Em Honest with Video Depositions

Have you ever walked out of a deposition heady with the knowledge that you “won”? You had your Perry Mason moment and obtained critical information, perhaps even an admission, during your interrogation of the witness. On the way back to your office you call your colleagues to report the good news. Then you call your client. Things couldn’t be better for the case. You think, “I am one good lawyer!” After sharing the good news back at the firm, your law partner asks, “Did the witness waive reading and signing?” You exhale deeply. “No, there wasn’t a waiver,” you answer, brought a little bit back down to earth.

Fast forward thirty days. The witness has elected to review the deposition pursuant to Rule 30(e) of the Federal Rules of Civil Procedure (or the parallel state rule). Rule 30(e) allows for modifications in the testimony given by a witness, and specifically provides that there may be “changes in form or substance.” Fed. R. Civ. P. 30(e)(emphasis added). All the witness must do is submit a signed statement, commonly known as the errata sheet, along with a list of the changes and the reasons for making the changes. At that point the deposition is deemed to have been changed. You receive the errata sheet in the mail, and realize that your supposed victory has been thwarted; both form and substantive changes have been made. Yikes! The witness clearly consulted with his lawyer, decided that the answer was awful, and perhaps not exactly what he intended. It needed to be changed.

How could this problem have been avoided? Perhaps the most effective technique that some trial attorneys use to balance Rule 30(e) is to videotape the deposition. It may not be economical to videotape all depositions in a case; however, for key witnesses, having a videographer makes sense. To be clear, the videotape does not prevent the witness from making a substantive change as Rule 30(e) still applies regardless of the manner in which the deposition was recorded. That said, the statement made on the videotape - in almost all circumstances - can still be used for impeachment purposes. It remains a prior inconsistent statement which can be used to cross examine the witness. The witness will have an opportunity to explain at trial exactly why the statement was later changed, but if in the videotape the witness appears confident and assured when giving the original answer, the explanation for the change will not be credible. Using a written transcript to impeach a witness simply does not pack the same punch.

In addition to helping keep witnesses honest, videotaping also helps the jury comprehend and retain the testimony. Imagine that you are deposing Danny, the defendant driver in a case, and you have reason to believe that Defendant Danny smoked marijuana before injuring your client. You ask, “Did you smoke marijuana before the accident?” Danny pauses, looks down, and then looks at his lawyer as if waiting for an objection. Hearing nothing, he then looks down again. After a tortuous 30 seconds, he answers in a meek and quiet tone, “No.” The transcript of the deposition would simply read:

Q: Did you smoke marijuana before the accident?

A: No.

The videotape, however, tells a very different story because it provides information beyond simply the written transcript. Here, it shows Defendant Danny's demeanor, shifting eyes, and pregnant pause. Because the jury is actually seeing and hearing the testimony, the retention and impact of the testimony are greater.

A final benefit from videotaping a deposition is that it can also help keep a check on opposing counsel. Putting aside the ethical impropriety of coaching a witness during a deposition, we have all encountered lawyers who suggest answers to witnesses. An opposing lawyer may say, "Answer the question ***if you know***," with a heavy emphasis on the "if you know" part. The witness recognizes the cue and then proclaims, "I don't know." Videotaping depositions deters this conduct because lawyers recognize that videotaped depositions show tone in real time; a written transcript does not. Witnesses also take non-verbal cues from their lawyers. A simple sigh, roll of the eyes, or shifting of papers can send a message to a client. Obstructionist lawyers are far less likely to engage in this behavior during videotaped depositions.

In short, videotaping depositions is an effective way of insuring that your record is accurate, and gives you the best chance of winning your case.