PREPARING FOR A DEPOSITION

JOSEPH A. GERBER, ESQUIRE
COZEN AND O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000
jgerber@cozen.com

Atlanta, GA
Charlotte, NC
Cherry Hill, NJ
Chicago, IL
Columbia, SC
Dallas, TX
Los Angeles, CA
New York, NY
Newark, NJ
Philadelphia, PA
San Diego, CA
Seattle, WA
W. Conshohocken, PA
Westmont, NJ

INTRODUCTION:

No aspect of modern civil litigation is more important to the outcome of a case than oral depositions. Because the vast majority of civil actions are settled at some point in advance of a trial, it is fair to suggest that depositions in a civil matter are at the heart of most decisions leading to the disposition of cases.

After a brief definition of the deposition process and format, this paper will review the most traditional "commandments" for deponents or witnesses at depositions. We will then review steps that will aid the claims profession in preparing for a deposition.

Where do depositions fit into the civil litigation process?

A deposition is part of the pretrial discovery phase of a civil lawsuit. Between the pleading stage (consisting of the Complaint, Answer, Counterclaim, Third-Party Joinders and Third-Party Complaints and Answers) and the trial (jury or non-jury), the Federal Rules of Civil Procedure and most State Rules of Civil Procedure provide for a variety of pretrial "discovery" activities. These procedures are intended to gather potentially large amounts of information at the pretrial stage of the case so as to facilitate the exchange of information in advance of trial

which practice frequently leads to the disposition of matters without the need for trial. In the event that a trial is necessary, one goal of pretrial discovery is to streamline the case and save valuable trial time that might otherwise be taken up with the exchange of information which can be so much more effectively and efficiently accomplished in advance of trial.

Traditional pretrial discovery activities include written questions or Interrogatories, responses to these questions or Answers to Interrogatories, Requests for Production of Documents, Responses to Request for Production of Documents and the opportunity to issue or serve Notices for Deposition.

THE BASICS:

What Is A Deposition?

A deposition is an oral question and answer session at which a witness or deponent provides sworn, oral testimony or answers in response to questions posed by opposing counsel or other attorneys representing other parties within the litigation.

The document that initiates the deposition process is known as a Notice of Deposition which typically includes specific details as to the time and location of the deposition, the identity by name or title of the witness to be deposed and, frequently, a request for the production of certain written files

or materials that will be inquired into as part of the questioning process.

In most jurisdictions, depositions are conducted in attorneys' offices with all counsel present, including your own attorney, and a court reporter or stenographer. Some jurisdictions require depositions to be taken at the local courthouse.

The stenographer, who also administers the oath to the witness (Do you swear that the evidence you are about to give in the deposition in the matter of Smith v. ABC Insurance Co., will be the truth, the whole truth and nothing but the truth?), accurately records each question, each answer, and each objection or other verbal discussion. Following the deposition, the stenographer will prepare a written transcript which will provide a detailed, word-for-word record of the deposition proceedings. Frequently, the witness will be asked to review this transcript to ensure that it accurately records precisely what transpired at the deposition. Also, the witness will have the opportunity to note any discrepancies from testimony or clarify any missing answers or other gaps in the testimony as recorded by the stenographer.

In the context of civil lawsuits based upon policies of insurance, counsel for the insured or claimant will typically notice the deposition of a variety of claims and insurance

company personnel. In significant cases, this will usually include virtually everyone in the chain of authority from the field adjuster through the claims supervisor, claims manager, branch manager, regional claims manager, home office supervisors and managers, claims vice president, and, in particularly troublesome matters, the President or CEO of the insurance company.

Similarly, Requests for Production of Documents, either by way of individual discovery requests or as part of deposition notices, will include the files associated with each of these claims' professionals together with any other files maintained by the company. Requests specifically include any and all copies of the file including field office files, branch office copies, and home office or duplicate files; telephone logs, records of phone calls, calendars, diaries, appointment books, and any private notes or other messages or recordings kept or maintained in connection with the activities of any of the individuals associated with the file.

The most modern recording technique that is currently the subject of discovery and insurance litigation includes requests for "electronic mail" or "E-Mail." Even in instances where a company responds that any and all "E-Mail" messages have been erased or lost, opposing counsel may try to "reconstruct" such information from company data bases.

How Long Will The Deposition Last?

Depending upon the complexity of the matter, the subtleties of the coverages at issue, and whether the insured has pleaded for damages beyond indemnity including claims for extra contractual items such as damages for alleged bad faith or violations of applicable unfair claims practices statutes, the deposition of a claims professional typically lasts from several hours to one full day. In particularly complex matters, a deposition may continue for several days or weeks.

If I Am Deposed, Will I Still Have To Appear As A Witness At Trial?

Probably, yes. Although counsel may stipulate to use a transcript of your deposition at trial in lieu of a personal appearance, the far greater likelihood is that you will be required to appear as a "live" witness at the trial. However, because your testimony has been fully recorded and transcribed into written form following your having been deposed, the evidence you offer at trial will probably closely track your prior testimony at deposition.

What Can I Do To Enhance My Value As A Deposition Witness?

First, there are a number of "cardinal rules" of deposition deportment and conduct. These commandments, these deposition "do's" and "don'ts" are set forth in virtually every discussion or paper on the topic of depositions. They bear repeating here, because respect for these time-honored rules will substantially enhance your role as a positive witness favorable to the company's presentation of its case.

Secondly, preparation for the deposition, preparation that begins days, weeks, or even months before the deposition is also critical. Obviously, this preparation will begin long before your deposition is ever noticed and will include a full and complete understanding of the litigation and, more importantly, what counsel for the insured is seeking to obtain from your testimony and from your file. Those steps you can take to better prepare yourself will be set forth following a review of the cardinal rules of depositions.

THE CARDINAL RULES OF DEPOSITIONS

1. Listen Carefully To Each Question

Concentrate intently as opposing counsel asks each question and, then, think for a moment before you respond. Then, answer the question that was asked. This "first rule" of deposition behavior is deceptively simple -- and, for most witnesses, not as

easy as it sounds. Listening, includes concentrating upon precisely what information the questioner is seeking. Is it a question that can be fully and accurately answered with a "yes" or a "no?" Is the question fair in that it accurately states facts or information? If not, you may need to correct any inaccuracies.

If, after thinking about the question for a moment, a simple "yes" or "no" is the appropriate answer, then simply provide that response. Opposing counsel, or whoever is questioning at the moment, has ample opportunity to follow-up with additional questions that seek further information.

If an answer beyond "yes" or "no" is appropriate, then simply answer the question -- no more and no less. It is the job of the questioner to fashion questions that elicit the full and complete story. Therefore, just answer the question that is asked. This is perhaps the hardest challenge faced by any witness. There is nothing wrong with a "run through" in advance of the deposition with your own attorney in order to get a feel for gaining skill and experience so that you can "simply answer the question."

2. Understand The Question

Do you understand the question? If not, you must ask the questioner to "Please restate or rephrase the question." Do not try and guess as to what the questioner means to ask, but is too clumsy or ill-informed to ask. Persist in seeking clarification until such time as there is a clearly stated, clearly understood question on the table.

3. Never Volunteer Information

The admonition to "never volunteer" goes beyond simply providing too much information in an answer, i.e. going beyond the question asked and providing names, dates, details and narrative that are non-responsive to the specific question posed.

The deposition witness needs to know that some interrogating attorneys will simply remain silent after the witness has answered the question. At this juncture, these attorneys will simply look at a witness for some extended period of time without asking a follow-up question. Human behavior patterns (and you should test this well-proven human trait at some time) compels many people to then try to fill in the "gap" in the dialogue. This can be used as an effective interrogating technique by certain attorneys. As a witness, you should and must be 100% comfortable with any gap in the dialogue. If the attorney has a question, let the attorney ask it. But, you as the witness,

should not feel any compulsion to "jump in" or "fill in any gap" in the question and answer process.

4. Always Tell The Truth

Honesty in testimony is not as simple as it sounds. Certainly, all of us, especially upon taking a sworn oath with our hand upon the Bible offered by the stenographer, recognize the moral and legal imperative to testify accurately. Very few witnesses get into trouble for what we would categorize as outright lying. However, a witness, in trying to be helpful, or in trying to look informed and intelligent, may try and provide testimony where there are honest gaps in the witness's own knowledge. Either the witness has no knowledge or they try to be helpful and testify where their knowledge is incomplete or sketchy.

5. If You Do Not Know The Answer To A Question, Then "I don't know" Is The Correct Response

Even if you have to say "I don't know" dozens and dozens of times as a witness, you should not be embarrassed if in fact you are testifying accurately. Avoid the temptation to try and escape embarrassment or "looking bad" by falling into the trap of testifying in areas where, in fact, the correct response is "I don't know."

6. If You Once Knew The Answer To A Question, But Can No Longer Remember, "I don't remember" Is The Correct Response

Opposing counsel may try and help your recollection by referencing the file materials or to other information or documents that might aid you in recalling something. However, as with information you never knew in the first place, a deposition witness should have no hesitancy in repeatedly testifying "I don't remember" if, in fact, that is the truthful response.

7. Be Sensitive To The Imaging You Are Projecting

As a by-product of the actual testimony you provide, you will also be projecting an image of yourself, and potentially, your company. Your demeanor will be judged and evaluated by all attending counsel and, potentially at a later time, by a judge and/or jury that reviews the transcript. In most situations, there are specific qualities that you wish to project at your deposition. You will want to be characterized as:

(a) Professional in demeanor and appearance;

(b) Interested in and cooperative with the proceedings;

(c) Prepared and focused upon the issues;

(d) Thoughtful;

(e) Willing to accept responsibility for and stand behind claims' decisions and other actions taken by you in connection with the handling of the matter or claim at issue.

8. Avoid Arguing Or Other Confrontational Stances

You can vigorously represent yourself and your company and its position in a lawsuit without becoming nasty and argumentative to opposing counsel at a deposition.

Losing your temper will not aid you in your task of testifying carefully and accurately in a matter that typically involves complex issues of contract and insurance coverage interpretations. Admittedly, some attorneys for claimants may take highly aggressive and accusatory postures. This kind of behavior should not deter you from comporting yourself as a total professional. Remember, "No one likes a wise guy!". Avoid sarcasm and any personal remarks. Remain focused upon the issues. Maintain your standing and position well-above any rude or abrasive conduct by opposing counsel. He or she may simply be setting a trap for you, hoping you will lose your professional demeanor and be drawn into a shouting match during which time you may carelessly make a statement that critically injures your legal position.

PREPARING FOR YOUR DEPOSITION

As stated above, to fully prepare for your deposition, you need a full and complete working knowledge of the file and a detailed understanding of precisely how the claim has progressed through the company. By the time a Notice for Deposition arrives, it may already be too late to fully and completely understand and appreciate all the nuances of the claim at issue.

Obviously, your preparation for deposition begins with a review of the full and complete file. This will necessarily include first, a gathering of any and all relevant documents that might be included in a comprehensive Request for Production of Documents or a Notice of Deposition that includes such a request. "The file" will include the working or field file, the branch office or regional office "duplicate file", the home office file, and any and all other materials that might thereupon the individual claim including diaries, calendars, phone messages or telephone logs, and certainly, any and all handwritten notes or other memoranda. Increasingly, counsel are also requesting access to or print-outs of electronic mail or E-Mail messages associated with the file.

A key to your success as a deponent will be your understanding of the context of the deposition. What is the opposing counsel looking for? Your understanding of how the upcoming deposition fits into the context of the case is

critical. Therefore, it is important that you first, appreciate the underlying nature of the claims made against the company, the coverage issues, and, any extra-contractual claims. In other words, you should become fully conversant with the type and nature of the issues of the lawsuit -- both the coverage/liability issues and any damage issues. What portion or portions of a policy are at issue? What forms, endorsements, declarations pages or other policy terms and conditions are important or at issue? What documents are important that are not part of the policy such as applications, renewal forms, inspection reports, pre-loss engineering reports, etc.? What conversations or other actions are fundamental to the case?

Precisely what is opposing counsel hoping to learn from your deposition? Is counsel simply looking to you for the production of the claims' file, underwriting file, or other written files? Are you simply to be the "custodian" of the file -- producing the written material and simply verifying that "this is the file" with perhaps certain limited testimony as the file maintenance procedures?

Or, alternatively, are you the key representative of the company with direct hands-on activity and decision making responsibility? Perhaps you are the supervisor, manager, vice president or CEO responsible for oversight or management of a claims function.

Keep in mind -- opposing counsel is not trying to make you "look good." In fact, most will believe that if you can be made to "look bad", if you can be made to "look bad" -- regardless of whether the issues relate to this specific claim -- the claimant's cause may well be served.

Most depositions of claims professionals include the following major topic areas. By understanding the goals of opposing counsel as to each area, you should be better able to prepare for the deposition and represent yourself and the company in the most thorough and favorable light.

9. Your Personal Experience

Counsel will typically develop a detailed chronological history of your career. Assuming that you are a decision maker in the file, the two possible real agendas of opposing counsel might be to either:

(a) demonstrate that by virtue of your extensive experience and track record, you should have "known better" than to make the "wrong call" on this file, or

(b) your experience, career history and job responsibilities were totally inconsistent and incompatible with the decision that needed to be made in this case. The decision may have been outside your field of experience or expertise. Or,

alternatively, the claim and issues may have simply been "over your head." Therefore, of course, you made the wrong decision. Moreover, the company should never have put you into that position in the first place.

On the personal side, opposing counsel may wish to demonstrate that you are overworked. That is, that you simply have too heavy a work load and are left with insufficient time for careful, deliberate and intelligent decision making. Therefore, of course, quite understandably, you made a judgment error.

10. Company Compliance With Its Own Claims Manual, Training Manual Or Claims' Procedures

In addition to a request for the entire claims file, opposing counsel will also request copies of a company's claims manual, training manual or written claims' procedures. At some point in your deposition, opposing counsel will attempt to demonstrate just how much you and your colleagues deviated from the company's own written guidelines and procedures. As a matter of simple fact, either the claim file will or will not conform to these pre-set procedures. However, you should be sensitive to

the notion that the preamble to most such written procedures contains some cautionary or qualifying language to the effect that the procedures are intended as guidelines applicable to most cases. But, that, they are not "written in stone" and that specific cases may require deviation.

In advance of the deposition, as an important part of your preparation, you need to determine just how well the handling of this particular file does or does not conform to written company procedures. Further, what truthful explanations underlie any non-conforming aspects of the claim file. A thorough claimant's counsel will take you first on a "tour" of the claims file, and then on a "tour" of company's own written procedures, including claims manual and other materials. Your intimate familiarity with all of these materials, and your ability to intelligently explain any deviation will inure to your benefit and to the company's benefit within the lawsuit. Similarly, you need to be familiar with the applicable unfair claims' practices handling statute within your own jurisdiction. And, just as you are able to distinguish this particular file from the standard claims manual procedures and explain any deviations, you need to also be prepared, in advance of the deposition, to distinguish and explain the just why, if at all, the procedures followed in this particular claim may not comport with the precise letter of the statute.

A skilled claimant's attorney will also ask you to compare the handling of the claim at issue with other claims of similar type or vintage. Specifically, the attorney may be seeking to prove that this particular claim or claimant was singled out for some "special" treatment resulting in both unusual handling and arguably, an unusual or improper result. Claimant's counsel will also try and encourage you to "second guess" decisions made by you or others within the file. Specific questions such as "If you had it to over again would you...?, or "If this case came across your desk today, would you not decide to...?" You and your attorney need to go through these kinds of "second guessing" questions in advance of the deposition in order to explore precisely how you will respond to these issues when raised.

PHILA1\1369034\1 099995.000