

LOS ANGELES

Daily Journal

AUGUST 11, 2000

Verdicts

& Settlements

Viewpoint

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If trial lawyers properly prepare for depositions, prior testimony can be used to keep cross-examination witnesses on track.

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Surprisingly, many trial lawyers fail to take full advantage of their opportunity to cross-examine key witnesses at trial. Too often, lawyers sit down after cross-examination with the uncomfortable feeling that their questioning could have been more effective. Unfortunately, they are usually correct.

If counsel properly prepares for deposition and uses the transcript in questioning and impeaching witnesses who change their answers, both the witness and the jury will know that they have seen a skilled cross-examiner at work.

If trial counsel prepares properly, the questioning attorney can ensure that no matter what tack the witness takes, the cross-examination will proceed according to counsel's script.

■ **Preparing properly for cross-examination.** How does one prepare "properly"? It all begins with the deposition. The key is to ask questions at the deposition in a manner that will ensure that the witness, when cross-examined at trial, will have two choices with respect to each question posed. The witness can either give the answer counsel wants, memorialized in the deposition, or give a contrary answer and be subject to impeachment.

To box the witness into this tight spot, counsel must do three things before the deposition. First, counsel must know every element of the causes of action in the complaint and be thoroughly familiar with any legal and factual issues relating to those elements. Second, counsel must also decide the theme of the case to be presented to the jury. Third, counsel must formulate uncomplicated but precise questions that can easily be answered in a "yes," or "no," or "I don't know" fashion.

Too often, lawyers depose key witnesses without first thor-

oughly familiarizing themselves with the legal and factual issues in the case. If counsel does not fully understand all of the legal and factual intricacies of each element of the case, it is not possible to ask all the relevant questions at the deposition.

While this might seem obvious, in reality it is depressingly common for attorneys to first become familiar with all of the intricacies of their case only on the eve of trial.

Successful trial attorneys know that it is essential to craft a case theme to present to the jury. In a sexual harassment case, the theme may be that while perhaps there was some harassing activity, the plaintiff has significantly overstated the nature and extent of the harm. If that is the theme, counsel must know this when they are deposing the plaintiff and other key witnesses in order to ask questions relevant to that theme. A dynamite theme developed after the deposition of the key witness often leads to a far from dynamite cross-examination.

■ **Formulating cross-examination questions.** If trial counsel has properly prepared for deposition, formulating short, precise questions should come naturally.

The goal is to design questions for the deposition to which opposing counsel can not interpose a viable objection. Then, during cross-examination at trial, all counsel needs to do is take the question from the deposition transcript and ask it to the witness using the same words used at the deposition.

For example, assume that during the deposition, counsel asked the following question and received the following answer:

Q: Is it true that the defendant did not ever physically touch you?

A: Yes.

At trial, counsel then asks:

Q: Is it true that the defendant did not ever physically touch you?

■ **Impeaching with prior deposition testimony.** If the witness does not answer “yes,” the witness can be easily impeached by reading the transcript to the jury to show that the witness, at the time of the deposition, gave a different answer. The key is to not let a witness respond with long or complicated answers during the deposition. To accomplish this, counsel must limit deposition questions to queries that elicit “yes,” “no,” or “I don’t know” responses. When a witness responds to straightforward questions with long, complicated answers, it is trial counsel’s job to ask a differently phrased question in order to get the type of answer useful during cross-examination at trial.

This can be accomplished in a number of ways.

Sometimes counsel may want to follow up with “So the answer to my question is ‘yes?’” If that does not work, counsel can ask the witness if it is possible to respond to deposition questions with “yes,” “no” or “I don’t know” responses.

If counsel has adequately prepared for the deposition and the questions are short and precise, then, in most instances, it will be almost impossible for a witness to avoid responding with a short, uncomplicated answer. Any witness who consistently testifies that it is not possible to answer with a “yes,” “no,” or “I don’t know” response will soon lose credibility with the jury.

Here is how counsel should handle such a witness at deposition and then at trial:

At deposition —

Q: Is it true that the defendant did not ever physically touch you?

A: Well, he often came up behind me and harassed me and he always made inappropriate comments to me, and on and on.

Q: Can you answer my question with either a “yes,” or a “no?”

A: I have answered your question to the best of my ability.

Q: So you cannot answer my question with either a “yes” or a “no?”

A: Well, your question involves a lot of issues, and so

forth, and on and on.

Q: So it is true that you cannot answer my question with a “yes” or a “no?”

A: Yes.

At trial —

Q: Am I correct that you were asked at deposition whether it is true that the defendant did not ever physically touch you?

A: Yes.

Q: Am I correct that you testified at deposition that you could not answer that question with a “yes” or a “no?”

A: Yes.

Using this technique, it does not take long for jurors to realize when a witness is intentionally avoiding answering the questions.

■ **Keeping witnesses on track.** The key is to cross-examine the witness at trial in manner such that every single question is close enough to the deposition question so that the witness must always give the answer counsel seeks, or be impeached with a prior inconsistent statement from the deposition transcript.

A good cross-examiner can conduct an entire cross-examination at trial and never get an answer that creates a problem — either the witness agrees with counsel or counsel impeaches. This can work so effectively that eventually, when a witness gives an answer inconsistent with the prior deposition testimony and counsel begins reaching for the deposition transcript, the witness, knowing what is going to happen next, will change the answer to avoid being impeached.

In fact, if counsel really plans the approach thoroughly, and especially if the deposition transcript is long, counsel may be able to insert a question into cross-examination at trial that does not track the witness’ deposition testimony as closely as the attorney might like. The witness, having been impeached a number of times, will probably assume that counsel is armed with testimony to impeach, and will offer the desired answer.

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