Active listening at deposition

Seasoned trial attorney Tim Tietjen discusses an underrated trial skill, and why taking depositions early can be an advantage

By Dan Pleasant

"Everything you know is wrong."

That's the credo of Tim Tietjen, partner at San Francisco's Rouda, Feder, Tietjen & McGuinn. He uses the maxim (a quote from legendary radio DJ Scoop Nisker) to remind himself to always keep an open mind, both when trying cases and during discovery. This is particularly true when deposing defendants and their experts. He says that effective cross-examination demands that questioners not remain fixated on their outlines and their preconceived notions about the case, but instead pay close attention to what the witness actually says and how they say it. "Instead of hewing to a rigid outline, you need to 'go with the flow' with the witness." Tietjen calls this technique "active listening."

Tietjen feels that too many attorneys – rookies and veterans alike – make the mistake of scripting depositions in advance, and fail to respond nimbly when deponents veer from the lawyer's script. When Tietjen sees defense counsel arrive at deposition with a typed-out script, he says, "It makes me smile."

"Attention must be paid" – Willy Loman, "Death of a Salesman"

So, what is this active listening of which Tietjen speaks? Active listeners make a conscious effort to hear not only the words that another person is saying, but, more importantly, try to understand the complete message being sent. This requires paying very careful attention to the speaker. You cannot allow yourself to become distracted by whatever else may

Tietjen

be going on around you – or by, for example, your notes or outline – or by forming counter arguments that you'll make when the other person stops speaking. Nor can you allow yourself to get bored, and lose focus on what the other person is saying. All of these factors contribute to a lack of listening and understanding.

Active listening in practice at depo

Tietjen cautions that active listening is no substitute for thorough preparation. Not being wedded to an outline doesn't mean not having one; instead, always have a plan but be prepared to deviate.

Rather than taking a linear approach, Tietjen compartmentalizes topics to be covered into discrete issues and lines of questioning he calls "pods." As questioning progresses, he compares the facts he "knows" about each issue – tempered with his commitment to retaining an open mind – with the testimony of the witness on each topic. After this first pass, he then circles back to critical topics, particularly with experts.

So, sequencing of expert depositions is important. Ideally, plaintiffs should take opposing experts' depositions first. This is so because there two distinct stages to every deposition: information gathering and then (and only then) cross-examination.

In practice, during the information-gathering stage, Tietjen seeks to identify the facts the opposing expert "knows." He then compares that to all the "known" facts in the case to target those facts "unknown" or ignored by the expert. It is only in the second, cross-examination phase that Tietjen tests the experts' conclusions against additional facts that have been gleaned from discovery or plaintiff's own experts.

"Generally, don't start your cross-exam straight off the bat," Tietjen advises. "Instead, you want to get all information you can first, and then cross. Patience and active listening are generally rewarded."

He says one of the best ways to learn how to take depositions is to read lots of deposition and/or trial transcripts, both those taken by expert litigators, and those not so experienced. "You can quickly develop a feel for which approaches are effective and which are not."

And Tietjen has a lot of recent experience in teaching his techniques. In addition to mentoring junior attorneys in his firm, he has experience on the home front: daughter Kendra is a recent bar admitee, following in her father's footsteps.

Take advantage of plaintiffs' precedence

In the chess game that is litigation, plaintiff always plays the white pieces. Tietjen believes it's important to take advantage of the fact the plaintiffs always have the first move.

"Because we thoroughly investigate the case before filing a lawsuit," he explains, "in most cases we have an informational advantage on defendants at the

time the case is filed." Tietjen recommends that plaintiffs start the discovery process as soon as possible, and, in particular, notice the deposition of the defendant or other key defense witnesses early. As he explains, the hierarchy that prevails in most defense counsel's offices dictates that cases in the early discovery stages are often covered by the least experienced attorneys; it's frequently only when trial dates approach that defense shops bring out the experienced counsel. This pattern means that taking the key depositions early can provide plaintiffs' counsel with an experience gap when it matters most. And sometimes it only takes one deposition.

A case study on plaintiff's early advantange

One of Tietjen's recent cases proves the point. In May 2013, a 23-year-old plaintiff was involved in an auto accident that rendered her a C-5 incomplete quadriplegic. She was driving northbound on Highway 680 when another driver, Defendant One, spotted an impaired driver, Defendant Two, on the highway. Defendant One was in the midst of performing a "dealer trade," having dropped off a car at a dealership and he was driving a traded-for car back to another dealership.

Defendant One called 9-1-1 to report the impaired driver. He was on the phone with the 9-1-1 operator for three minutes, and after he reported the license number of the impaired driver's car, he was warned by the 9-1-1 operator to stay away from the impaired driver.

But Defendant One ignored that warning, and continued to shadow and monitor defendant Two. The impaired driver came alongside Defendant One's car and swerved into his lane. Defendant One then suddenly swerved to his right into plaintiff's lane of travel. His sudden turning movement forced Plaintiff to steer to the right to avoid a collision, and she lost control and went off the highway and up an embankment, rolling her car several times before it landed back on the highway upside down.

Plaintiff contended that the direct cause of the accident was Defendant One's negligently swerving into plaintiff's lane of travel and forcing her to take evasive action. Plaintiff further contended that Defendant One was an employee acting in the course and scope of his employment with the dealership that hired him to drive the car when the incident occurred. As to the second dealership involved in the car trade, plaintiff claimed they were liable for acting in a joint enterprise with the other dealership in conducting the auto trade.

Defendant One claimed, as supported by the CHP accident investigation, that the sole cause of the accident was the impaired driver. Further, Defendant One claimed he was acting as a Good Samaritan in reporting the impaired driver when the accident occurred. The dealership that hired Defendant One also claimed that the impaired driver was the sole cause of the accident, and that Defendant One was an independent contractor and not an employee at the time of the incident. The second dealership involved in the auto swap denied that the dealer trade created a joint enterprise. It further claimed the plaintiff was inattentive and negligently overreacted to the situation.

Taking the critical depo early

Tietjen took Defendant One's deposition shortly after filing the case. He had the 9-1-1 call records through early investigation; critically, the defendants did not. Sure enough, the defendants sent Defendant One to the deposition with a junior attorney who sat silently by as Tietjen elicited damning fact after damning fact: Defendant One was fatigued; it was the end of a long day; he was not thinking clearly at the time; he thought he was on the phone with the 911 operator for twenty seconds, not the three minutes confirmed by the records.

Catching the defense at an information disadvantage, and having the opportunity to cross the defendant while being represented by a junior attorney taken off guard by the unravelling information, proved critical to laying the foundation for a successful outcome.

Plaintiff is a C-5 incomplete quadriplegic and will require lifetime medical care. After mediation, the parties entered into a global 8-figure settlement agreement.

Final thoughts

Tietjen concludes, "Cases are like relationships. They never stay static, but are always changing – for good or ill. The key is to remain flexible and adapt your approach to accommodate those inevitable changes."


Pleasant

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