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Managing the Law Office

Avoiding Joe Fracazo's Catastrophe

by David A. Donet, Column Editor

That week had started out like many other weeks for Joe Fracazo, Esq.. Nothing out of the ordinary was in the works. A couple of Hearings, one deposition, and a prospective client had made an appointment for Wednesday afternoon. "Piece of cake week!" thought Joe. "I may even go home early a couple of times this week... say around 6:00 p.m., instead of just in time for the late-night news." Little did he know that his life was to end suddenly that week.

Joe thought of himself as an average lawyer. He considered himself a

general practitioner, but had long ago decided that it was better to stick to two or three areas of law to be efficient and effective. He had an average office in an average street, right in the center of an average town, not far from city hall, in an average one story building that he had bought right after winning an important case.

His office - true to his average style - was not lavishly appointed, but it was elegant and serious. Anyone walking into that office immediately felt the air of respectability. He had

developed an enviable reputation among his peers, who considered him a fair and honest man and a mighty adversary.

Joe, however, was not a cautious man. He had been a circus acrobat in a prior life (circa between college and law school) and was well known for refusing a safety net even during the most dangerous stunts. His favorite mode of transportation was an old hog (i.e., a Harley Davidson for those of you from the big city) that he had bought at a police auction a few years ago. It had been retired from "the

continued on next page

The "Zen" of Depositions

by Tim Jesaitis

When I was a new-be lawyer, I searched for articles to help explain the *art* of taking depositions. Certainly, there are excellent articles about the procedures of depositions. However, absent are those about the "zen" of depositions — where your mind should be before, during, and after the deposition. Now that I have some years and countless depositions under my belt, I offer these few comments to those who, like me, look for such matter.

My mentor, Albert M. Frierson, gave me an apt analogy to begin my legal career: Depositions are like tennis — first, you start out just hoping to get the ball over the net (just get through the deposition); however, as time goes on, you learn how to put

various spins on the ball, and find that the game (deposition) can be as challenging as your abilities allow. Truer words have not been spoken.

Focus on these: 1) Visualize the points; 2) remember the audience; and 3) "see" the record.

Visualize the Point

I would imagine that there is a reason, a point, or purpose, for taking the deposition — a real reason, beyond the paranoid ones conceived by opposing counsel. It could be as simple as wanting to know more about the witness. Knowing about them can take two forms — know their history, and know what makes them tick. Do they have buttons to push? Do they push your buttons? For me, as a workers' compensation

defense attorney, this idea of "ticking" is central to a claimant's deposition. Why are we in litigation? Often, the answer is obvious. Sometimes, though, when my clients assure me that they have done everything right

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MANAGING THE LAW OFFICE

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force” after ten years of chasing bad guys and winning records for most racial-profile stops. Joe would zip in and out of traffic like a madman, wearing a long white scarf and goggles reminiscent of an old Charlie Brown Meets the Red Baron cartoon.

Joe lived in a modest home on the beach. Yes, right on the water. He had won this house in a game of pool while in college and moved in right after graduation from law school. He has lived there ever since. In fact, true to his character, he has stayed in that house during every hurricane that has hit Florida since he moved in, horror stories from his neighbors and in the media about the danger of doing so notwithstanding.

It was not unexpected, then, that Joe's zest for *la vida loca* would carry into his law practice, unbeknownst to his clients and colleagues.

You see, Joe Fracazo did nothing to safeguard his office. He had no backup system for his computer files; had no fire-proof system to safeguard his client's important papers, not even a fire extinguisher (the latter of which would have come in handy when he threw a half-lit cigarette into the waste basket under his desk - good thing he was drinking a Pepsi at the time and put the fire out with it).

Joe died on Thursday of that week, the victim of his careless lifestyle. That day had started for Joe as usual. He had gotten up around 5:30 and went for a swim - despite the fact that the rip current flags were up and there were to be no lifeguards on duty until later that morning. By 7:00, he was out the door and on his way into town. By 7:30 he had picked up his morning coffee and guava pastry from his favorite bakery and by 8:00 he was behind his desk, reading the morning paper. By 9:30, Joe was dead.

It all started a few weeks ago, when Joe was approached by the local phone company sales rep, who talked him into getting a high speed internet access line for the office. If there was one thing that Joe wanted to make sure of, was that he wanted to stay current in all of this internet stuff so that some recently-graduated

kid didn't blind-side him again with some case that the kid had found the night before the hearing on Westlaw, or was it Lexis? Doesn't matter. Joe had wanted high speed access for a long time and now that it was available, he wanted to be among the first to get it.

Joe Fracazo was no dummy when it came to computers. He had earned an undergraduate degree in computer science from a big name university and was known in the hacker community as Joe Houdini. But, true to his careless ways, Joe had forgotten that his office computers would be easy prey for hackers like him and from the ever abundant viri purveyors, as Joe had installed neither antivirus software, nor a firewall.

When Joe arrived at his office that Thursday morning, he turned on every computer in the office (all three of them). He turned on his own computer last and began reading the local paper as the computer booted up. He finished reading the front page of the paper and decided to open his email program - as was his custom - when he noticed to his great, disgusted amazement how file after file in his computer was being erased into oblivion by some bug that had gotten into the system as soon as the email program started. What was worse, he could see from the reflection on his office window that his assistant's computer hard drive was also being erased, as was - unbeknownst to him - his paralegal's.

Joe tried and tried to stop the process, but it was not responding. He pressed the power button, to no avail. In desperation, Joe reached behind the computer to pull the plug, but in the process, he knocked the monitor to the floor and it exploded on impact, sending sparks flying everywhere, which caused the mountain of files and papers on Joe's desk to catch on fire.

Joe ran to grab his jacket from its usual hook behind his office door, to try to put out the fire with it. However, Joe's practice had not been as lucrative as it once was and his polyester jacket was quickly engulfed in flames as well. By this time, the smoke was so intense that a passerby noticed it and called the fire brigade, which got there very quickly, but not quickly enough to prevent the fire from spreading to most of Joe's office.

You see, Joe and his staff had papers on top of everything. They had open file cabinets all over and bookshelves lined up all the hallways in the office.

The whole thing lasted maybe ten minutes, but it was enough to destroy all of the data on Joe's computers, as well as many of his office files. Most importantly, the fire consumed all of the original, irreplaceable, confidential documents that one of his clients had given him to use in the case against that big corporation south of town that had been producing carcinogenic consumer products for years and years. This was the case that was going to make Joe a rich man.

Joe could not believe his eyes. His whole life destroyed! His career shattered in an instance! His dream of buying the rights to Margaritaville gone forever! He could not bear the thought. What was Joe to do? He was sure that there was at least one piece of evidence that he had been looking at the night before and that was not with the rest of it. "If I could at least find this paper" he thought, "then all is not lost because this was the most important one."

Joe looked and looked but to no avail. The more he searched through his charred office the angrier he got. Not just because he could not find the paper, no. He was even more upset at not having paid attention to the column that he had read a few weeks before in which a fellow by the name of Donet had given a few suggestions on avoiding catastrophes in the law office. Things like backing up all of one's data at least daily. Indeed, by making two backups - one staying at the office and one being taken out of the office to prevent something like a fire from destroying even the backup.

Joe kept reviewing in his mind all of the things that he had read in that article and grew angrier by the minute. Like the suggestion that one should have a computer-safe fire extinguisher (or two, or three) in the office. "A computer-safe fire extinguisher? What's that?" "Oh, yes, he said that it was one of those powder ones, because the liquid ones aren't good for computers." "Duh! Like he needed to tell me that!" thought Joe.

"I definitely should have followed his suggestion about having a fire-proof safe or filing cabinet for those important papers." "On the other

hand, I prefer his suggestion that one get a scanner, scan the documents and put them in a bank vault or other safe place like that until the day of the trial." "Easy for Donet to say, though. He's probably some big shot lawyer working in some 700-lawyer Firm!" "Easy to get a scanner when all you need to do is fill out a requisition!" "But wait, didn't he say that he is in a 3 lawyer Firm and was a solo for a long time before that?" "I'm gonna have to find that article to re-read it and implement those changes that he suggested."

By now Joe was furious. He had looked everywhere. Or so he thought. He hadn't looked on top of the bookshelves in his office, behind the fancy crown molding that Joe had installed himself a few weekends ago. He remembered that he had hid it there in case someone broke into the office - being that the office didn't have an alarm and all.

Although Joe, like Donet, was a tall man (5' 7 & 7/8"), he could not reach the top of the shelf without getting on something. Joe found his charred chair and pushed it over towards the bookshelf, his anger relenting a little after it became clear to him that he had in fact put the paper there and this bookshelf had been damaged by neither water, nor fire. He carefully climbed on the chair and reaching for the paper behind that now inconvenient crown molding. He began feeling around blindly for the paper but quickly became frustrated with the whole thing. Let's face it, his patience had all but worn out by the entire calamity. So careless Joe gave a pull to the bookshelf with all his might and it came tumbling down with a thunderous crash - and then, simultaneously, a gunshot pierced the air with its violent roar. Joe fell lifeless to the ground, as the bullet from his 457 Magnum had penetrated his right temple, in an upward angle, and had incrustated itself in the roof rafters, after piercing the office ceiling. Joe had also forgotten that he kept his loaded revolver on top of that bookshelf and it discharged itself when Joe knocked the bookshelf to the ground.

So, my friends, the moral of this story is: Don't be as careless as Joe Fracazo and you won't die before your time. Backup your computers;

take one copy of the backup home with you every night. Install antivirus software and a firewall and keep these always up to date. Buy computer-safe fire extinguishers. In fact, consider asking you local fire dept. to conduct a fire safety inspection.

It's really not hard to do. First, buy antivirus software for every computer. This is probably the cheapest investment in software and perhaps the most important. There are many programs on the market. Among the better known ones are:

MacAfee: <http://macafee.com>
Norton Antivirus: <http://symantec.com>

For a good review of antivirus software, you may wish to read the following PC World article: ***Install-and-Forget Antivirus Programs***. You find it by clicking here. <http://www.pcworld.com/reviews/article/0,aid,105314,00.asp>

As for firewalls, there is more than one way to skin this cat. There are hardware firewalls, such as those integrated into routers (which are typically used by high speed internet service providers to bring the service to your office network). There are also several software programs that do a very good job as well and can be used with or without the foregoing hardware. Among them:

Zone Alarm: <http://zonelabs.com>
Outpost Firewall: <http://www.agnitum.com>
Norton's Personal Firewall: <http://www.symantec.com>
McAfee's Personal Firewall Plus: <http://www.mcafee.com>

Windows XP also has its own firewall, but it has its shortcomings. I have disabled it in our systems, as it is more troublesome than not.

Backup your computer data daily. There is no reason not to do that. Backup programs are cheap and easy to use. Pay close attention to not just your clients' documents. Backup your financial, docket and file management data, including your trust account and at least your latest billing cycle. Take one set of the backup tapes or disks home with you every day. Better yet, there are a number

of internet sites that are designed as data storage centers and allow you to have absolute control over the privacy of your data. These companies usually have redundant backups of your data in their computers in several parts of the country, for added safety. Check out these sites as an example. There are many more:

XDrive: <http://www.xdrive.com>
IOmega Online Storage: <http://www.iomega.com/istorage>
DataVault: <http://www.datavaultcorp.com>

Be safety conscious. Try to leave everything as protected as you can at the end of the day. For instance, a flood can be just as devastating as a fire. When I went solo after my first few years of practice with a Firm, I leased space in an all lawyer office suite building. One Monday morning I arrived at my office to find that the pipe that feeds water to one of the toilets on my floor had busted over the weekend and had flooded my entire floor. I had one bankers box full of files next to my desk, which was sitting on about four inches of water. Needless to say, it took countless hours to reconstruct copies, not to speak of the water damage to the originals.

Nowadays, it's not just files that can cause havoc in a flood. Most computer makers have changed the design of their units to the "tower" configuration, so that your monitor no longer goes on top of the computer. Most people seem to put these computers on the floor, underneath the desk. Even office equipment companies are designing office furniture with a compartment under the desk for these units. You may want to rethink the decision to have that computer sitting anywhere but on top of a desk or work surface.

So, there you have it. The way not to fall into the kind of carelessness that killed Joe Fracazo.

If you find these lines useful, or not, if you wish want to share your comments or a horror story, or a happy ending, drop me a note. You can find me for now at <mailto:ddonet@earthlink.net>.

See you next time!

David

Practice News and Tips:

Medical Malpractice

by Jack W. Merritt, Merritt & Merritt, Sarasota, Florida

In connection with considering taking a possible medical malpractice case, with the current statutory requirements before you can even file suit being such as they are (even without caps on non economic damages), I suggest that you rarely consider taking such cases. A general guide that may help you evaluate such cases is provided below.

First and Foremost - Always remember that a jury will give a doctor the benefit of the doubt. This is not because a doctor can do no wrong, but is because of the unique respect that doctors are

given by this society and the bad publicity against injured patients and their attorneys that has been paid for by the insurance industry, the FMA and AMA.

1. Clear liability and clear damages. Best scenario and the only type truly worth taking.
2. Clear liability and damages are in doubt. Next best scenario, but not good. Typically avoid taking such cases.
3. Liability is in doubt and clear damages. Not a good case because the benefit of the doubt always go with the doctor.
4. Liability is in doubt and dam-

ages are questionable. Never consider taking this type of case.

Also remember the Wrongful Death Statute and its implications in connection with a medical malpractice claim. These cases are very difficult to win and you don't want to put yourself in a situation where you spend tens of thousands of dollars and you cannot recover because of the statute.

Jack Merritt practices in the areas of Civil Trial Practice, Commercial Litigation, Personal Injury, Products Liability and Securities Disputes.

Paralegal Information

by Pricilla Horn, CLA

GPSSF Members

Tip #1: One of the best things you can do for your paralegal (and your practice) is encourage their participation in local chapter events, including monthly meetings, educational seminars, and pro-bono projects involving the community.

This provides another way to get your firm's name well-known, and is also very beneficial for the continuing growth and education of your paralegal.

Tip #2: Your paralegal can volunteer to take photographs of the guest speaker at the next commu-

nity event or legal organization's monthly meeting, and then send a copy of the photo (with captions identifying the persons in the photo) to the local newspaper, as well as to the guest speaker. (Another way to have your firm's name mentioned.)

Executive Council Profiles

Priscilla Horn, CLA, is a nationally certified paralegal with over twenty years of experience assisting attorneys in the preparation of their client's cases in the areas of automobile negligence, personal injury, medical malpractice, wrongful death and nursing home litigation matters. She is past president of the Dade County and Brevard County paralegal chapters, and remains active in paralegal organizations on both state and national levels. Ms Horn was recently re-appointed for the 2003-2004 term as CLA representative for the GPSSF Section of the Florida Bar.

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What Are Some of the Essential Gadgets for the Road Warrior and Why?

by Richard M. "Rick" Georges

As I sit in the Hollywood Hills Amphitheater with a 3 pound ultralight computer in my lap, waiting for the show to start, I have to first answer this question with an "are you kidding me?" What kind of nerd would work during an outdoor performance at Disney's MGM theme park?

Well, the answer is the Future-Lawyer. I can't seem to let idle time go by without trying out the latest in mobile technology for the Road Warrior. While my daughter looks over my shoulder, wanting me to give her the computer, so that she can use the wireless Internet PCard to check her websites, I resist the temptation. I have a tiny 3 megapixel digital camera around my neck, that uses tiny Secure Digital storage cards to store photo quality images in a couple of ounces. The Casio Exilim S3 is a marvel of mobile technology, allowing up to 300 high quality images to be stored and shot in a camera that is so small and light, you can forget you are carrying it.

But, the most essential gadget has to be the wireless card that allows Internet access anywhere you happen to be. The AirCard 555 accesses the Earthlink 1XTTT enhanced network over the CDMA wireless network, and comes with compression software from Fourelle Systems, Venturi, that doubles or triples the throughput speeds. The result is truly wireless throughput speeds that are 3-4 times faster than dial-up. At an all you can eat monthly price of around \$60, it is the one essential tool in my travel kit these days. The computer is a Dell Latitude X200. It is about a year old, and Dell has already put it in the boneyard, with the addition of the X300. That means you can buy one for around \$1300. It is a 3 pound marvel, that slides neatly into a media base (around \$200 on Ebay) with a CD rewritable drive and a floppy drive. The Road Warrior needs to travel light, so the media

base stays home when I travel. I got an extra media base for the office, so that all I have to carry back and forth is this tiny computer. It has a full keyboard and a 12.1 inch screen that is perfect for everything I do. It syncs with my 15 gigabyte IPOD, which contains over a hundred of my CD music, and has room for much more. The final addition to the Road Warrior arsenal is my new Kyocera 7135 cell phone. This little guy actually combines a color Palm PDA with the cell phone. It also serves as a wireless modem, and Alltel provides all you can eat Internet access and email for about \$60 a month. It is a great adjunct to the AirCard in the Dell. The coolest thing is that the Amicus calendar and address book integrate with the phone, so I can dial anybody in the address book with a touch of a button. It also uses tiny Secure Digital memory, and a 256 megabyte card carries an entire library, a full complement of MP3 music, and all the software a Road Warrior could ever need. If you are interested in more information on any of the gadgets mentioned here, email me at futurelawyer@futurelawyer.com, and I

will be happy to lead you to the promised land. Oh, by the way, the total traveling weight of all the stuff here is under 5 pounds.

Richard M. "Rick" Georges is a sole practitioner in St. Petersburg, Florida, and is a past Chair of the Technology Committee of the Florida Bar. He is the author of the column, "Future Lawyer" tm, which has been published in many publications and on the Net. He is a past member of the Florida Courts Technology Commission by appointment of the Florida Supreme Court and the Law Office Management Advisory Service Advisory Committee of the Florida Bar (LOMAS). He has taught law office management, computer-assisted legal research, and micro-litigation skills at the College level. He has presented seminars and training on all aspects of the use of technology in the legal profession, for local, state and national bar associations, and for many public and private entities. He can be reached via email at futurelawyer@futurelawyer.com, or at his home page at <http://www.futurelawyer.com>.

Paralegal News Column

by Pricilla Horn, CLA

National:

NALA, Inc., the national organization for paralegals and legal assistants, has recently changed its credential design to reflect the optional use of the CLA (Certified Legal Assistant) designation or the new CP (Certified Paralegal) designation, for paralegals who have successfully completed the intensive CLA examination. It can be requested by email: nalanet@nala.org with the

subject line "New CLA Certificate."

State:

PAF, Inc., the state chapter for Florida paralegals, held its annual seminar and election of officers in Orlando. The new state chapter president is Johnna Phillips, CLA, from Tallahassee. Additional information on all state chapters can be obtained by going on-line: www.pafinc.org

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DEPOSITIONS

from page 1

(and on paper it appears that this is so), the “why” of litigation becomes a true focal point of the deposition. Why does this particular claimant believe that litigation is the method to solve her problems?

Then, there are those depositions where the point is not to obtain information but to convey it. I often see this when certain skillful claimant attorneys schedule my adjuster for deposition. The point is not to find out how the adjuster has handled the file (as the answer is obvious); rather, it is to show where things on the file went well and not so well, and in those areas where things did not go so well, how a carrier fee would be payable, under §440.34(3). (This same concept reappears in the “Know the Audience” section.)

No doubt, new lawyers carefully craft their questions prior to each deposition, writing out pages and pages of query. But, what is the point to be made? Precisely where should the metaphorical ball be hit, and why there? To focus in on the *points*, I write the core ones, simply, in the margins. Then, before concluding my examination, I can go back to those points to make sure that they have been addressed.

Often, the trick or zen of depositions is to be conscious enough to realize when *the moment* occurs: When the purpose is revealed, the witness’ motives are laid bare, and whatever truth there is lies supine on the table, deliciously dissected.

Sometimes the point does not occur to you until you are in the thick of the deposition. Listen to that little voice that says, “There’s something going on here . . .”

I was taking a CPA’s deposition. She had slipped, fallen, and herniated a lumbar disk. My client, the employer/carrier, paid for a discectomy and then pain management. She filed for PTD (permanent total disability, i.e., “I will never work again”). I thought one point was going to be for me to describe for her and counsel all the sedentary jobs my clients had found for her. However, the deposition took a most interesting turn.

The claimant lamented how she had not worked in 18 months. She lamented how she had not been paid workers’ comp for over 12 months. She sold her Florida house several

months ago and moved to Wyoming to be near her daughter. Just a month ago, the claimant continued, she bought a house.

The small voice said to me, “Who’d give her a mortgage? She’s not working.”

So I asked, “On the mortgage paperwork, did the lender ask about your sources of income?”

“Oh,” she said, “I applied on-line.”

I went through a few more questions, then realized she really didn’t answer my question. I asked again. “Oh, you should see the APR I’m paying,” she said.

Still not a direct answer. I asked one more time. “Did the lender, either in writing or over the phone, ask about your sources of income?”

She was silent. She had been standing, leaning against the wall. She frowned. “OK,” she said slowly, “I admit it. I lied.”

She went on to testify how she told the lender that she had been running an accounting business out of her house for the past year. How her daughter was her main client. How her daughter paid \$2,000 per month to do the books for her small retail shop.

Did I mention that the PTD claim was withdrawn?

So, at the end of any deposition, can you formalize the equation to describe what made the witness tick? Did you hit on all the points scribbled in the margins? Did you find that there were new points to scribble in?

Remember the Audience

Remembering your audience is a little more complicated. The audience can be singular or plural. It will vary based on the type or timing of the deposition. Certainly, the witness may be an audience. Opposing counsel may be. More likely, the real audience is the judge or judges who read the deposition, either in trial or on appeal. Before serving up the, “Can you state your name for the record,” the essence of audience should be determined.

For example, most judges of compensation claims require deposition transcripts to be submitted to the court at least two days before the final hearing. The night before the hearing, the judge will read the depositions. At the beginning of trial, the judge will have a clear vision of the players and the issues.

With this in mind, alter how and when to ask questions — what information is put “on the record” prior to

the beginning of the actual trial. What impressions should the judge have? What information? What can be saved for cross exam? What does your client know that the other attorney did not cover? Should the deposition audience know about it before live testimony?

Often the main concern in deposition is impeaching the witness — do I do it now, or wait for trial? For me this issue generally arises during a claimant deposition. Whether I reveal my knowledge of contrary information at the time of the deposition is solely dependent upon my audience.

There are times that I am trying to work a settlement. Having the claimant’s attorney know these inconsistencies at the time of the deposition may be useful. Other times, there are those cases that I know are headed only in one direction: final hearing. There, the question is whether I gain (or lose) any advantage if the judge knows about the inconsistencies during the deposition? Or should I wait for trial and create the wonderful element of surprise?

There was my case of Mr. Kay. His was a “coming and going” case. He argued that he drove from the job site at 5:05 a.m. to the local “Quik-Stop” to grab some coffee. On his way back to the job site, he got T-boned. His employer, though, suspected that his accident actually occurred while he was simply on his way to work — the whole “cup of coffee story” was just a ruse. If the employer were right, then Mr. Kay’s accident was not covered by workers’ compensation (the “coming and going rule”).

During the first two-thirds of the deposition, Mr. Kay carefully detailed his important role that day: What a huge job it was, how many yards of concrete would be poured, how many mixers would be used, how many men would be coordinated. On and on. He testified that he arrived precisely at 5 a.m. After waiting some five minutes, when nobody had yet shown up, he decided to go get coffee.

I wanted the judge to know, right then and there, that this story held no water. I had decided going into the deposition that whatever he told me, I was going to present to him (and to my real audience, the judge), my impression of what really happened: If the claimant got coffee that morning, he did it on his way to work (because he realized he wouldn’t have time once the day got started).

Near the end of the deposition, I confronted the claimant with this contradiction: “Mr. Kay, if it was an all important day, if everything depended on you, if you were *the man*, then why would you leave the job site just to go get a cup of coffee some *three miles away*?”

The claimant was caught off guard. He began to stammer. His stammering was part of the record. I felt confident that the judge who read the deposition the night before would come to the final hearing with the proper quizzical eye.

“See” the Record

Space. This encompasses all of the nonverbal communication that occurs during depositions. The court reporter is charged with accurately taking down all of the verbal communication. We know by heart the instruction to witnesses: Say “yes” or “no” rather than shake your head; don’t say “ah-ha” or “uh-uh.” However, as attorneys face various depositions, a lot can occur in nonverbal communication, some of which you may wish to have on the record.

I know I’ve been there: Just taking notes, not watching anything, doing my examination (whether direct or cross), my head down, meticulously following prepared questions, or scribbling notes from answers. Eye contact? You got to be kidding!

But, amazing things happen in a deposition with eye contact — looking up from a notepad and actually *watching* what is going on, or be the object that is being watched. This is what I mean by “space.”

Take the simple concept of disbelief. Often, a witness explains a point of view which I find difficult, if not impossible, to believe. I will simply look at the witness. I put my pen down. I make eye contact. I look “confused.” I say nothing during this moment.

The court reporter has nothing to type while I do this. Most witnesses, though, try to fill those moments of my silent questioning. They begin to stammer. Some witnesses strain to explain themselves two or three times over before any further questions need to be asked. The record reads like “prattle.”

Then there is conveyance of your “sympathetic side.” Imagine when a witness gets to a key point, climbs up on his soap box, and reveals portions of his heart and mind that he had been waiting to reveal. This is the key moment in the deposition.

At these junctures, if I am aware enough to realize them, I will put my pen down. I will look directly at the witness. I will lean forward. I will fold my hands in front of my papers with a demeanor of keen interest and concern. I may even squint my eyes a little, in order to “picture” what the witness is saying. The witness notices the dramatic change, from my scribbling to my listening. Then, the flood gates of truth are washed back.

There was this time, during a claimant’s deposition, we got to the issue of permanent total disability. The claimant, a 60-year-old man who had a serious injury, began zealously talking about how he had worked so hard all of his life. He was still working for the employer. He talked about what effort he used to get to work each day. I realized that this was the moment he was waiting to tell me about. I put my pen down. I leaned forward, crossed my hands, squinted my eyes periodically, and nodded my head in understanding.

He kept talking. And talking. And talking.

All of a sudden, to the amazement of his attorney, the claimant said, “So, it doesn’t matter how hurt I am, I will keep working.”

Wow. The witness, sensing my earnest attention to his plight, divulged his inner strength — at the cost of his PTD claim.

Also, a deposition transcript, without intervention, will not describe the passage of time. It will not describe intonation. It will not describe gestures. Smiles, smirks, eye rolling, pointing, laying one’s head flat on the table — all go without notice in the deposition, unless someone describes them so as to put it into the deposition. No talking — no record. So much of our communication is nonverbal. For example, I can raise my eyebrows in astonishment or in interest while a witness talks, and that movement alone may keep the witness talking. No additional questions need be asked. I can slowly shake my head “no,” and the witness will keep on explaining. My gestures, obviously, are not typed into the record, though the witness’s reaction (verbal sputtering) certainly is.

No gesture is automatically recorded by the court reporter. If any attorney feels the gestures are noteworthy, then it would be incumbent upon that attorney to describe the gestures into the record. Sometimes I describe either opposing counsel’s

or my own gestures, in order to make sure the court understands that the testimony given has a certain odor about it. Sometimes opposing counsel describes my gestures in an effort to either reel me or the witness in.

During one deposition, my employer representative was being deposed by the claimant’s attorney, Mr. S. Mr. S nodded profusely throughout my client’s testimony. Halfway through, Mr. S even began to start winking. I realized, too late, that my employer was starting to babble. He began talking faster. My client was coming across as very nervous and nearly incoherent. The simplest question, normally seeking only a yes or no, received an answer that ran for pages. I realized far too late that all of the nonverbal communication used by Mr. S had a profoundly negative effect on my case. No matter what the employer would say later at trial, his incoherence was captured for posterity. The nodding and winking, however, were only captured in my memory.

Space can occur in the record by other means. A claimant alleged that the dust and fumes from a construction area at work aggravated her asthma. She did not report her problems, though, until the year-long project had been completed for four months. The employer had raised the “notice defense” (i.e., the employee has 30 days within which to report a work injury).

In the middle of the claimant’s deposition, as things were starting to get interesting, I asked her, “When did you first believe that the dust from the construction site was aggravating your asthma?”

The claimant just sat there. And sat there.

I could tell that she was trying to figure out what answer should she give (as opposed to the real answer). She just sat there, eyes focused upward.

I glanced at my watch. Her attorney was scribbling notes on his legal pad. Still nothing.

“Thirty seconds,” I said.

She looked at me. The attorney looked up from his pad, as it occurred to him what I had done. I had interjected the lengthy silence into the record.

The room erupted. The attorney yelled, “How do you know it was thirty seconds?”

The claimant yelled, “I’m still thinking!”



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Maintaining Good Client Relations

- Avoiding Conflicts of Interest
- Duty to Communicate
- The Fiduciary Duty

11:35 a.m. – 11:45 a.m. **Break**

11:45 a.m. – 1:05 p.m.

Ending the Relationship

- Voluntary Withdrawal
- My Client Fired Me
- When is a Client no Longer a Client

About the Speakers....

JACK W. MERRITT is a partner with Merritt & Merritt in Sarasota, Florida. He is a member of The Florida Bar and the Maryland Bar. He has served as chair for a national conference on ethical sales practices in insurance. Mr. Merritt is an honors graduate with a degree in Business Administration and a major in Accounting from Ohio University. He has a Master of Business Administration degree with a concentration in Finance from Saint Louis University. Mr. Merritt received his Juris Doctor from the University of Baltimore.

WILLIAM I. WESTON has been a lawyer and educator for thirty years. He is currently Professor of Law and Associate Dean at Concord University School of Law. Concord is the country's only totally on-line virtual law school and is a Washington Post Company. Dean Weston is a well regarded expert in ethics and lawyer discipline. He has provided CLE programs in professional responsibility all over the country for the ABA and for several state and local bar associations. Dean Weston will hold your interest with his easy going style and sense of humor.

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DEPOSITIONS

from page 9

My employer laughed.

Since then, I have used the technique of telling time on several other occasions. I especially enjoy using it with physicians. More often than not, after I indicate how much time elapsed since the question was asked, the witness will say, "I'm still thinking." By interjecting the element of time, the judge can see when a witness is struggling with a question.

Without "speaking" the passage of time, the answer, no matter how long it took, would simply be the next line in the transcript.

Conclusion

So much more happens prior to and during a deposition than is covered by the Rules of Civil Procedure. Certainly, writing out questions is an integral part of achieving the zen for depositions. More importantly though, focusing your points, knowing your audience, and realizing that you are creating a *written* record (of verbal

and non-verbal communication) brings one to that higher plane. You are drafting a short story, if you will, that you control. The trick may simply be found by creating a record that contains more than just verbal questions and answers.

Tim Jesaitis is a board certified workers' compensation attorney in St. Petersburg. In addition to his law practice, he is also an adjunct professor at University of Stetson's law school — where he graduated in 1990 — teaching workers' compensation.

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