THE FLORIDA BAR TRIAL LAWYERS SECTION

The Advocate

www.flatls.org | Vol. XXXIX, No. 1 | Fall 2009

MESSAGE FROM THE CHAIR

E-Filing and Email Service: Ideas Whose Time Has Come

Most of us already know that in July 2009, Florida's Supreme Court, after being prompted by the legislature, directed the Electronic Filing Committee of the Florida Courts Technology Commission "to develop a plan for implementation of the Florida Courts E-Portal." Some of our counties are already filing pleadings electronically. In my area of practice, Orange County (Orlando) files everything electronically in its newer cases, but few of our surrounding counties have gotten there. This new development will require electronic filing systems to be compatible with the Florida Courts E-Portal.

The danger for trial attorneys is the possibility of different filing systems for every county across our state. If the judicial system does not mandate uniformity (such as we have in our federal system), court filing will be a nightmare of different systems and rules for every county, thus making our jobs (and those of our secretaries and paralegals) even more difficult.

Even newer is the idea of serving all of our pleadings via email only, and eliminating paper service and fax service. Email service has been studied separately by The Rules of Judicial Administration (RJA) Committee, the Appellate Law Committee and the Rules of Civil Procedure

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Direct Examination – Make It Interesting

by Paul Luvera

"Just the facts, Ma'am"

— Sergeant Joe Friday in "Dragnet," a popular television program in the 1950's

Examining witnesses looks easy on television and in the movies. Whether direct or cross examination, it is always very brief, entertaining and successful. It looks so easy, until you do it in a court room with a real live witness. Your own client can become your worst witness or your own expert loses all credibility. Your carefully prepared cross examination can become an experience you wished had never have happened. That's the real world of trial lawyers.

What can you do to make the examination of witnesses less painful and perhaps even successful? One good start is to apply some time proven concepts to the process. From the hundreds of books and articles written about this subject there are some fundamentals that seem to apply to most witness examinations and

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which we should learn.

In addition, there are two axioms that have universal application to not just examination of witnesses, but the entire trial. One of these is to keep in mind at all times that a trial is a battle of impression and not logic. It is not the merely the weight of evidence and logical reasoning that controls the outcome of a trial, but rather unconscious impression about the case. This is particularly true when it comes to witness examinations.

Another is the importance of theme in the presentation of the case. Themes capture a line of thinking and assist people to arrive at a conclusion in a few words. It is important to always weave your trial theme into the examination of witnesses.

Be Prepared

The phrase is more than the Boy Scout motto. It is the first and most fundamental rule of planning any examination of a witness. Even experienced trial lawyers need to plan for the examination. To do otherwise, will inevitably result in a rambling, confusing and worse, boring examination whether it is direct or cross examination.

The first rule in becoming prepared for the direct or cross examination of witnesses is to understand your client and their case as if it was yours. You need to be able to put yourselves in their shoes, know their thinking, their suffering and their personal background. Spend time learning about your client. How can you bring out the key facts in examining witnesses if you don't know your client and the story of their case? In the examination of witnesses you need to know not just who your client is, but you also need to put yourself in the shoes of the witness as much as you are able to do so. Ask yourself: Who is this person inside? What does this witness fear most? What is driving the testimony? To prepare for direct and cross examination, try to put yourself in the witness's position and think the way the witness is likely thinking. Do the same for your client. This "mental transference" should also be made with regard to the jury as well as the judge throughout the trial. During the direct and cross examination of witnesses you should be asking yourself: What is the jury thinking right now? Your examination can be much more effective if you mentally try to determine what is going on in the minds of the witness, the jury and the judge.

The best preparation for direct examination is to think just like a juror or a judge and ask "What would they want to know about this witness?"

In addition, have a plan before you start any examination. Don't just get up and start talking without a road map of where you are going and how you intend to get there. Know what you want and how to get it. In the Wizard of Oz, each of the characters knew what they wanted. Dorothy wanted to go home. The lion wanted courage; the tin man wanted a heart and the Scarecrow a brain. They knew what they wanted and they knew how to get there, by following the yellow brick road to the great Wizard of Oz. We need the same kind of planning in preparing to examine witnesses.

How do you create such a plan? In most cases under modern discovery rules, we are aware before trial of the general nature of the evidence, the witness testimony and the information each witness will offer. Make an analysis to determine the essence of what is important and significant to your case. You need to establish what is legally required to prove your case. But you also need to bring out the facts that are compelling or important to jurors as well. Everything else is secondary. For cross examination, an analysis of what is really relevant to undermine the credibility of the witness and the defenses as well as bringing out information the witness has that supports your case should be made. In both cases, the issue is, how can this witness assist in telling the story about my client's case?

How do you determine what is really relevant and important from what is not? The first consideration is what is legally necessary to lay a foundation for offered testimony and evidence as well as to establish the required proof for your case. This is a legal analysis. The second is to decide what should be selected from all the available evidence to be brought out with the witnesses. Determine what is important from a listener's standpoint in either proving your case on direct or in cross examination. What are the controlling and important issues from a jury point of view? What do they want to know?

Even experienced lawyers recognize that they are not always capable of making a correct evaluation of what is important and significant to jurors from all the evidence in the case. It requires input and consultation with non lawyers. People who have no connection with the legal system, who think like "normal people" and not lawyers will provide you with the most accurate information

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on this important subject. Usually this takes the form of a focus study in most major cases, but it can be as uncomplicated as talking to as many people as will listen about your case. All that's involved is a review of the facts of the case, good and bad, by ordinary people who are not involved in the legal process or lawyers. From this feedback, you can select the subject matter that these people identify as most significant to them and therefore are most likely to be significant to jurors in your case. You also create your theme from this feed back by reviewing what these ordinary people think and say about your case. The facts and issues are then organized in the order of priority based upon the importance these people have indicated. From this outline you create both your direct and cross examination points, the case theme and the key issues in the case.

Be Focused

Staying focused in both direct and cross examination is very important if you want to maintain interest and persuade the jury. It's been said that if you are hunting rabbits, you need to concentrate on only one rabbit at a time and not try to chase after everyone you see. Trying to cover every possible issue and subject is a sure way to conduct an ineffective examination of any witness. By using the outline you create from the review with non lawyers, you are in a position to prepare a direct and cross examination which is focused and relevant to what the jury is interested in hearing. It is supplemented by any legal requirements for establishing your case or the introduction of evidence.

To help stay focused throughout the trial, it's helpful to have a single sheet of paper in front of you at all times to remind you of the need to keep it short and simple, to stay on the subject and to focus on your what you know are the significant points in your examination of witnesses. In fact, the title of the paper might be in bold print: "Keep it short and simple." Below that briefly state the theme you are following. Then outline clearly and briefly the key trial issues. Use this for a quick reference and continuous reminder. By referring to this sheet regularly during examination of witnesses you are reminded to always stay focused upon the story of your client and the fundamental issues in the case rather than be distracted.

Be Brief

Jurors and judges become bored with long rambling examinations of witnesses whether on direct or cross. To persuade we need to capture and keep interest. If the jurors aren't listening you are not going to convince them of anything. To keep interest means, in part, being brief and to the point. Focus your case. Evidence is like an iceberg. The bottom below the surface may be enormous, but only the tip is can be seen above the water line. That's how your examination should be framed. Only a small amount of the facts are really significant or persuasive. Concentrate on that twenty percent that is significant and ignore all the rest. Focus your case. Identify the issues that count. Stick with those issues and ignore the rest that are not highly relevant. Use a rifle not a shot gun approach in your examination of witnesses.

To persuade, you need to capture interest – brevity is a key to capturing interest and being persuasive.

Remember, you are telling a story, whether it is direct or cross examination. Telling a story involves not only organization, but also brief interesting facts, keeping it short and to the point. Years ago, match book advertising was very popular. The message had to be brief, but communicate a clear message in a small space. Today all we need do is to watch the evening news to see the same method of communication used. Note the time devoted to major television news stories. Usually less than two minutes with photos is all that is required to communicate a great deal of information. Another example is the print media such as USA Today or People Magazine which limit stories to very short articles but which convey a full message. A message does not have to be long and complicated to tell a complete but interesting story. As the late Bishop Fulton Sheen once said "a sermon is like drilling for oil. After the first ten minutes, if you haven't struck oil, don't bore any longer." The same is true in trial when we examine witnesses.

A well told story requires work. If we are not prepared and not focused in our examinations we will always ramble and provide irrelevant as well as unnecessary details. It is this kind of detail that cause boredom in our listeners. We reason to conclusions by general impression, that's what counts to the jury. To create favorable impressions in our examinations we need to eliminate facts which are not important and only clutter up the discussion as well as waste time.

Make Direct Examination Interesting

Our goal in either direct or cross examination of witnesses should in part be "never a dull moment." We want to keep interest so people will listen and to communicate thoughts which will persuade. That means telling a story in an interesting manner by the way we conduct our examinations. On direct examination, you should present your case as a story. In conducting direct examination you have choices in how to do so. You can examine as if it were a narrative by a long questions and short answers, a step by step process keeping tight control. People who are locked into a prepared question and answer outline often end up doing this. But it is very boring. It sounds rehearsed. It lacks spontaneity. However, asking more open ended questions and allowing the witness to tell their story is interesting and far more persuasive. The witness should be allowed to tell their story by your manner of examination as if they were telling their neighbor what happened. Direct examination which is conducted by open ended short questions allowing the witness to expand and explain is far more interesting then closed ended questioning restricting the witness to a few words in response. In thinking about how to conduct direct examination, remember Rudyard Kipling's

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DIRECT EXAMINATION
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excellent advice. It is what direct examination is all about:

"I kept six honest serving men. (They taught me all I knew) Their names are what and why and when and how and where and who"

Messages in a court room that are too complicated result in jurors mentally shutting down and blaming the lawyer for their problem of not understanding. Therefore, your direct examination should be uncomplicated and your points simple to grasp. Frame your questioning in a way in which the facts are explained, technical terms defined and examples are frequently used. Use demonstrative aides and other devices frequently in the examination.

We all know the importance of first impression. One never gets a second chance to make a first impression. The beginning of your direct examination is important. If experts are right, the first three minutes of any presentation, especially witness examination, are the most crucial. If we don't capture interest then, we may never fully regain it. The American attention span has shrunk with changes in how we get our news and information. The advertising industry is very aware of this fact and explains how a thirty second television commercial can have a significant visual and mental impact. Plan your examination with this in mind.

In that regard, if you are the judge or juror, what is the first thing you would want to know when a witness is called on direct examination? For most people it is: who is this person and why are they being called as a witness? If you begin your examination of an expert, for example, by going through a long qualification process, you are likely going to have jurors trying to guess the answer to these questions and in addition, mentally drifting off. Instead, why not tell them right away? Most judges aren't going to be upset with an innocuous leading question for the purpose of setting the scene such as:

First impressions of a witness mean a lot!

> *Q. "You are Mr. Smith's physician who examined and treated him? You are prepared to tell the jury what you know and what conclusions you have reached?*

You can always re-frame the question to be non-leading if required, but what's important is not to leave the hearer wondering who this person is and why they are being called as a witness. This technique can be applied to any kind of witness called on direct and it sets the stage for the jurors to know what to listen for and gives them an interest in the examination.

As to establishing the qualifications of an expert or witness you must, of course, lay a sufficient foundation for admissibility, but if too prolonged and intensive the jurors will find the process of qualifying an expert boring. You need to balance the process by summarizing and focusing on significant factors that make the witness especially qualified to offer opinions. The details of the experts' achievements are not often important.

In addition to making a correct start and being clear as well as brief, remember that visual aides are very important in direct examination. Breaking up the examination with such things as drawing or writing on the paper or blackboard or demonstrating something is an effective way to explain as well as keep the examination interesting. Electronic technology such as visual presenters and software presentations are common in trials today. When not over done these modern devices can be time savers as well as enhance interest. Simple things such as posters, models, photographs or overhead projectors still are helpful tools in the direct examination process.

Reprinted with permission from plaintifftriallawyertips.com *(June 10, 2009). Paul Luvera is a nationally recognized trial lawyer and is a principal in the Luvera Law Firm in Seattle, Washington.*

MESSAGE FROM THE CHAIR
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Committee, and probably others. Fortunately, members of those committees saw what was happening, and have formed a joint task force with various other committees, and are in the process of coming up with a uniform system of email service. That will probably be contained in the RJA, although it is possible that each set of rules will refer to it.

What does that mean for you and me? We know the Supreme Court and the legislature want us to not only save trees, but to streamline (and make less expensive) the litigation process. It is likely that in the next two or three years you will file all of your cases electronically only, and all of your pleadings will be served electronically as well. Likewise, most (if not all) of your correspondence will be via email.

Some lawyers lament the loss of that crisp (and expensive) stationery, and receiving real ("snail") mail. I for one do not, and would encourage each of you to churn out less paper, so that we might save a few trees. Plus, having sent out an email, you already have a record of the correspondence, so when the case is over, you aren't bundling up a bunch of paper and paying someone to store it for you (or paying your staff to scan it in so that you can discard the paper).

Most major companies are moving away from paper files, and attempting to store everything electronically. Why shouldn't Florida's trial attorneys lead the way by moving into a totally electronic system both in our filing with courts and service of pleadings and writing of correspondence via email?

Internet Marketing Tips for New, Small Law Firms

By Debra Regan, Vice President of Law Firm Marketing Services at LexisNexis

An unprecedented series of law firm layoffs has thousands of lawyers looking for work. Many are hanging out their own shingle for the first time either as solo practitioners or as part of two- to five-partner "micro" firms. To turn the pink-slip trend into a profitable new business quickly in this tough economy, every non-billable hour needs to generate leads and build business. The following are Internet marketing tips for budding sole practitioners and micro practices:

Advertise online. Print yellow page advertising alone won't cut it. The investment for a one-time, print display ad is an expense unsupported by demonstrated or measurable data. Investment in online marketing will likely yield more qualified leads and enable easier measurement of ROI as compared to a similar investment in print advertising or print directories.

Invest in a professionally designed and developed web site. A polished, professional web site is a must-have for anyone launching a new firm, regardless of size. In 2008, 32 percent of solo attorneys and 20 percent of firms with two-to-five attorneys did not have a web site, according to a 2008 Harris Interactive study on marketing among small law firms. Don't be one of these unfortunate few.

"Consumerize" your web site. When prospects seek an attorney, they want someone with obviously good credentials, but they also want to know what kind of person their attorney is. Pepper in some personal data about schools, hobbies, and outside interests.

Incorporate video on your site. Develop an introductory video of the managing partner that showcases personality as well as expertise. Post the video in the web (and YouTube) and even consider a TV spot down the road.

Get listed in and link to online directories. Identify all online directories available for posting attorney and firm profiles. This includes attorney specific portals and social networking sites. Link to these on your website and don't forget to add your firm's web site to each online listing you post.

Hire an expert. You practice law and let others grow your business! Consider outsourcing your internet marketing campaign to qualified experts. First, ask for a consultation and determine a comfortable budget (earmark usually 2-5 percent of monthly budget as a good start point). Let the experts generate leads for your fledgling practice.

Optimize your web site. Search engine optimization experts can be tremendously helpful in improving online visibility and optimizing a firm's organic search rankings. Select a search marketing team that offers transparent and results-driven metrics.

Engage in pay-per-click advertising. No firm is too small to reap tangible benefits from pay-per-click campaigns. Ensure your marketing experts select appropriate keywords, based on analysis, that are geographically and topically suited to your firm. This strategy helps favorably position small firms to directly compete with larger firms in your market.

Understand and use appropriate metrics. Learn how success and ROI are measured in an online marketing campaign. While you don't need to be an expert, you do need to understand the difference between organic and paid search, as well as "clicks," "impressions," and conversions." Tracking leads is an appropriate metric used by only 20 percent of attorneys. Visit http://law.lexisnexis.com/lmc/identify-opportunities.asp to get more tips on how to track leads.

Be responsive! While your internet marketing team brings in qualified leads, put a system in place to respond to each one. Make a phone call, send an e-mail in response to an inquiry, or schedule a meeting. Keep these leads in a simple database so when you're ready to send the first newsletter from the firm, clients and prospect lists are easily accessible. Don't forget to reference the LexisNexis marketing checklist at http://law.lexisnexis.com/lmc/marketing-checklist.as to get the marketing wheels turning! ■

What to Do? How to Handle the Obstructionist Lawyer in a Deposition

By Michael Flynn, Editor, *The Advocate*

Deposition literature and skills training programs offer many suggestions about how to handle the obstructionist lawyer. The following is a "Top Ten (Really Eight)" list of tactics for dealing with the misbehaving lawyer. These tactics are listed in chronological order, beginning with pre-deposition tactics followed by tactics that can be used during the deposition.

Number 1: If a deposing lawyer, through experience or investigation, has a reasonable basis to suspect misconduct by an opposing lawyer, then seeking a pre-deposition protective order may be effective in stopping the misbehavior before it starts. Such protective orders, granted upon a showing of good cause, should set out the parameters within which the deposition will be conducted. This order may even include the presence of another lawyer or magistrate to act as a "referee" regarding objections and other matters that may come up during the deposition.

The deposing lawyer faced with this circumstance may also want to first attempt to get the opposing lawyer to agree in writing to abide by and refrain from certain conduct during the deposition. Such an agreement might reference state or local deposition conduct guidelines and civil procedure rules and may be enough to permit a court to sanction a breach of this agreement. The unwillingness to enter into this type of agreement or to stipulate on the record to this kind of agreement can be persuasive evidence in the event the refusing lawyer misbehaves. However, court approval of such an agreement is an extra precaution that sets up, upon violation of the order, compelling proof of contempt of court. In some courts, a standing discovery order renders the need for a protective order covering deposition conduct moot.

Number 2: If a deposing lawyer anticipates misconduct by an opposing lawyer, then videotaping the deposition may thwart the misbehavior. In most instances, the presence of the camera seems to have a leveling influence and encourage proper behavior by not only opposing lawyers but by deposing lawyers and deponents as well. Not always, but sometimes. The tactic of videotaping a deposition is a popular option to curb deposition misconduct because videotaping can be done relatively cheap. Further, the camera does not lie, which gives a reviewing court solid evidence of potentially sanctionable misconduct. Also, holding the deposition in a room at the courthouse may also deter a lawyer from misbehaving.

Videotaping a deposition can be a good deterrent to misbehaving lawyers.

Number 3: Some deposing lawyers have requested, prior to the beginning of a deposition that the opposing lawyers and the deponent agree that all objections to questions be made with the deponent not in the deposition room. For this procedure to be binding, the lawyers and the deponent would have to agree to it. Although known to have happened, it would seem that securing this kind of agreement may be difficult. Further, many courts may look at this process as not very effective. Certainly such an agreement would limit the ability of a deponent's lawyer to coach a witness while a question is pending through a speaking objection. However, this kind of process begs for an opposing lawyer to object as often as necessary to disrupt the flow of deposition questioning resulting in a disjointed deposition. Therefore, before proposing such a procedure, the deposing lawyer would have to gauge the pluses and the minuses of taking a deposition this way with this particular deponent and opposing lawyer.

Number 4: One of the conventional rules of deposition questioning is friendly and informal first. This axiom may not only apply to the deposing lawyer's behavior towards a deponent but also the deposing lawyer's approach to opposing counsel. Many times a friendly and solicitous approach to a deponent's lawyer can set the tone for proper behavior during a deposition. For the most part, this kind of approach cannot hurt. A deposing lawyer who is considerate and cooperative towards both a deponent and a deponent's lawyer may diffuse existing or perceived animosity and the temptation of an opposing lawyer to be inconsiderate and uncooperative. A tangential benefit may be that even if only the deponent buys into the approach offered by the deposing lawyer and the deponent's lawyer does not or vice-versa, this can create a rift between the deponent and the deponent's lawyer. In either case, such a rift can benefit the deposing lawyer when the deponent or the deponent's lawyer chooses to behave appropriately despite the other's attempt to engage in inappropriate behavior. From the deposing lawyer's perspective, the creation of cognitive dissonance can, with patience, produce the desired result of an incident-free deposition.

Number 5: To combat lawyer misconduct during the deposition, the deposing lawyer's first option should be to ignore the deponent's lawyer, look directly at the deponent and ask for an answer to a question. The rationale for this tactic is multi-faceted.

First, assuming the deponent lawyer at the beginning of the deposition has discussed and obtained the agreement of the deponent to answer the questions posed, the deponent lawyer insisting on an answer from the deponent is in effect insisting that the deponent live up to the agreement to answer questions. Second, since under the civil procedure rules, an objection or other comment regarding

a question does not permit a deponent to refuse to answer a question absent a claim of privilege or perhaps undue harassment or a court-imposed limitation on discovery, the deposing lawyer is entitled to an answer to the question. Further, by ignoring the deponent's lawyer, perhaps the defending lawyer will tire of misbehaving. The key to this tactic is to avoid responding, arguing or otherwise discussing an objection or other comment made by the deponent's lawyer with the deponent's lawyer. Brendon Sullivan, the lawyer for Oliver North, bemoaned this tactic by stating on the record that he was not a potted plant. However, from the perspective of the deposing lawyer, a misbehaving lawyer is a potted plant and initially should be ignored to see if that stops the misbehavior. Although not a fool proof tactic, ignoring the deponent lawyer's misconduct, first, and then insisting the deponent answer a question may work and allow the deposing lawyer to gather information. To be most effective, this tactic requires the deposing lawyer to be patient and even-tempered. Regardless, a deposition transcript that reveals this tactic is a solid first step in making the record of a misbehaving lawyer.

Number 6: If ignoring the deponent lawyer's misbehavior does not work, then the deposing lawyer must make a reasoned decision to do something more. This decision should be based on the fact the defending lawyer's misbehavior has escalated to the point that the deposing lawyer cannot gather information from the deponent or the testimony proffered by the deponent is not the deponent's testimony but rather the testimony of the deponent's lawyer.

The first option may be to speak to the deponent's lawyer politely and request that the lawyer refrain from the misbehavior. The deposing lawyer has the option of having this conversation on or off the record. This is a judgment call. Having the conversation off the record may not be enough to impress upon the defending lawyer that the misbehavior must stop. However, having the conversation on the record may just entice the defending lawyer to engage the deposing lawyer further and delay the deposition. In either instance, a conversation that is hostile, confrontational or anything other than professional will most likely not be effective.

Number 7: If a polite and courteous conversation in which the deposing lawyer requests that the defending lawyer refrain from misbehavior does not work, then the next step in the progression of tactics is to make a record. Frankly, the deposing lawyer should always be record conscious in any deposition but most assuredly from the moment a defending lawyer begins to misbehave. However, at this point in the progression of tactics, the deposing lawyer becomes more assertive and consciously decides to escalate tactics by making the record.

First option is to ignore the obstructionist lawyer and keep on asking questions

The key to making a usable record is at least three-fold. First, the deposing lawyer must chose to make a record of an incident of misconduct that is truly misconduct. When in doubt, avoid making a mistake and either ignore the potential misconduct or pause to evaluate more fully the potential misconduct. Second, pick a good incident. The deposing lawyer must evaluate if the misbehavior is clear enough in context to be worthy of note. Petty or other kinds of silly misbehavior should not be the focus of making a record unless there are a substantial number of these instances that prevent the gathering of

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Mark your Calendars!

(Look for brochures in the mail and find information on the Trial Lawyers Section's website: www.flatls.org)

2010

January 19 – 21	**The Florida Bar Midyear Meeting** Hilton Orlando
January 20 – 21,	**Chester Bedell Mock Trial Competition** Hilton Orlando
January 22	**Executive Council Meeting** Hilton Orlando
February 1 – 2	**Civil Trial Certification Review (0987R)** Tampa Airport Marriott
March 4	**Topics in Evidence (0994R)** Co-sponsored with Criminal Law Section Tampa Airport Marriott
April 22 – 25	**Executive Council Meeting** Santa Fe, New Mexico
May 7	**Maritime Law Update (1021R)** TBA, Ft. Lauderdale Co-sponsored with Admiralty Law Committee
May 11 – 15	**Trial Advocacy Seminar (1024R)** University of Florida, Gainesville
June 23 – 26	**The Florida Bar Annual Meeting** Boca Raton Resort & Club, Boca Raton

information. Third, the deposing lawyer must be able to describe accurately, without inflammatory comment, what happened. There is no margin for exaggeration or misspeak.

When making a record, it is the factual description of the incident that means the most. However, in addition, it may also be helpful for the deposing lawyer to make reference to the civil procedure rules or other ethical or professionalism rules and guidelines that apply and prohibit such misconduct. Finally, in this record the deposing lawyer may chose to remind the defending lawyer of his or her obligation to refrain from such misbehavior. The danger in this last part of making the record is that such a reminder may just trigger the deponent's lawyer to instigate an argument and more commentary.

The making of a record is especially important when dealing with an inappropriate instruction not to answer. Aside from the foregoing admonitions about making a record, the first step for the deposing lawyer is to confirm on the record that the defending lawyer is instructing the deponent not to answer a question. Second, despite this instruction, the deposing lawyer should look to the deponent and ask the deponent to answer the question. Sometimes this works and the deponent goes ahead and answers the question contra to the defending lawyer's instruction. Assuming the deponent follows the defending lawyer's instruction, the next step in making the record is for the deposing lawyer to request the defending lawyer state with specificity the legal and factual basis for instructing the deponent not to answer a question. By obtaining this information, the deposing lawyer can evaluate if the instruction not to answer is really inappropriate and if not, how to rephrase a question to avoid this objection.

Again making a usable record takes patience and thought. One tool that is helpful in making a record is the court reporter and the ability to look at a real time transcript. Although expensive, an instantaneous review of a transcript can be helpful

Trial Lawyers Section

		09-10 Budget	08-09 Actuals
31431	Section Dues	$ 315,000	$ 306,300.00
31432	Affiliate Dues	$ 175	$ 70.00
31433	Admin Fee to TFB	$ (78,750)	$ (76,617.00)
Total Dues Income - Net		**$ 236,425**	**$ 229,753**
32191	CLE Courses	$ 21,055	$ 33,076.00
32293	Section Differential	$ 6,250	$ 9,389.00
38499	Investment Allocation	$ 8,193	$ (47,497)
Other Income		**$ 35,498**	**$ (5,032)**
Total Revenues		**$ 271,923**	**$ 224,721**
51101	Employee Travel	$ 5,535	$ 4,004.00
84001	Postage	$ 1,500	$ 1,241.00
84002	Printing	$ 1,500	$ 337.00
84003	Officers Office Expense	$ 500	$ -
84006	Newsletter	$ 18,500	$ 18,293.00
84009	Supplies	$ 250	$ 51.00
84010	Photocopying	$ 300	$ 157.00
84051	Officers Travel Expense	$ 4,000	$ -
84052	Meeting Travel Expense	$ 9,000	$ -
84053	Out of State Travel	$ 2,000	$ -
84054	CLE Speaker Expense	$ 5,000	$ 96.00
84101	Committee Expense	$ 1,000	$ 24.00
84200	General Meeting	$ 800	$ 757.00
84201	Board or Council Meeting	$ 20,000	$ 20,627.00
84202	Annual Meeting	$ 14,000	$ 5,483.00
84204	Midyear Meeting	$ 5,000	$ 772.00
84205	Section Service Program	$ 3,000	$ -
84301	Awards	$ 5,000	$ 821.00
84302	Scholarships	$ 18,000	$ 17,500.00
84315	Mock Trials	$ 20,000	$ 21,658.00
84422	Website	$ 5,000	$ 8,050.00
84501	Legislative Consultant	$ 60,000	$ 60,000.00
84701	Council of Sections	$ 300	$ -
84998	Operating Reserve	$ 21,168	$ -
84999	Miscellaneous	$ 5,000	$ 3,531.00
Total Operating Expenses		**$ 226,353**	**$ 163,402**
86431	Meetings Administration	$ 1,115	$ 350.00
86543	Graphics & Art	$ 5,381	$ 3,561.00
Total TFB Support Services		**$ 6,496**	**$ 3,911**
Total Expenses		**$ 232,849**	**$ 167,313**
Net Operations		**$ 39,074**	**$ 57,408**
21001	Fund Balance	$ 409,644	$ 364,434.00
Total Ending Fund Balance		***$ 448,718***	***$ 421,842***

to not only making the decision to make a record but to also review the deposing lawyer's attempt to make that record.

The foregoing suggestions for making a record of lawyer misconduct details the ideal circumstance. In fact, misbehaving lawyers often do not cooperate and do not present the ideal record for description or court review. However, with some reflection and thought, a deposing lawyer can make an effective record even if not the ideal record.

Number 8: If after exhausting patience, the aforementioned tactics and attempted to question the deponent as fully as possible and the obstructionist behavior of the defending lawyer still does not stop, the next step is to recess the deposition and seek court intervention. The deposing lawyer should not adjourn the deposition at this point but merely recess the deposition to set up immediate court intervention. This means that the deposing lawyer must have planned ahead enough to know that a judge or magistrate is available and willing to intervene in a deposition incident. An empty threat of court intervention will most likely not be effective.

A useable record of misbehavior that can be readily accessed is a key to court awarding sanctions.

To present deposition misconduct to the court for review requires that an accurate transcript be produced and delivered to the court. Here the capability of the court reporter is crucial. The ability to electronically or otherwise transmit promptly to a judge an accurate transcript is best. The deposing lawyer must be selective to include the cleanest instances of lawyer misconduct in the portion of the deposition transcript delivered to the court. Make the court's job of reviewing the transcript as easy as possible. Further, the deposing lawyer should not go to the court for intervention unless there is more than one instance of lawyer misconduct. The exception to this rule may be if the single instance of misconduct covers a lynch pin issue in a lawsuit. The real point here is that judges and magistrates do not like to referee discovery disputes. However, if a deposing lawyer can present to a court a series or pattern of clear lawyer misconduct, then the court is more likely to be receptive. Finally, in order to minimize the loss of the opportunity to question the deponent without delay, the deposing lawyer should request an immediate court ruling and continue the deposition immediately.

This list is certainly not exclusive or exhaustive and I am sure that other lawyers have used a variety of tactics when dealing with the obstructionist lawyer. There is probably no end to the inventiveness of lawyers who choose to obstruct a deposition. However, hopefully this list of tactics is helpful.

Visit the Section web site: www.flatls.org

LexisNexis® Tips:

Online Video Complements Law Firms' Search Marketing Strategy

Attorneys can't expect their firm's online video to get 170 million views like Susan Boyle's performance on "Britain's Got Talent," but there are ways to ensure a law firm's video complements the overall marketing strategy, says Debra Regan, vice president of the internet marketing agency at LexisNexis. Debra offers several suggestions about the importance of online video in helping to grow a lawyer's practice:

1. **When considering online video compared to TV advertising, think about the web as a "lean-forward" medium.** Visitors searching your site can click away any time they wish. The goal is to immediately engage and keep visitors there beyond a minute. Of the U.S. Internet audience, almost 78 percent have viewed online video, watching 235 minutes on average, says comScore Networks, Inc., Video Matrix Service, May 2008.

2. **Think in a trio – three key messages delivered in the first 30 seconds of the video.** That's the maximum number viewers will remember.

3. **Be energetic and passionate about your services and commitment to client service.** Video offers an opportunity for lawyers to be personable and approachable. If you make a mistake, chalk it up to a natural error that could be more appealing to potential clients than if you filmed a too-perfect performance. Natural and relaxed are the way to be.

4. **If you have a camcorder at home, practice with it.** Become comfortable looking into the camera and be sure your eyes are not darting around the room during filming. If no video cam is available, practice speaking into a mirror.

5. **Complete the video with an actionable invitation.** Visitors should be invited to reach you by phone or email for further information. The end production should be no longer than two minutes with the first 45 seconds the most critical to engage viewers.

6. **Incorporate video on your firm's web site and distribute to relevant channels.** Upload on social media sites and legal directories, like Lawyers.com[sm]. Video can increase your exposure on the search engines. Google incorporates video in its universal search results, especially videos from youtube.com.

7. **When engaging in Pay-Per-Click campaigns, key words drive success.** When shooting a video, optimize it with mention of top keywords early and often i.e. "I am a personal injury lawyer in Houston, Texas." At the same time, add these key words to the video file name and title "Personal Injury Lawyer in Houston Video."

8. **Expect to track and measure pre- and post-publish statistics for your website.** Be sure to delineate the web page on which the video is uploaded to measure such statistics as page views, downloads, call tracking with a dedicated number, or other metric.

9. **Cross-promote your video on other pages of your web site.** Add linking and sharing functionality so people can forward to a friend, bookmark on or post on other sites like Facebook and Twitter. Add your video to youtube.com and other video distribution sites to help generate traffic to your own web site.

10. **Measure, measure, measure!** The average viewing time for a LexisNexis- produced law-firm video is 41 seconds according to captured data in October 2008. You'll want to know number of viewers; pass-along rate; what percent of the video was viewed; are leads being generated by video? Other metrics can be added later.

Debra Regan (debra.regan@lexisnexis.com) is vice president of the internet marketing agency at LexisNexis, part of the Lawyers.Com and Martindale-Hubbell networks since 1999. For more than 10 years, LexisNexis has delivered a full suite of online marketing services to lawyers as a trusted brand. The in-house agency is staffed with search marketing, pay-per-click, video and web design experts along with a full team of web developers with key industry certifications. For more information, visit www.lexisnexis.com/lmc.

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