Legal Summit

HELPING YOU REACH THE PEAK OF YOUR PRACTICE

JANUARY 2019 | www.johndaylegal.com | www.dayontorts.com | nashvilleinjuryattorney | johndaylegal

COPYRIGHT© 2019 BY JOHN A. DAY

DEPOSITIONS: RULES TO KNOW

by
Liz Sitgreaves

The Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence govern depositions in Tennessee state court cases. An understanding of these rules is essential to deciding when and who to depose, scheduling depositions, recording them, and determining when and how you can use depositions at trial. Reviewing these Rules should be as much a part of your deposition prep as reviewing the discovery produced in the case.

1. KNOW WHEN YOU CAN TAKE YOUR DEPOSITION

Tennessee Rule of Civil Procedure 30.01 governs when you can take a deposition. Under Rule 30.01, testimony of any person, including a party, make be taken by deposition upon oral examination following commencement of an action. Leave of court must only be obtained if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule of Civil Procedure 4.05. The Rule provides that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in Rule 30.02(2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

2. NOTICE YOUR DEPOSITION

Even if you have agreed with your opposing counsel on deposition dates, send a Notice of Deposition. While your opposing counsel may have agreed on the date, that provides little protection to you if the party fails to appear. Further, Tennessee Rule of Civil Procedure 30.02(1) states that "[a] party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action." It requires that the notice shall be served on the other parties at least five days beforehand when the deposition is to be taken in the county in which suit is pending. If the deposition is to be taken out of the county, the Rule requires at least seven days' notice. Rule 30.02(1) tells you what should be contained in your notice of deposition, including: the time and place for taking the deposition, the name and address of each person to be examined, if known, (and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs). Further, Rule 30.02(1) provides that if a subpoena *duces tecum* is to be served on the person to be examined, then attached to or included in the notice should be the designation of the materials to be produced as set forth in the subpoena.

3. FIGURE OUT YOUR STRATEGY BEFOREHAND AND KNOW WHEN YOU CAN USE THE DEPOSITION AT TRIAL.

While depositions are a part of discovery, think hard when you are planning your outline about what you want to get out of the deposition. If it is a personal injury case and the defendant has admitted liability in their Answer for a rear end collision, do you really need to spend a significant amount of time questioning them about the details of the wreck? If that Defendant has no knowledge about your client's damages, is it even worth taking their deposition? It might be…so you can lock them down on whether your client appeared hurt following the wreck or if your client talked to them after the wreck.

IN THIS EDITION:

Page 1: Depositions: Rules to Know

Page 3: How to Prepare to Argue a Motion

Continued on page 2

It is additionally important to know when you can use that deposition at trial. You may have gotten some brilliant testimony out of a witness or party, but will that gem see the light of day in court? Tennessee Rule of Civil Procedure 32.01 provides that "At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any of the following provisions..." The Rule thereafter enumerates when the deposition can be used:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a public or private corporation, partnership or association, governmental agency or individual proprietorship which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is "unavailable" as defined by Tennessee Rule of Evidence 804(a). But depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01(1).

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction at that time of any other part which ought in fairness to be considered contemporaneously with it.

4. KNOW WHEN A WITNESS IS UNAVAILABLE FOR TRIAL

Tennessee Rule of Evidence 804(a) provides the definition of unavailability for purposes of Tennessee Rule of Civil Procedure 32.01(3). Rule 804(a) states that a witness is unavailable when the witness:

(1) is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) demonstrates a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process; or

(6) is, for depositions in civil actions only, at a greater distance than 100 miles from the place of trial or hearing.

Rule 804 also tells you that when a declarant is considered "not unavailable as a witness." According to the Rule, "if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying" that witness is not deemed unavailable.

Additionally, Tenn. Code Ann. § 24-9-101, enumerates certain individuals who are exempt from subpoena to trial (but are subject to subpoena to a deposition). These are:

- An officer of the United States
- An officer of this state
- An officer of any court or municipality within the state
- The clerk of any court of record other than that in which the suit is pending

- A member of the general assembly while in session, or clerk or officer thereof
- A practicing physician, physician assistant, advanced practice registered nurse, psychologist, senior psychological examiner, chiropractor, dentist or attorney
- A jailer or keeper of a public prison in any county other than that in which the suit is pending
- A custodian of medical records, if such custodian files a copy of the applicable records and an affidavit with the court and follows the procedures provided in title 68, chapter 11, part 4, for the production of hospital records pursuant to a subpoena *duces tecum*
- A licensed clinical social worker, as defined in § 63-23-105 and engaged solely in independent clinical practice, in proceedings in which the department of children's services is the petitioner or intervening petitioner.

The statute also provides that if the court grants a motion to quash a subpoena issued pursuant to subsection (a), the court may award the party subpoenaed its reasonable attorney's fees and expenses incurred in defending against the subpoena.

HOW TO PREPARE
TO ARGUE A MOTION

by
Liz Sitgreaves

The only legitimate reason to file a motion is because winning it is likely to advance your client's cause. The only legitimate reason to oppose a motion is because losing it will harm your client's cause.

Thus, if you file a motion, you want to receive 100% of the relief you seek or as close to it as possible. If you represent the responding party, you want to defeat the motion in its entirety or you want to narrow the scope of the relief granted to your adversary as much as possible.

Effective oral argument may help achieve the result you seek in the motion. Below, I discuss how to prepare to achieve the best result you can in an oral argument on the motion primarily from the standpoint of the movant. The same basic principles discussed apply to preparation by the non-moving party.

1. Read the motion and all papers submitted in support of and in opposition to it.

2. Does your motion and supporting papers give the judge the factual information needed to resolve the motion in your client's favor? If not, supplement the record.

3. Does the motion and supporting papers give the judge the legal arguments (with supporting law) needed to resolve the motion in your client's favor? If not, bring up the new arguments at the hearing or in a supplemental filing as appropriate.

5. Does the motion clearly state the relief you seek? Is there a reasonable basis for the judge to give you this relief on the facts and the law?

6. Has your opponent submitted (or are they likely to submit at oral argument) facts into the record to counter or supplement the facts you have placed into the record? Do any of those facts deal a death-blow to your motion? If so, can you articulate exactly why should not withdraw your motion? If you think you should go forward with the motion, articulate why those facts are not fatal to your motion.

7. The same advice above applies to your legal arguments. Can you articulate why each statute, regulation, rule or case cited by your opponent does not prevent you from obtaining the relief you seek? This will require reviewing each material legal authority cited to see if it is properly cited, is still good law, and whether it can be distinguished in some way.

8. Who is your judge? Will he or she have read the papers before the hearing or not? Unless you are 100% sure that the papers will have been read and the judge will be fully prepared for argument, assume the papers have not been read and prepare for an oral argument on the entire matter. Organize your argument so that you give the judge only the information needed to rule on the motion. Avoid attacks on adverse counsel if at all possible.

9. That said, the judge may be fully prepared for argument and start the hearing with words like this: “Counsel, I have read the papers and understand your position. I have a question about two things. First. ….” If you hear words to this effect, do not start your oral argument as you would have started it if the judge had not had the opportunity to read the papers. Instead, answer the judge’s first question directly, and weave in such additional information as is necessary for the judge to understand that your position is rooted in the facts and the law.

After answering that question, briefly summarize the relief you seek, ask the judge if he or she has any other questions, and if not sit down. Do not go back to the beginning of the argument you planned to make – the judge doesn’t want to hear it.

There is one exception to the above: if you have thought of an additional legal argument, or want to emphasize an additional fact or facts in a way different than you have done in the briefs, do it now. For instance, “Your Honor, I want to bring to the Court’s attention one additional court decision I found while preparing for this argument. It provides….” Have a copy of the decision for the court and adverse counsel. (Indeed, it is best to provide it to opposing counsel before the hearing.)

10. If you are offered a rebuttal argument, limit your remarks to only those items raised by your opponent and address only those matters which you believe (a) may have left an inaccurate impression of the relevant facts; (b) are misstatements of law; and (c) may be a correct statement of the law, but the law is not controlling under the circumstances. Be succinct. If your opponent cites authority not previously brought to your attention in a brief and it appears to harm your position, it is appropriate to ask the court to submit a supplemental brief on that point.

11. Remember you are addressing a judge in a court of law. Dress appropriately. Be respectful of the judge and your adversary. Have your materials organized. Use demonstrative aids if appropriate to make your point.

Reasonable minds can differ about whether an oral argument changes the outcome of a motion. But experienced lawyers know that if a judge permits oral argument, there is at least an opportunity to make a difference in the outcome of the case and that opportunity should be seized. Proper preparation may increase the likelihood of winning and will impact the judge’s opinion of the strength of your case as well as your reputation as a trial lawyer.

Liz Sitgreaves is a trial lawyer at the Law Offices of John Day, P.C., where she focuses on appellate work, personal injury law, wrongful death and tort litigation. Liz has been a long-time Board Member of the Lawyers’ Association for Women (LAW), Marion Griffin Chapter, and currently serves as the President of the organization.

5141 VIRGINIA WAY #270
BRENTWOOD, TN 37027
TOLL FREE: 866.812.8787
PHONE: 615.742.4880 FAX: 615.742.4881
WWW.JOHNDAYLEGAL.COM

The Law Offices of John Day, P.C., with offices in Brentwood and Murfreesboro, is an award-winning law firm representing clients in personal injury and wrongful death claims. Our attorneys help clients receive compensation for injuries sustained in auto and trucking accidents, pedestrian and biking accidents, and injuries related to medical negligence, dangerous and defective products and many other types of accident cases. The firm also represents clients in legal and professional malpractice claims, as well as commercial litigation lawsuits. Our highest honor is to be called to assist other lawyers in pursuing cases outside their practice area, or which require the investment of time or money beyond their comfort zone. Referral fees are paid in accordance with the Rules of Professional Conduct. To discuss a case referral, call John Day at (615) 742-4880 or email *referral@johndaylegal.com*. To request a free copy of our book about the process and ethics of case referrals, email *referral@johndaylegal.com*, ask for a copy of “*Win Win*,” and give us your contact information. It will be sent by return mail.