

DEPOSITIONS

Anything you say may be taken down and used in evidence against you...

When problems arise on an account, you, as broker, are likely to represent an important source of information as to what may have gone wrong. But 'information' can quickly become 'evidence', and informal meetings escalate easily into requests to provide a witness statement or evidence by way of deposition. The art in dealing with such requests is to provide appropriate assistance, without providing ammunition for a claim against the firm. However, that can sometimes be a difficult path to tread so it is important to be aware of the pitfalls and what can be done to avoid them.

This bulletin focuses on these issues in the context of the deposition process, because it is increasingly common for brokers to be asked to provide evidence in this way. Nonetheless, a lot of the points raised are of general application and should be borne in mind when dealing with any information gathering exercise.

THE DEPOSITION PROCESS

A deposition is a means by which you ('the deponent') can provide witness evidence under oath, before the trial of an action takes place. Although you may still be required to attend court in person for the subsequent trial, it is possible that your evidence can be submitted without you having to appear. Though most closely associated with US proceedings, depositions can also be taken for use in other foreign jurisdictions or, indeed, for the English courts.

You may be legally required to provide deposition evidence, because you are a party to the proceedings or because a party has obtained a court order requiring you to submit to the process. Frequently, however, depositions are carried out voluntarily in order to provide assistance to a party for commercial reasons.

The deposition will usually take place at a lawyer's office, where you will be asked detailed questions by other parties' lawyers. Though you may well be represented by your own lawyer, it is very rare for your lawyer to ask you any questions. Depending on your level of involvement with the matter, this question/answer session can take anything from half a day to several days and will be recorded by stenographer and, sometimes, tape or video. Once the transcript is available, you will be given an opportunity to review it and make any corrections that you feel necessary, but substantive changes may well be brought to the attention of the court and are likely to diminish your credibility as a witness considerably, so this is a limited opportunity for revision.

DEPOSITION DANGERS

On the face of it, clients or underwriters are likely to require your evidence in the event of a coverage dispute in order to explain the insurance cover obtained and the factual background to placement or presentation of the claim. However, the reality is that both clients and underwriters will be on the look out for any E&O vulnerabilities that can be exploited to reduce their own exposure. No matter how friendly the approach, the other parties and their lawyers are not on your side and are not concerned to protect your position.

The lawyer questioning you is likely to deploy a number of time old tactics: lulling you into a false sense of security; winding you up in the hope of provoking a rash response; pressuring you to provide opinion on matters outside your knowledge or recollection; or using broad, open ended questions in the hope of eliciting a lengthy (and therefore less controlled) response.

You are also likely to be shown documents, possibly from many years ago, and asked to interpret them without necessarily being given an opportunity to consider the context in which they were created.

Crucially, your own lawyer will only be able to stop a line of questioning in very limited circumstances (when the lawyer questioning you is asking for privileged information). The image of the wily US attorney fighting his client's corner with angry objections can be a misleading one, as the deponent still has to answer the question. If the objection is upheld, the answer may not appear on the court record but, for settlement purposes, that is cold comfort.

AVOIDING THE PITFALLS

There are a few key pointers to bear in mind when handling the situation.

Before the deposition:

- Speak to the Griffin: we can help you prepare for the process and can assist with the arrangement of legal representation.
- Prepare thoroughly: review all relevant documents and remind yourself of their intended meaning at the time; anticipate tricky issues; be clear in your own mind about what issues you can and cannot comment on.

During the deposition:

- Listen to the questions and restrict your answers to the specific question that you have been asked: do not guess, speculate or volunteer information.
- Be patient: if a lawyer is trying to rattle you, nothing will frustrate them more than you remaining calm, professional and respectful at all times.
- Always remember why you are there: do not be lulled into a false sense of security by friendly lawyers who appear to be on your side.
- Take your cue from your own lawyer: stop talking as soon as they start to raise an objection and think about why they may have raised it (i.e. what trap they are trying to ensure you avoid).
- Do not try to argue your case or "win": just confine yourself to the facts and the legal argument will follow at another stage.
- Always tell the truth.

After the deposition:

- Carefully check the transcript of your deposition and raise any concerns with it that you might have.

BULLETIN MESSAGE

Depositions may be becoming more common, but should never be regarded as routine. Handled well, the deposition process can be highly beneficial, for your client, your firm or both: it can cement commercial relationships and, if the evidence goes your way, can help to fend off potential E&O claims. Handled badly, you run the risk of offering your firm up as a target.

Bearing in mind the stakes, to seek advice and/or legal representation for such a process, should not be seen as a sign of weakness and the Griffin strongly recommends that you contact it for assistance at the earliest opportunity.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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