

FROM MY SIDE OF THE BENCH

Take that Deposition on the Road

BY HON. RANDY WILSON

I'M SITTING IN A LONG TRIAL WATCHING an endless series of depositions. Every time one of the lawyers utters those dreaded words, "Our next witness is Mr. Smith by deposition," you can hear an audible groan from the jury. It doesn't have to be that way.

Not long ago, a case was tried in my court in which the jury hung on every word of a deposition. The deposition turned out to be case dispositive. Let me set the stage. Plaintiff alleged that she was injured at a grocery store. Specifically, she claimed that she was standing in line in the checkout counter when a panel on a lower cabinet door fell on her leg. An employee of the store was cleaning underneath the register and removed the panel to gain access under the counter. Plaintiff contended that the employee negligently positioned the panel to cause it to fall on her.

The defendant believed it was important for the jury to understand exactly how the accident occurred. Normally, lawyers will simply notice the deposition of the employee to take place in his law office. The videographer will set up a generic screen and the questions begin. The problem with this is that every deposition starts to look like another and the jury starts dozing.

The lawyer in the grocery store case, however, did something different. He noticed the deposition to take place in the store at the checkout counter. The witness was sworn in, preliminary identification questions were asked, and the witness was asked to demonstrate exactly what he was doing. The witness was given the tools he was using that day and in ten minutes showed the jury precisely what had happened. Admittedly, conditions were not perfect for a deposition. The sound level was less than perfect in the checkout line. You could hear requests by other clerks for price checks on the PA

system. You could see shoppers pushing their grocery carts in the background and look at the lawyers, court reporter, and videographer and wonder what in the heck was going on. Nevertheless, it was one of the most realistic portrayals of an accident scene at a deposition that I had ever seen.

After about ten minutes at the checkout counter, the lawyers adjourned the deposition for ten minutes so that the deposition could resume in a private office at the store. The questioning continued for another 45 minutes or so asking the witness the usual litany of questions about his background, job duties, etc. There was no reason to ask the witness these types of questions on the store floor.

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The first ten minutes at the accident scene, however, were critical. Now the jury knew exactly what happened. They knew how everything was laid out, where everyone was positioned and precisely how the accident happened, at least from one side's perspective. And, more important,

the deposition wasn't just another talking head.

Lawyers should give serious consideration to this tactic in more cases. Sure, you can set the stage somewhat with pictures and videos, but a video deposition at the scene, where the witness can walk around and point to objects and place all the main characters can be one of the most powerful tools in a lawyers' arsenal.

Admittedly, a road show deposition is harder in business disputes. However, it's not necessarily out of the question. Suppose you're contending that the parties entered into an oral contract while sitting in someone office. If you're trying to prove up the existence of the contract, consider taking the deposition in that office. It certainly adds drama to the deposition for the witness to point to a chair and say,

“Mr. Smith sat in that chair right there and told me”

It's at least worth thinking about. Even if a traveling deposition doesn't prove anything more than a normal deposition in a conference room, such depositions are certainly more interesting and there's a better chance the jury will stay awake and remember it.

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective. ★