Legal Advisor

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DEPOSITIONS...DO'S AND DON'TS

BY: CASS CASTILLO, ASA - HOMICIDE DIVISION

I recently read a booklet that the Department of Justice prepared to help lay witnesses understand the criminal justice system and how to interact with it. It appeared to me that some of the suggestions could be of assistance to Law Enforcement Officers in giving a deposition in a criminal case. This brief article is an attempt to list those suggestions and format them into an easily remembered checklist.

It should be clear to every officer that regardless of the demeanor of a criminal defense lawyer during a discovery deposition, he or she is not taking your sworn testimony to strengthen the State's case. The goal is not to tighten the noose around the client's neck. Rather, discovery depositions are taken by defense lawyers primarily for four reasons:

1. to gain information
2. to commit the witness to a version of the facts
3. to evaluate the witness
4. to prepare for motions and trial

Defense lawyers are also looking for any errors you may have made or omissions of things you should have done. In short, they are gathering information to second guess everything you did and everything you did not do. In a strictly legal sense, the criminal defense attorney is not your friend during the deposition. Do not treat him like one. However, you should always maintain a pleasant and professional demeanor during the deposition.

The following is a list of ten (10) tips for officers regarding giving a discovery deposition in a criminal case:

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1. Read Your Report
   - Thoroughly read your report before you testify. That will assist you in recalling the facts more accurately when questioned. If a question deals with distances or time, and your answer is only an estimate, be sure you say that it is only an estimate. Do not agree with a defense lawyer's estimates of distance or time unless you have independently arrived at the same estimate.
2. Tell the Truth
   - You must always tell the truth. There is absolutely no excuse for failing to tell the truth. If a truthful answer to any question exposes another person to danger, compromises an ongoing investigation, results in a personal or financial crisis to yourself or another or will cause a "bad thing" to happen, you still cannot lie. The proper way to respond is to politely refuse to answer the question and briefly explain why. If the defense persists, the prosecutor, the defense lawyer, and the judge can resolve the issue in court. Additionally, you should realize that you enhance your credibility by readily admitting every fact regardless of whether you believe it helps or hurts the case.
3. Do Not Volunteer Information
   - Answer only the questions that are asked of you. Do not volunteer information that is not actually asked for. Do not give your conclusions or opinions or say what someone else told you unless you are specifically asked.
4. Think Before You Speak
   - Listen carefully to the questions you are asked. If you don't understand the question, have it repeated, then give a thoughtful, considered answer.
   - DO NOT GIVE AN ANSWER WITHOUT THINKING.
5. Explain your answer
   - If a question cannot be truthfully answered with a yes or no, then it is permissible to explain your answer.
6. Do Not Exaggerate
   - Do not make overbroad statements that you may have to later correct. Be careful in responding to a question that begins, "Don't you agree that…?" The explanation should be in your own words. Do not allow an attorney to put words in your

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DEPOSITIONS...DO'S AND DON'TS

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mouth.

7. Correct Your Mistakes
   - If your answer was not correctly stated, correct it immediately. If your answer was not clear, clarify it immediately. It is better to correct a mistake yourself than to have an attorney discover an error in your testimony. If you realize you have answered incorrectly, say, "May I correct something I said earlier?"
8. Do Not Lose Your Temper
   - An officer should always be courteous even when the defense lawyer is not. If you react emotionally to a question or statement you are likely to say something that you later regret.
9. Respond Orally to the Question
   - DO not nod your head for a "yes" or "no" answer. Speak loudly so that the court reporter or recording device can hear and record your answer.
10. Be Positive and Confident
    - Give positive, definite answers when at all possible. Avoid saying "I think", "I believe", or "In my opinion" if you can answer positively. If you know, say so. You can be positive about important things which you would naturally remember. If you are asked about little details which a person naturally would not remember, it is best just to say so if you do not remember. DO NOT MAKE UP AN ANSWER!

Remember, when being deposed, you are under oath and you must tell the truth! The fact the deposition takes place somewhere other than a courtroom does not detract from the fact it is still a formal court-ordered proceeding.

Cass Castillo is an Assistant State Attorney in the Homicide Division. Cass has been with the State Attorney's Office, 10th Circuit, since January 5, 1993.

"If you realize you have answered incorrectly, say, "May I correct something I said earlier?""

...FROM THE COURTS...

ACCIDENT ELEMENT OF LEAVING THE SCENE EXPANDED.

The defendant was charged with leaving the scene of an accident resulting in death. She filed a motion to dismiss, asserting that the state could not establish a prima facie case. The facts on which the motion was based were that the defendant turned into the path of another vehicle, violating its right of way. The other vehicle swerved to avoid a collision. In so doing the other driver lost control of his car, left the road, and turned over. He was killed. The defendant left the scene. The trial court granted the motion, but on appeal, the Second District reversed, holding that although the defendant's car did not crash, she was involved in the crash because she caused it. State v. Elder, 32 FLW D27 (Fla. 2d DCA Dec. 20, 2006).

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...FROM THE COURTS...

A LIMITATION ON THE CRIME OF HARASSING TELEPHONE CALLS.

The defendant was charged with, among other things, several counts of harassing telephone calls to a place where the victim had a reasonable expectation of privacy in violation of section 365.16(1)(a), Florida Statutes. At trial, the victim testified that he ran a business out of his home and that he had a separate telephone line for the business. It was on this line that the defendant made calls to him which he considered harassing. The defendant was convicted as charged. On appeal, the Third District reversed, holding that the victim did not have a reasonable expectation of privacy in a telephone line for his business. Avrich v. State, 31 FLW D2208 (Fla. 3d DCA Aug. 23, 2006).

ONE PUNCH WAS ENOUGH.

The defendant was charged with manslaughter. At his trial, the evidence established that he punched the victim once in the head when the victim was not looking. The victim died as a result of the punch. The defendant was convicted as charged. On appeal, he argued that the conviction could not stand because the state had failed to prove that he had an intent to kill the victim. The Second District rejected this argument and affirmed, holding that manslaughter by act only requires proof of an intentional act that causes the death of the victim. Hall v. State, 31 FLW D2963 (Fla. 2d DCA Nov. 29, 2006).

OPERATING METH LAB CREATED EXIGENT CIRCUMSTANCES.

The defendant was charged with possession of a listed chemical substance with intent to manufacture methamphetamine and filed a motion to suppress. The facts on which the motion was based were that officers were conducting surveillance of a certain residence. They observed the defendant leave and go to several stores where he purchased items commonly used in the manufacture of methamphetamine. He then returned to the residence. Based on their experience, the officers believed that the defendant was operating a meth lab. Because of the dangerous nature of meth labs, they were concerned for the safety of the occupants of the house. They entered the house and removed the occupants. However, they waited until they had obtained a warrant to conduct a search of the house. The court denied the motion, and the defendant was convicted as charged. On appeal, the Second District affirmed, holding that exigent circumstances justified the warrantless entry into the house. Barth v. State, 31 FLW D3029 (Fla. 2d DCA Dec. 6, 2006).

REQUEST FOR ID DOES NOT CREATE A DETENTION.

The defendant was charged with possession of a controlled substance and filed a motion to suppress. The facts were that while on patrol, an officer approached the defendant who was standing with a group of men. The officer asked for identification which the defendant voluntarily provided. While standing there the officer ran a warrants check which showed that there was an outstanding warrant for the defendant=s arrest. The officer arrested and searched him, finding drugs. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Supreme Court affirmed, holding that a request for identification and a warrants check does not change a consensual encounter into a detention. The Court also held that even if the detention had been illegal, the existence of the arrest warrant would have made the subsequent search legal. Golphin v. State, 31 FLW S845 (Fla. Dec. 14, 2006).

DEADLY WEAPON MUST BE USED IN THE TOUCHING TO CREATE AN AGGRAVATED BATTERY.

The defendant was charged with aggravated battery. At his trial the evidence established that the defendant forced his way into the victim's kitchen, grabbed her, and said something she could not understand. When she screamed, he grabbed a sharp knife and held it near her throat. He then let her go and fled the house. He was convicted as charged. On appeal, the Fourth District reduced the conviction to simple battery, holding that the element of aggravated battery requiring the use of a deadly weapon means that the deadly weapon must be used in the touching element of battery. Munoz-Perez v. State, 31 FLW D3061 (Fla. 4th DCA Dec. 6, 2006).