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The Deposition From the Creditor's Perspective

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The following discussion of a common discovery device, called the deposition, is meant to provide general answers to questions frequently encountered by the authors as litigators. It is not represent legal advice: in all individual cases, specific legal counsel should be sought.

While the debtor's counsel may have a specific purpose in taking a particular deposition, the taking of a deposition (the process where a debtor or its representative is required to appear in person and answer questions under oath) by the debtor's counsel may be an attempt by the debtor to "play poker" with and "bluff" the creditor to settle the case in a manner favorable to the debtor rather than spend more time and money continuing the lawsuit. If, however, the creditor chooses to play the "game", he forces the debtor and debtor's counsel to spend a substantial sum of money defending the action. This is money the debtor may not have and result in the debtor suddenly canceling the deposition. The willingness of the creditor to continue the expense of the deposition may also emphasize to debtor's counsel the seriousness of the creditor to spend the time, effort and money to ultimately prevail. This may tell debtor's counsel that the debtor should consider resolving the matter quickly as the most expeditious resolution.

The second advantage to the creditor and its counsel is that it allows them to learn opposing counsel's theories and case strategy. It will also allow creditor's counsel to be alerted to possible avenues of discovery on subjects, which might otherwise have been overlooked. It gives an insight into the "thinking" of the debtor and its counsel.

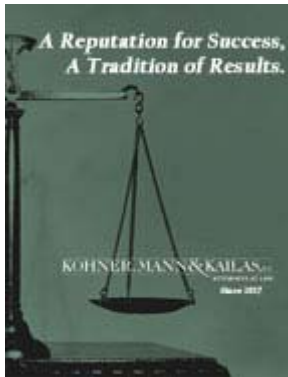
Third, a deposition provides to the creditor's representative valuable practice in testifying. If the creditor's representative has not previously testified, the nervousness which usually accompanies this first examination will ultimately provide confidence of the witness in his or her ability to handle the lawyer's questioning at the subsequent trial. The written transcript of the deposition will provide the witness with the record of the probable questions he or she may be asked at trial. It will give the witness an opportunity to further prepare and explain any damaging testimony given at his or her deposition or to give the same answer in a form which may be less helpful to the debtor's case.

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Finally, the deposition itself will offer creditor and creditor's counsel the opportunity to present to the debtor and his counsel a strong and effective presentation of the creditor's claim. A persuasive presentation by the witness will make the debtor and its counsel question the value of further expensive proceedings. A well-prepared witness giving strong, effective testimony at deposition can and does often mean success in either a favorable settlement or successful judgment at trial.

From the Debtor's Perspective

In a typical collection matter, the taking of a deposition of the creditor's representative is initiated through agreement of counsel for the parties, a notice of deposition or a subpoena. By one of these devices, the creditor's representative (witness) is asked to appear, typically at the office of the debtor's attorney to answer questions under oath before a court reporter. In many cases the representative will be asked to produce documents at the deposition for inspection, review and questioning. The deposition itself may last only a short period of time or may be protracted. At the conclusion of the deposition a written transcript of the proceedings will have been created which becomes a permanent record of the testimony of the witness. Depositions permit direct questioning and follow up without creditor's counsel structuring the response to the inquiry. They are a valuable tool for the debtor's attorney.



The debtor's counsel in a disputed collection matter may have a series of purposes in the taking of the deposition. First, he may be attempting to "test" the creditor's evidence, claims and particular legal theories. He will attempt to discover the identity of witnesses, evidence or documents which might help prepare his case. He will also examine the creditor's documents which are not self-explanatory.

A second purpose of taking the creditor's representative's deposition is to uncover weaknesses in the creditor's evidence. To accomplish this purpose, the debtor's counsel will attempt to force admissions, evaluate witnesses (including their ability to handle cross-examination and their potential impact on the judge or jury), and to adduce evidence for appropriate motion such as a motion for summary judgment. It will be the attorney's hope to "educate" the creditor and his counsel as to the weaknesses in their case with the ultimate goal to foster a settlement favorable to the debtor or possibly defeat the creditor's claim completely.

Finally, his purpose may simply be to commit an adverse witness to specific admissions and testimony. It also will ensure that should the witness ultimately not be available at the time of the trial that the witness's testimony has been perpetuated.

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