WHEN TO TAKE DEPOSITIONS IN FAMILY LAW MATTERS

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Discovery is often an interesting component of family law matters because, as opposed to many other areas of law, the extent of discovery in our cases may vary simply based on the parties' financial resources or substantive issues involved. While many of us stand by the proposition that - at the very least - parties should exchange executed Case Information Statements to provide a baseline view of the marital estate, incomes and lifestyle at issue, and, also frequently insist on exchanging information through interrogatories and document requests, depositions are more often conducted on a case-by-case basis.

Whether due to the cost involved in preparing for and taking a deposition, or the simple necessity (or lack thereof) in a particular case for doing so, practitioners often hesitate to issue a deposition notice or subpoena that could provide vital information at any stage of an ongoing litigation. With discovery rules that are often relaxed in the Family Part (where practitioners often never experience an actual "closing date" to discovery), it often seems depositions occur in rapid fashion as trial dates loom on the horizon. The information procured at a deposition, however, may not only be useful in preparing for and use at trial, but also in reaching an amicable resolution. With that in mind, this Hot Tip will focus on when to consider taking depositions in family law matters.

Rule 4:16 – Use of Depositions; Objections; Effect; Errors and Irregularities

As a general matter, R. 4:16-1(a) provides that a deposition may be used by any party "for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Rules of Evidence. As part of this Hot Tip, however, consider the value of a deposition to achieve a settlement in your client's best interests. For instance, if there exists a dispute regarding the value of an entity as determined by competing forensic accounting experts, deposing the opposing party's expert and the party may succeed in weakening the other party's position to the point that settlement is the more beneficial option over trial.

Similarly, if a spouse is accused of wrongdoing, perhaps a claim regarding the dissipation of marital funds, deposing the accused spouse may carry the intended effect of exposing his/her position and forcing a settlement that may not have otherwise occurred. It may also, on the other hand, expose the weaknesses of your client's own position where you can better advise him or her regarding next steps.

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Rule 4:14 – Depositions Upon Oral Examination

A brief review of R. 4:14 and its various subparts provides extensive detail regarding the deposition process and requisite procedures. A few notable points derived from the rules that should aid you in your practice:

R. 4:14-1 – Provides that a deposition of any person, including a party, may be taken at any time after a matter's commencement. While practitioners often wait until paper discovery is exchanged to take depositions and oftentimes face opposition from opposing colleagues when attempting to do so at an earlier stage, there are many situations where an early deposition could prove useful for your client's position. For instance, deposing the other party and relevant third parties in connection with an ongoing custody dispute could prove invaluable to discrediting the other party in a way that carefully crafted certifications and discovery responses could never achieve. The same can be said when a forensic accountant is involved. While experts will interview the relevant parties and third parties, being able to question those individuals under oath often provides testimony and related information that would not otherwise have been obtained at early stage. Note, however, that this rule does contain certain limitations if a deposition is sought at the very outset of a matter.

R. 4:14-2 – Provides that a deposition may be taken of any person at a location "reasonably convenient for all parties . . . ." While the location of a deposition may often be a matter of strategy designed to create some level of discomfort for either the parties or attorneys involved, in today's pandemic-based environment almost all depositions are being taken virtually. The same approach can also be applied to R. 4:14-7 regarding the location for taking depositions of fact witnesses, which contains specific geographic-based limitations. As a result, strategy has somewhat been removed as to location and shifted the confines of a computer screen. This disruption in standard practice should not deter you as a practitioner from taking a deposition as you normally would. Moreover, any hesitation as to the virtual setting and use of exhibits quickly disappears once you become accustomed to the process.

R. 4:14-7 – Subpart (2) addresses the taking of expert witness and treating physician depositions. While often time consuming and costly, the taking of expert depositions following the issuance of an expert report may be necessary to not only review in detail the expert's process in reaching the factual conclusions and recommendations contained in the report, but also to determine how you are going to address the impact of the report on the strengths and weaknesses of your client's position. Whether it be a custody analysis, accounting analysis, vocational analysis or something else, being prepared to either emphasize or impeach the expert involved in your case may be critical in swaying the view of a trial judge.

Rule 4:16 – Unavailable Trial Witness

Reverting back to R. 4:16, deposing a witness may also prove critical if the witness will be unavailable at trial whether due to disability, illness, location or otherwise. Comment 3.1 to this Rule provides, "Unavailability pursuant to paragraph (c) of this rule is defined consistently with unavailability pursuant to N.J.R.E. 804(a)(4), namely death or inability to attend because of age, illness, infirmity or imprisonment, or presence out of state, or not able to be subpoenaed provided the proponent of the deposition has not procured the witness's absence."

R. 4:16-1(c) also provides, "The deposition of an absent but not unavailable witness may also be so used if, upon application and notice, the court finds that such exceptional circumstances exist as to make such use desirable in the interests of justice and with due regard to the importance of presenting testimony of witnesses orally in open court." Exceptional circumstances are considered on a case-by-case basis, and the grounds for allowing deposition testimony are limited in scope.

If you are at all uncertain as to whether a witness will be available at trial, strongly consider taking that witness's deposition to potentially avoid any future issue.

The Rules of Court cited above and related Hot Tips should assist you in developing a better sense of if and when to depose a party, expert or third party witness in a family law matter.