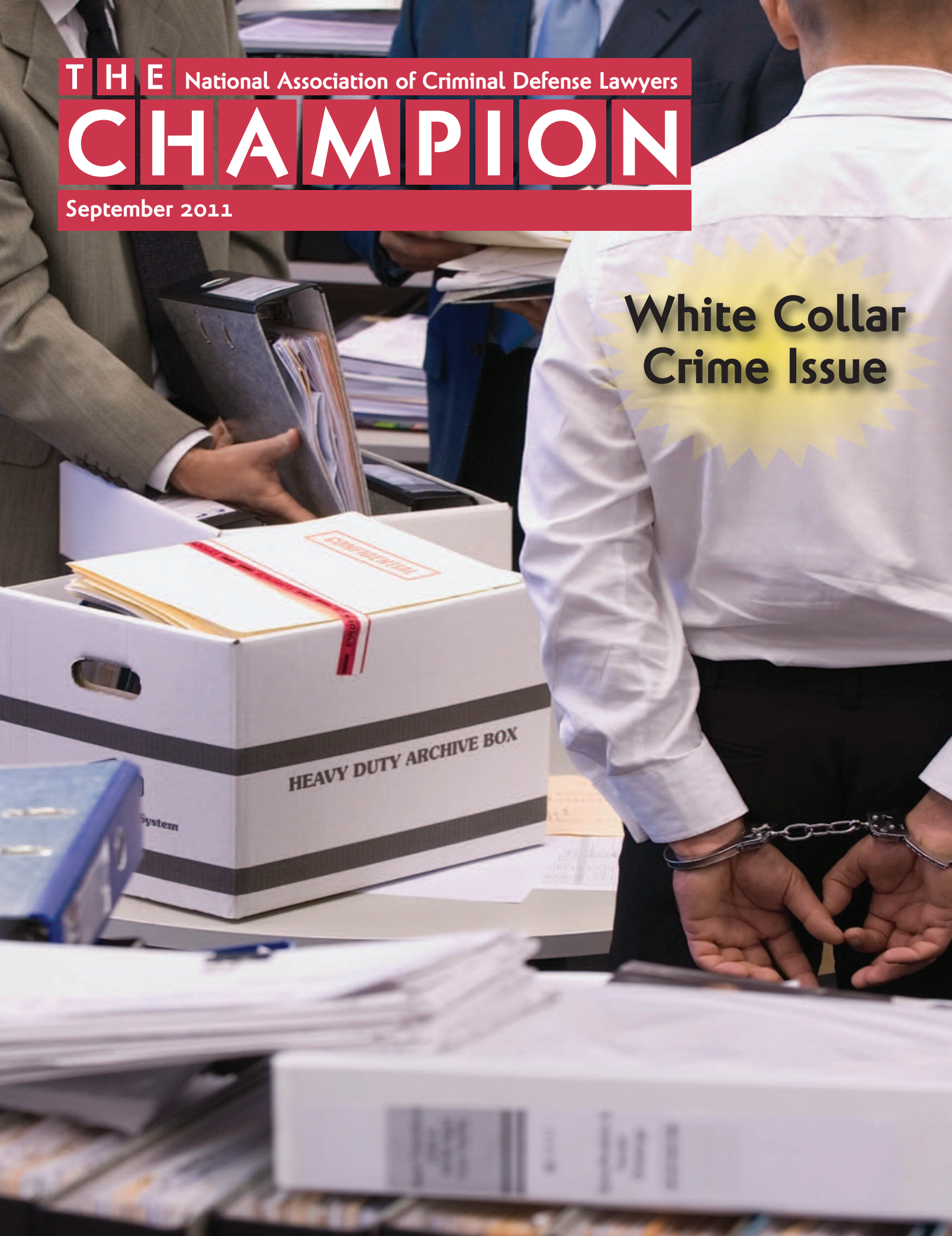
THE National Association of Criminal Defense Lawyers
CHAMPION
September 2011

White Collar Crime Issue



Practice Points

BY SHAUN KHOJAYAN

Taking an Effective Deposition in a Criminal Case

A witness is unavailable to come to court, but her testimony is needed. This is yet another obstacle the defense attorney must overcome while preparing the case. Inevitably, the attorney drafts motions or requests for letters rogatory to secure the deposition or oppose it. While there are good articles discussing the legal standards involved in securing or opposing depositions from unavailable witnesses,[1] most attorneys have little experience with actually taking an effective deposition, particularly in the defense of a criminal case.

In *federal* court, Rule 15 of the Federal Rules of Criminal Procedure makes depositions available to both sides upon good cause shown in a motion to preserve material testimony from an otherwise unavailable witness. In *state* court, however, depositions in criminal cases are rare. Only a handful of states allow depositions in criminal cases. The states that permit such depositions have differing rules as to when they are allowed, if they are used only to preserve testimony, or if they can be used as a discovery tool as in civil cases.[2]

When a defense attorney has successfully sought a deposition or has to participate in one brought by the prosecution, these tips will make the effort more rewarding and the deposition more useful at trial. Properly worded deposition questions and answers can help support later motions in limine, impeach other witnesses or the deponent if she later attends trial, and can be used more effectively in closing arguments.

Ask correctly formed questions and clarify unclear answers.

"Who did he meet there?" A question like this is of little value without the context of other questions and answers. Remember that the deposition will not be played in its entirety to the jury. The court will rule on objections lodged during the deposition and only the remainder of the deposition will be used at trial. Thus, when the opponent objects, ask the question a second time in a way that makes the question clear and not objectionable. Revise the question until there is no objection. Most of the time, asking a clear question is as simple as using fewer pronouns: "Who did Mr. Johnson meet at Ms. Christine's house?" The jury understands and can follow this question. It is clearer than this one: "Who did he meet there?"

Moreover, if the deponent answers, "He met her at that time," restate the answer to make clear the subject and object of the sentence. "You mean, Mr. Johnson met Ms. Christine at 6:00 p.m.?" Clear deposition transcripts make it easier to impeach another witness or the deponent if she later attends trial or if the defense needs the testimony to support a particular motion in limine. Asking short questions with fewer pronouns and clarifying unclear answers requires practice and patience. The additional effort will be worthwhile in the end.

Object to unfounded objections or speaking objections.

An attorney should object during depositions to preserve the objections and assert privileges for court review

later. Some jurisdictions have limits on the kind of objections an attorney can make during a deposition, such as limiting the objection to "the form of the question" or to preserve a privilege. Assume that if an attorney makes no objection, the court will rule that the attorney waived the objection. Knowing this, a prosecutor may repeatedly lodge objections to defense questions. However, repeated objections — such as "vague" or "asked and answered" or speaking objections — are sometimes unfounded and not made in good faith. Such repeated, unfounded objections serve to obstruct the defense lawyer's questioning and signal answers to the deponent. Object to the repeated objections to ensure that questioning is not obstructed: "Counsel, I object to your repeated objections and speaking objections. Your repeated objections have the effect of coaching the witness, which is improper. If this continues, I will adjourn this deposition and move for a protective order." This statement should stop the obstructive tactics — at least for a while. If the prosecutor continues, repeat the defense's objection and adjourn the deposition with the understanding that the defense will file a protective order to control the abusive tactics.

If the deposition is outside of the defense lawyer's district, before traveling to the deposition, clarify with the court the procedures to follow to handle protective orders or motions to compel to avoid delay in having to reschedule the deposition. The court may agree to handle such deposition issues informally by teleconference or on an expedited basis.

Avoid making or allowing "standing objections."

The deposition may drag on and be quite lengthy. However, do not make "standing objections" or recognize the prosecutor's "standing or continuing objection" to a line of questioning. Standing or continuing objections are vague, unhelpful to the defendant's cause, and likely not recognized by the court.[3] To avoid the uncertainty of a judge's ruling on a continuing objection, tell the prosecutor that the defense does not agree to recognize his standing objection. Accordingly, whatever objections he wants to raise should be stated in a timely fashion.[4]

The deposition will be videotaped, so dress appropriately.

In criminal cases, there is a greater likelihood that the deposition will be videotaped to be played later for the jury. Yet some prosecutors, especially those with civil litigation backgrounds, dress casually because "there is no jury present." Dressing in casual attire is not good practice. The defense attorney should not show up in jeans or other casual attire. The attorney will be recorded when she moves around during the deposition, shows the witness an exhibit, or acts out something for the witness to see before the witness testifies about it. Furthermore, the attorney wants to signal to the witness and jury that she takes this witness's testimony seriously. Also, it is a good idea for the defense lawyer to describe the exhibits as they are used and, if possible, lift them up for the camera to record and preserve the testimony accurately.

Pre-mark exhibits and be prepared to impeach the witness.

Two weeks before the deposition, mentally walk through the deposition. Note the categories of questions to be asked, the exhibits to be used during the deposition, and how each topic will be developed before moving to the next topic. Sufficient copies of exhibits should be available to avoid delays in questioning. Pre-mark the exhibits. If electronic or audio evidence will be played for the witness, make sure the equipment works in advance and be prepared to mark the recording or DVD as an exhibit.

This is a deposition of a witness in a criminal case and not necessarily a discovery tool. This witness may not be friendly to the defense. Ask short, one-subject questions that are not objectionable. Leading questions are helpful and appropriate too. Be ready to impeach the witness as if at trial.

On a related note, the deponent has to answer all questions regardless of objections unless the deponent's attorney (unlikely to be the prosecutor) instructs him not to answer to preserve a specific privilege. Thus, one way to keep the questions and answers flowing like an informal conversation (and to elicit more truthful testimony) is to keep eye contact with the deponent while the prosecutor lodges his objections, and calmly advise the deponent to answer the defense's question — without breaking eye contact with the deponent. This tactic implies to the deponent that the objections are secondary and the attorney is there to hear the answers. Of course, as mentioned earlier, revise a question that draws an objection and ask it again in an unobjectionable form to preserve the particular answer.

Bring an investigator to the deposition.

The prosecutor will attend the deposition with a special agent, and the defense assumes the agent will not interfere with the deposition. But while the defense attorney is asking questions, she cannot see what is taking place behind her or on the side of the room. Whether intentional or not, the prosecutor and his special agent may nod their heads or roll their eyes and signal to the deponent how to answer. After all, there is no judge or jury present, i.e., no one to catch this impropriety. An investigator or assistant can watch the other participants to ensure there are no improprieties. Do not attend the deposition alone and assume that everything will go smoothly. Even if unintentional, improprieties occur and the defense needs to limit them during its one opportunity with this otherwise unavailable, material witness.

Take a break every hour.

Although an attorney might feel good and think she is on a roll, she needs to take breaks during the deposition to ensure she does not miss anything. A deposition is not a race, and there is no need to rush the questioning. A break every hour to use the bathroom or get a drink of water — even if counsel does not think it is necessary — will help counsel's stamina and thought process. During the break, confer with the investigator or assistant as to what topics might have been missed or glossed over or what testimony was unclear that needs to be clarified. However, keep in mind not to allow the opponent to take a break while there is an unanswered question pending; it could be considered improper coaching.[5]

Ask questions regarding unavailability.

Depending on strategy, the defense may still want the prosecutor's deposed witness to appear at trial. Thus, ask questions that explore the basis of the witness's alleged unavailability. "[A] witness is not 'unavailable' for purposes of the … exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[6] What diligent effort has the prosecutor made to make the deponent available for trial? Is the deponent medically unable to fly? Has any doctor advised him about his inability to fly? What did the doctor specifically tell him about flying? How long ago was the advice? If his airfare and stay were paid, could he probably attend trial? Or is attending trial just inconvenient? If the defense can establish that the witness is not truly unavailable, then the attorney can later move in limine to compel the witness's live testimony at trial to preserve the client's Sixth Amendment right to confrontation and have the jury meaningfully evaluate the witness's demeanor and credibility.[7] The defense can also oppose the deposition beforehand on these grounds, i.e., insufficient showing of unavailability, but the prosecutor will be wise to establish unavailability through declarations and prepare the deponent for such questions.

Conclusion

An effective deposition will read more clearly and not confuse the fact finder. Prepare the deposition strategy in advance. Take breaks to confer with the investigator or assistant. These suggestions will result in more helpful testimony that the defense can use later at trial.

Notes

1. *See* Linda Friedman Ramirez, *Federal Law Issues in Obtaining Evidence Abroad — Part Two*, The Champion, July 2007 at 38; Ross Garber, *Gathering Defense Evidence Abroad*, The Champion, September/October 2009 at 29.

2. *See, e.g.,* Fla. R. Crim. P. 3.220; Texas Code Crim. P., Art. 39.01 and Art. 39.02; Mo. Sup. Ct. R. 25.10-25.15; Wash. Crim. R. 4.6 and 4.7; Iowa R. Crim. P. 2.13(1).

3. *See, e.g., United States v. Merida*, 985 F.2d 198, 201 (5th Cir. 1993) (request for continuing objection based on lack of foundation did not preserve hearsay and confrontation objections); *United States v. McVeigh*, 153 F.3d 1166, 1200 (10th Cir. 1998) ("the considerations bearing upon a decision whether to admit or exclude evidence under Rules 404(b) and 403 are sufficiently complex that ordinarily neither counsel nor the trial court should rely on a standing objection with respect to evidence coming within the purview of these rules") *overruled on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999).

4. *See* Fed. R. Evid. 103(a)(1).

5. *See Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

6. *Barber v. Page*, 390 U.S. 719, 724-25 (1968).

7. *See United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993). ■

About the Author

Shaun Khojayan began his career as a trial lawyer with the Federal Defender in San Diego. Subsequently, he worked as a plaintiff's class action attorney with Milberg, Weiss, Bershad, Hynes & Lerach LLP. He is now in private practice and is the creator of *JurySelectionPro*, a practical tool to make jury selection less stressful and more meaningful.

Shaun Khojayan
Shaun Khojayan & Associates, P.L.C.
9454 Wilshire Blvd., Ste. 600
Beverly Hills, CA 90212
310-274-6111
Fax 310-274-6211
E-MAIL shaun@khojayan.com