DEPOSITION TECHNIQUES THAT WORK

by

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The advent of the seven hour deposition has led thoughtful practitioners to reexamine the way we take depositions. No longer do attorneys representing well financed defendants have the option of droning on for days on end, in the hopes that something useful will miraculously emerge from the hundreds of pages of transcript. Now, our depositions must be carefully planned, so we get what we need – and perhaps what we hope for – within a limited time.

While many of us had previously focused on good, tight depositions, the “one day of seven hours” amendment to Federal Rule of Civil Procedure 30(d)(2), effective December 1, 2000, now compels every litigator to hone his or her skills. My purpose is to share with you some techniques which have helped me, and those whom I have taught, to take depositions that can help you win at trial or before trial – in those rare circumstances when summary judgment is more than “the impossible dream,” – and, most often, help you to achieve a settlement that you and your client will consider a victory.

For more than two centuries grammar schools prepared pupils for life by teaching the three Rs, “Reading, wRiting, and aRithmetic”, obviously taught by those who, like me, were challenged by spelling. I’m here to preach the gospel of depositions by the five Ps: Planning, Preparing, having a Purpose, Pursuing your purpose, and Paying attention. Follow them and see how your depositions help you win cases. Ignore them at your peril, the sixth P.
Let me now go through these P points to show how they can help.

PLANNING. Planning is now mandated in federal cases by the requirement in Rule 26(f) that all counsel meet “to develop a discovery plan . . . .” So why do I include it in this presentation? Because, all too often, the Rule 26(f) planning is done in a five minute session, in the judge’s anteroom or a hurried telephone call, and consists of little more than asking and answering the question, “How much time do you need for depositions?” And even less planning occurs in those state courts which have no equivalent requirement.

The Rule 27(f) conference, or its state court counterpart, is an opportunity to arrange discovery in a manner that will enhance your ability to prepare the case for victory at trial. This is the time to make sure you will have all the documents you need from your adversary and non-parties in sufficient time to study them before you ask your first deposition question.

But Rule 27(f) planning can do more. Consider the sequence of depositions and where they will be taken. Do you want to pin down the plaintiff before she hears what your witnesses will say? Or would your case benefit from producing your clients for deposition before adversary counsel learns all the questions she should be asking? Should plaintiff be deposed in her lawyer’s office, where she will be more comfortable, or in your office? That may be governed by your strategic decisions: do you want her to be relatively relaxed, so she will be more likely to testify less guardedly, or do you think the pressure of testifying in a less familiar setting will help her realize the futility or weakness of her case.

Speaking of stress, do you want your client to be there for deposition of the adverse party? I once took a deposition which my client attended and both he and the witness were carrying pistols, a rare occurrence in New York City. A certain tension was added to the questioning, not to mention the objections! Even without packing heat, the presence of the accuser or malefactor can add pressure. Is that desirable in your case?

Once you have thought through these and other issues, you can propose neutral sounding ground rules that will enhance your chance to “win” the depositions.
PREPARING. I used to dream of developing into an advocate who could sit in my office listening to Mozart until, at the key moment, I would be called into a courtroom or deposition room to pose instinctively the three decisive questions that the host of other lawyers had omitted to ask the witness. Alas, well into my fourth decade of practice, it still hasn’t happened.

There may be some extraordinarily talented lawyers who can walk into a room without through preparation and win cases, but I have neither met them nor heard their names. The most able advocates I know are those who are always preparing, whether rehearsing their openings and summations or rearranging their deposition outlines. So let us consider preparation for a winning deposition.

A first step should be considering whether anything is to be learned from sources other than discovery. The internet makes an amazing array of facts accessible with the click of a mouse. Also, interviews of friendly co-workers, former employees and, in the right case, neighbors, can be revealing.

Depositions of expert witnesses require intense preparation. The factors affecting admissibility set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137 (1999) or similar state decisions, should be considered and appropriately researched. But don’t stop there. Research facts affecting his credibility, including judicial decisions discussing his prior testimony and his publications to see if he previously took a different position or used a different methodology.

Before deposing laymen or experts, an intense study of documents produced in discovery is essential. I usually make a set of exhibits which I mark with different colored highlighters, so I’ll be sure to see the key parts during examination.
Then comes the laborious, but essential, task of preparing an outline. This is when you should consider the sequence of points. Is a chronological approach best in this case? Do you want to start by getting the witness relaxed, so she’ll more likely make crucial admissions, or start with a bang before the witness gets comfortable? Will the witness give you more or less if your first question is, “You want your friend Sally to win her suit, don’t you?”

I know lawyers who write out all or most questions in their outline. I prefer a bullet point outline. Do whatever works best for you, but don’t fail to have an outline.

Arrange your exhibits in the sequence you’ll want them. And make sure your outline provides for all the required foundation for all the documents you will need to have admitted into evidence at trial. Also useful is a list for the court reporter of unusual or difficult names, so he will not have to interrupt to ask for spellings. The reporter will become your friend, which never hurts, and you'll save time. And every moment saved is a moment you can use for questioning.

If you will be taking the deposition away from your home base, find out what are the local rules and practices. Local counsel can be invaluable in helping you avoid traps. For example, beware of the reporter who asks at the beginning, “Customary stipulations?” The customs of the jurisdiction may not be those with which you are familiar. Substantive objections may not preserved, as in the federal system. In some locales, an examiner may “pass” a witness to the next attorney, without limiting the examiner’s right to ask further questions. In other jurisdictions, you must ask all your questions in one turn; when you stop, you’re finished. Also, the court reporter keeps custody of exhibits in some places, while in others, the examining attorney keeps them. This could be particularly important to know if you need the exhibits soon to take another deposition, to give to an expert or to attach to a time constrained motion.
HAVING A PURPOSE. Preparing our outline should focus us on our purpose. Why are we taking this particular deposition? I suggest there is no question more important to a winning deposition, for the purpose should guide us in questioning.

I know of at least nine different purposes for taking a deposition:

1. Obtaining useful testimony;
2. Preventing harmful testimony;
3. Obtaining information, *nota bene*, not the same thing as testimony;
4. Learning the weaknesses of your case;
5. Showing the adversary party the weaknesses of his case;
6. Crediting or discrediting other witnesses;
7. Observing the witness’s demeanor;
8. Showing the witness your demeanor; and
9. Assessing the witness’s controllability by you and by your adversary.

Whatever the purpose is, use it to guide your questioning. Of course, a deposition can be taken for more than one purpose, and your purpose can change, as you learn what a witness will say. When the purpose changes, so does the style of questioning.
PURSUING YOUR PURPOSE. Let’s go over some of these purposes to see how they affect the way we take a deposition.

There is a world of difference between obtaining useful information and obtaining useful testimony. If all you’re interested in is information, then query if you want to go through the deposition process at all. You may want to consider instead a witness statement or an interview. It’s cheaper, and you have the advantage of not having your adversary there.

But if you’re taking a deposition to get information, consider these techniques.

1. Ask open ended questions.

2. Try to get the witness to help you. Smile and be nice. While you’re not looking for flies, the old adage should honey your tone. Also, fumbling, inarticulate questions asked two or three different ways sometimes lead a witness to be more forthcoming, to help you.

3. After the apparent end of an answer, wait. Sometimes the silence will lead the witness to give more information.

4. After you are sure the witness has finished, follow up. Ask
   a. Was any one else there?
   b. Is there anything else you can recall?
   c. Is there anything that could refresh your recollection? If so, what?
   d. If the witness (well prepared) testifies that he doesn’t have a specific recollection, ask, “What is your general recollection?”
5. Ask work product questions:
   a. What did you do to prepare?
   b. What documents did you review?
   c. Did they refresh your recollection? (If they did, ask for them; they’re not protected as “materials prepared in anticipation of litigation or for trial”.)

Now let’s turn from getting information to getting useful testimony. Here are some things to remember when that is your purpose.

1. Ask questions that comply with rules of evidence. As objections other than form are reserved, you have to be alert to avoid asking objectionable questions?

2. What should you do about those objections as to form? From what I have seen, many attorneys are confused about what is meant by improper form. It doesn’t mean a question that will elicit a harmful answer; it is any question that, while incorrect, can be corrected by rephrasing. So, ask what’s wrong and correct it. This is not the time to establish your machismo by telling the witness, “Answer the question.”

3. If you are examining an adverse witness, ask leading questions. Where you know what the answer is – or should be – frame the question exactly the way you want it answered and put those golden words right in the witness’s mouth. And there is nothing wrong with suggesting the answer in your question and a shake of your head. E.g., “But your supervisor never asked you for sexual favors, did he?” And follow up a good answer with a reinforcing question. E.g., “He never even suggested it did he?”

4. If a useful answer is hearsay, ask the questions that may establish an exception.

5. Use simple words. Ask intelligible questions. We aspire to intelligence; we all can achieve intelligibility. For example, when asking about a document, identify it verbally, not just by exhibit number, so a juror will know what you’re talking about.
6. Avoid jargon. If necessary, get the witness to translate it into lay terms.

7. Use proper grammar. Don’t have pronouns without antecedents.

8. Don’t ask ambiguous questions.

9. Make witness use words in the common English language. If a generation X witness testifies, “He the man!”, get her to translate that into more conventional terms, such as, “He was the supervisor who had responsibility for that area.”

10. When you’ve gotten the pieces of testimony you like, put them together in a complete question in your own words.

11. When you will need a document at trial, get the testimony needed to establish the basis for admitting it into evidence. This may mean something more than saying “do you recognize this?” Establish that it’s authentic. Establish that the signature is authentic. You may want to establish that it was or wasn’t altered.

And you certainly ought to consider establishing that it’s a business record within the meaning of the relevant statutes (e.g., Fed. R. Evid. 803(6)) or otherwise admissible under the rules of evidence. Here is a checklist of other areas to consider.

Made in course of regularly conducted activity
At or near the relevant time
By someone with knowledge, etc.
Recollection was fresh then
Author was trying to be accurate
To accurately set forth what happened
My all-time favorite answer came when I asked a recalcitrant witness if he was truthful in his written report to his superior about a meeting he now professed not to remember. He claimed he could not answer because, “I do not understand what it means to be truthful.”

If instead of getting useful testimony, your purpose is preventing harmful testimony, the techniques are quite different. You want to foreclose everything that will hurt your case. So get the answers that will enable you to exclude, or at least limit, damaging evidence. For example:

If a person wasn’t at a meeting, establish that.

Ask questions needed to establish that damaging testimony is hearsay.

Ask questions to establish that testimony is speculation

Where the witness doesn’t remember, or she does remember and you’ve exhausted her memory, close the door. Ask, “Does that complete your entire recollection the conversation?” And when the witness testifies, “So far as I can remember now, yes,” ask, ”Is there anything that could refresh your recollection?” In short, close the door.

Sometimes your purpose may be to show the adverse party the weaknesses of his or her case. Note the emphasis on party. This is the one chance that you have ethically to communicate directly with the adverse party, where you don’t have to deal through the lawyer. You can explain with artful questions why the plaintiff does not have a leg to stand on. Rarely, but sometimes these questions can change the party’s settlement position. Because this is rare, you will always want to consider how much do you want to tip your hand.

Where your purpose is ascertaining a witness’s demeanor and controllability, you’ve got to come across with different techniques. You can’t be Mr. Nice Guy and have a feel for how the person is going to react if you put him under stress. You can’t be constantly be putting the witness under stress and get a feel for how the witness is going to respond if you come across as Ms. Nice Gal. So if you want to do this, think about what you’re trying to accomplish and think about how you want to appear at the deposition.
PAYING ATTENTION. If you’ve been paying attention you will remember that the last of the five Ps is “Paying attention.” In depositions, no less than trials, watch the witness’s (and counsel’s) body language and listen to the answers.

Body language can tell you when the witness is getting into a troublesome area. And if you’re good enough, you can sometimes tell when a witness is lying by watching. After all, we expect juries to determine prevarication from watching a witness.

As for the importance of listening, I can’t emphasize it enough. I’ve often said that a litigator is like any other person except for two highly developed portions of his anatomy. This has nothing to do with nerves of steel or any anatomical body parts made of brass. To me, the two most important parts of a litigator’s anatomy are first, his or her buttocks and second, his or her ears. Frequently, the most effective thing we can do is stay seated and keep our ears open.

By listening you can be sure that the witness answers your question, giving a verbal response, preferably using words that others will understand. And if it’s testimony you want, have the witness use descriptive words that paint a picture. When you listen, you can respond to the witness, making the interrogation into more of a dialog.

Finally, a word about tangents. Very intelligent witnesses may go off on tangents to take you away from where you’re heading. To do that, she has to entice you to follow with seemingly interesting material. So when a witness goes off on a tangent, consider going off with her. See where she is leading and what’s there. But remember where you were, and then return there. In short, don’t be afraid to jump off your outline, as long as you get back to it.

CONCLUSION There’s a lot to do and usually only seven hours in which to do it. (Let’s be grateful that the Rules Advisory Committee didn’t adopt the four hour limit considered in 1993!) Remembering the five Ps may not be the only way to achieve your goals, but I know of no better matrix. I therefore recommend them to you for your thoughtful consideration.

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