

Taking And Defending Depositions You Can Actually Use

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In the ever-shrinking world, it is now common for witnesses to live in a different state or country than where a lawsuit is pending. Given this trend, depositions play an increasingly prominent role at trial. And as always, even when depositions themselves are not used at trial, tactical decisions made in the course of preparing for and taking depositions have a critical impact at trial.

All too often, however, lawyers think about just “getting through” the deposition phase without fully taking advantage of the opportunity to build and develop their story. Below are tips for maximizing the impact of depositions at trial, both for depositions you are taking and those you are defending.

Taking Depositions

Treat it like a conversation.

Too many people treat depositions as a special subset of human interactions in which they are allowed to drone on at great length, tethered to an outline that someone handed them the night before, or in which the revered attorney talks down to the lowly deponent. For that reason, most depositions wind up being either deathly boring or really contentious. It doesn't have to be that way. Fundamentally, a deposition is an exercise in learning more. You have been doing that your whole life, so bring those skills to bear here. Engage with the witness like the naturally curious person that you are and just keep digging. Some of the best deposition questions are things like “What happened next?” and “How did you respond?” Pretend you are having dinner and you're trying to understand what happened. Take it from there, and you'll be fine.

Don't be overly tied to documents.

It is of course essential to review relevant documents before taking a witness's deposition. But too many lawyers restrict their questions to those documents (“Did I read that correctly?”) and, in doing so, miss a valuable opportunity to explore what they don't know or test their big-picture theories of the case. This is a mistake. Use depositions to really explore what happened. Documents often provide the bones of a



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dispute, and they provide valuable anchors (dates, times, who was at the meetings, etc.), but the human story accompanying those documents is at least as important at trial. Build questions around the documents but then step back and ask “What was going on here? Why?” I once had a (married) deponent admit, in response to really benign questions about an event at the office, that he routinely gave his secretary and other women in the office lingerie. It was not, how shall we say, at all relevant to the dispute, but it was interesting, and his lawyer was much more interested in settlement after that fact came out.

Be bold and explore.

Unlike at trial, in depositions there is typically no reason to refrain from asking questions to which you do not know the answer. Take advantage of this and depart from your outline whenever the witness’s answer interests you. If you have followed the advice above and treated the deposition as a conversation, you will likely have developed a rapport with the witness. This in turn might lead the witness to talk more freely than their lawyer would like — particularly if your questions are not obviously hot-button in nature. Test your themes with the opposing witnesses. If they can deflate them in deposition, that’s a pretty good sign that you need to keep working on your themes. And it only takes one key admission or new lead to make a day’s worth of exploration worthwhile.

Video killed the radio star (and the unfocused deposition).

There is utility to exploring new territory, as described above, but all the exploration in the world won’t help you at trial if you don’t have crisp impeachment or playback-worthy material. In the age of Instagram and Snapchat, judges and juries are simply not willing to tolerate long, tedious video clips, and you will need clean questions and answers to use the material as impeachment if you cross the witness live. If you stumble upon something, frame a few quick close-out questions to make sure that you can use the bit later. You can frame it as “I want to make sure I’m clear: You had the meeting with the Grand Pooh-Bah on Tuesday? And he told you to shred the documents? And after that meeting, you went to your office and shredded the documents? And you then reported back to Grand Pooh-Bah? And on Friday he gave you a promotion and a Ferrari?” (OK, that hasn’t happened. Yet.)

Also, think about whether you really need all the words that people ritually say in depositions. Do you really need to read the Bates number every time you refer to a document? (Why do people do that? The documents are attached as exhibits!) Do you really need to say, “For the record”? Finally, keep your energy up — don’t be the one who drones on — and keep in mind the old adage that you catch more flies with honey than with vinegar.

Defending Depositions

Tell your story!

This is the No. 1 tip for defending depositions with an eye toward trial. Too many lawyers think their version of the case must remain hidden, to be revealed only at the last minute at trial. That is certainly one view of how to handle defensive discovery. It’s not a strategy that, based on our experience, seems to work. Your witnesses should always have a sense of the big picture and understand how their testimony fits. Your witnesses’ deposition testimony can help proactively make your case, even under aggressive questioning, and declaw your opposing counsel’s carefully crafted lines of attack. To succeed with this approach, you will need to know your story and understand how each of your witnesses fits into it.

Perform a direct exam.

In the era of increased use of depositions at trial, we rarely leave a deposition without performing a short direct exam of our witness. You never know when your witness might become unavailable, by resigning their employment with your client, moving out of the state or country, becoming incapacitated, or some new variant that we haven't yet experienced. When that occurs, your direct exam is the only way to counteract damaging testimony sought to be introduced by the adverse party. Start your direct exam just as you would at trial — with your witness' background, including a quick background about their family, education, work history and community ties. Then, take them through their part of the case, allowing them to reinforce your theories of the case. Doing this will take the wind out of opposing counsel's sails and, depending on the content of your direct exam, might make them think twice about using the testimony they elicited. It will give you counter-designations if the other side tries to designate deposition testimony from that witness. At the very least, it will allow the jury to see your witness as a sympathetic and relatable person.

Help your witnesses develop muscle memory.

Witnesses often have trouble adjusting to the non-natural format of a deposition. To help prepare them for this, we have found that conducting mock examinations is much more effective than simply telling them what to expect. You should ask your witnesses the toughest questions and see how they react. Your witnesses should consider not only their words but also their body language and tone. In addition, corporate witnesses should be prepared to discuss irrelevant subject matter that good plaintiffs' counsel might nevertheless explore in search of a sound bite. For instance, an executive of a large corporation should be prepared to talk about layoffs and any notable tragedies involving the company in a humane and sympathetic manner. Even if such questions are totally irrelevant to your case, there is no judge in the room to stop them, and there is always a chance they are later introduced under an unanticipated theory. A corporate executive speaking flippantly about one of these topics will instantly cost you in the eyes of jurors — even if the testimony has nothing to do with your case. Stepping back from the documents and thinking big picture (“What would I do with this witness if I were on the other side?”) can help prevent surprise problems.

Remind your witnesses to mind their manners.

Remind your witness that they are being videotaped — and that any of their testimony could be taken out of context and played for the judge or jury. They should not allow themselves to become visibly agitated or annoyed — even if opposing counsel's behavior justifies such a reaction. They should be on their best behavior throughout their deposition, not just when they are answering questions, and should imagine that the judge and jurors are in the room at all times.

By following the above rules, we can all have a lot of fun and re-enter the realm of normal human interaction. In all seriousness, while this is a lot of work, taking the time to think through some of these issues on the front end will make your depositions much more helpful at trial. Let us know how it goes!

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