

DEPOSITIONS

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PRELIMINARY WORK

Purpose of the Deposition

By the time you begin to prepare for a deposition, a significant amount of preliminary work should be complete. During discovery planning you should have decided about the general purposes of all the depositions in the case. When preparing for each deposition, this process should be refined until you have clearly defined the deposition's purposes and goals.

If this is a discovery deposition, are you seeking names, dates, places? Are you seeking to have documents produced and/or explained? Are you looking for an explanation of policy? If so, are you thoroughly familiar with the applicable statutes or regulations? Is a primary goal to observe the deponent and/or the opposing counsel? If so, what specific information do you hope to gather about their style or reactions? Do you think the adverse party may be intimidated by court proceedings and thus be forced to settlement?

If you are seeking to preserve specific testimony, is it because a crucial witness may not be available at trial? Are you seeking to fix the story of the deponent so as to narrow the arguments available to the adverse party? Are you conducting multiple depositions in the hope of getting conflicting testimony? If so, what specifically will such a conflict mean in your case? Do you need specific testimony from the deponent in order to eliminate the need to

marshall complicated evidence elsewhere (e.g., multiple-custodian business records, etc.) to prove some element of your case?

You must be able to answer questions such as these very clearly in order to be able to plan intelligently for the deposition. All other decisions hinge on these answers.

Who Will Be Present At the Deposition

Another important phase of preliminary work is in preparing those who will accompany you to the deposition. Someone should always accompany you. Your job is to concentrate on the interaction between you and the deponent, remaining alert to subtle factors such as momentum and evasiveness, etc. You will be listening to the answers for the implications they have for your continued line of questioning. Someone must be listening to you, objectively noting whether your questions are clearly stated and keeping track of the case so as to alert you to areas you have failed to cover sufficiently. Your partner should also remind you to identify demonstrative evidence for the record. A partner is imperative if your deposition strategy is to move from one subject to another to head off the damaging effects of your opposition's preparation.

Your assistant should be someone who understands the case and understands your deposition goals. It may be co-counsel, another attorney or a legal worker who is familiar with the case. You also may want to have your client present. Having the client present usually makes the other side slightly uptight. Be sure to prepare your client extensively so that she or he understands the

deposition's purpose and procedures. Check applicable Rules of Civil Procedure or Court Rules to determine who can attend depositions other than the parties.

WHEN

If fixing testimony is your goal, depose as early in the suit as possible. The longer you wait, the more time opposing counsel has to study your case and advise the deponent. An early deposition can catch the opposition somewhat off-guard and produce more candid responses. For example, multiple depositions conducted to obtain conflicts in testimony should be conducted close together, probably on the same day.

On the other hand, depositions can be ineffective ways to learn about your case. If your goal is to obtain information, you will be in a much better position to ask appropriate questions and recognize incomplete answers if you have investigated the case. Similarly, when the crux of a case is a policy or action for which only the deponent is responsible, thorough investigation should build to that person's deposition.

When dealing with ongoing policy and its effects, the advocate must also consider the effects of the deposition's age at the time of trial. Consider:

- An early deposition records an immediate intent to change the challenged policy. At trial no change has taken place;
- An early deposition records a policy explanation which is clearly damaging to your clients. At trial some policy has changed.

In the first instance, the deposition is strong evidence that no change is

imminent and court action is appropriate. In the second instance, the court might well adopt a “wait and see” posture, forcing you to abandon your deposition and document the effects of the “new” policy.

WHERE

The site again depends largely on the deposition’s purpose. If the information you seek requires a relaxed deponent who is willing to ramble on, the setting should be one in which the deponent is very comfortable — probably his or her home ground. Depositions of agency officials are typically conducted at their offices, since they then have ready access to relevant records.

If the deposition’s purpose is best served by catching the deponent off-balance, then forcing a visit to a neighborhood legal services office may be ideal for accomplishing your goals.

GOING ON THE RECORD

Preliminary Matters

Before going on the record, make sure the court reporter is settled and comfortable; for example, offer coffee and tea, give the reporter a pleading or motion which contains the case caption, your name and address, etc. Indicate where opposing counsel and the deponent should sit. If you’ve asked the other side to produce documents, you may want to copy them before the deposition gets started.

Then signal the recorder to begin. Identify yourself, the purpose of being present (taking the deposition of Ms. X), and the time and place of beginning the deposition. Have the reporter swear the witness. Identify everyone else present.

Stipulations

The “usual stipulations” customarily adopted as a matter of course at the beginning of a deposition include:

- Waiving objections to the reporter’s qualifications
- Waiving objections to defects in the deposition notice
- Preserving until trial all objections except as to form
- Waiving the deponent’s signing of the deposition.

The first two are routine. The third about objections to questions on evidentiary grounds will be discussed in the section entitled “When Your Side is Deposed”, *infra*.

The last stipulation, waiving the deponent’s signing of the deposition, deserves some critical thought. The deposition’s force as a sworn statement is enormously increased if the deponent has the opportunity to read the deposition, and sign it. It almost forecloses any attempt to argue an answer away as a misunderstanding of the question. If credibility is an important factor in the deposition, you should seriously consider not making this stipulation.

The “usual stipulations” include:

IT IS FURTHER STIPULATED AND AGREED by and between counsel representing the respective parties that proof of the official authority of the Notary Public before whom this deposition is taken is waived.

IT IS FURTHER STIPULATED AND AGREED by and between counsel representing the respective parties that all defects, if any, as to the notice of the taking of the deposition are waived.

IT IS HEREBY STIPULATED AND AGREED by and between counsel representing the parties that each party reserves the right to make specific objections at the trial of the case to each and every question asked and to the answers given thereto by the deponent, reserving the right to move to strike out where applicable, except as to such objections as are directed to the form of the question.

Introduction

The introduction’s purpose is to record that the deposition procedure was completely explained to the deponent and ample opportunity was given for the deponent to fully explain. This will diminish the effect of the deponent’s attempt to explain away answers at a later date.

The introduction should include a careful explanation that the deponent should ask for clarification if any question is unclear and explain any answer which she or he feels does not reflect the whole story. A thorough introduction will be useful at trial if you are able to impeach the witness because she or he testifies inconsistently with his or her deposition testimony. Conclude your introduction with “Do you understand the procedure? Do you have any questions?” and remember that head shakes are seldom audible on the written record.

STYLE OF QUESTIONING

Some lawyers write out their deposition questions ahead of time because it lessens the chance of failing to cover completely all important areas. Others suggest preparing an outline of important areas, but insist that the specific questions should be formulated in response to the deponent’s answer patterns.

You can combine the best of both worlds by using an assistant. You can examine the witness from an outline, and not lose eye-contact or be distracted from the deponent's answers. At the same time your assistant can keep track with the more detailed list of questions and alert you to any particularly significant questions which you may have missed or failed to phrase precisely.

Whatever your questioning style, you should have a very clear idea of exactly what you want to do with the deposition's first few minutes. Psychological factors are extremely important in most depositions; the first ten minutes of the deposition are the most important. What you are attempting to do during this time is establish firm control of the deposition and overcome the effects of the deponent's preparation.

For example, a witness will undoubtedly have been instructed to pause before answering to give an opportunity for objection and to answer the questions as briefly as possible without explanation. One way of overcoming this instruction is to begin the deposition in a substantive area in which you are expert. If the deponent evades or answers your questions incompletely, you can follow up with a series of questions demonstrating specific knowledge of the area.

This strategy can result in the deponent beginning to give you the explanations without waiting for what will then be perceived to be the inevitable series of follow-up questions. At this point you will be in a position to move to substantive areas about which will continue without your ignorance being revealed. If the pattern breaks at any point during the deposition, you can return to this strategy to re-establish the pattern.

For the most part, keep the deposition as low-key and apparently uneventful as possible. Don't clarify the deponent's misperception of legal theories or contradictions unless it suits your purpose. Ask for details about answers which you feel are exaggerations or lies, but it should be done without challenging or warning the witness or counsel that some answers are particularly important.

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One strong temptation to resist is the tendency to repeat questions which you consider important. If you are moving around from one subject area to another, you can repeat a question at another point in the deposition without arousing suspicion, but coming back with an immediate, "So you don't actually know whether the intake workers are aware of this policy?" is a clear flag to the witness to back out of a former answer.

As a legal services lawyer you should also keep in mind that we always are building a fund of knowledge, particularly with our "regular" adversaries, such as the Department of Social Services, housing authorities, big landlords, etc. For this reason you should get into the habit of always asking the who, where and how questions which your deponent's answers suggest, even if the information will not be useful to you in the instant case.

Conducting a deposition in the style of cross-examination can be useful when you want to frighten the opponent into settling. This style also should be employed when the attorney intends to use a deposition in lieu of testimony.

Even if you have not formally requested or subpoenaed documents you can use the deposition as an opportunity to get access to certain documents. For example, if the deponent mentions a certain document exists, you can request counsel on the record if she or he will produce it. Although not legally binding, a promise to deliver certain documents is likely to be kept when it appears on the record. Furthermore, if you are deposing an agency official in his or her own office, you may be given the document on the spot.

Get into the habit of asking "Isn't there a record on this? Who keeps that record? Will you send a copy of that record?" Even if the informal pressure doesn't produce the record, you then have the precise information as to what, where and who which you will need for a Request for Production. You should also ask to see copies of standard forms used for such record keeping so that you will know what specific pieces of information could be sought in a Request for Production.

When you are confronted with documents in a deposition, you must decide whether to identify them as exhibits which are attached to the deposition transcript. If you question from a document, make it an exhibit. The transcript should clearly identify the document you are discussing ("You are referring now to Exhibit C, the List of Participants?"). Belabor document identification because it will be more confusing if you don't.

Many attorneys use their cross-examination style toward the end of the deposition, applying it to a subject area which is extraneous to their case. This strategy enables them to observe the behavior of the witness and opposing counsel without affecting the overall tone of the deposition until after the substantive information gathering stage is completed.

A particularly effective ploy is using the cross-examination style to bring out some piece of information which is embarrassing to the witness. The embarrassing information should be something which is not legally relevant, since you would otherwise be giving away something that might be very useful to you at trial.

COPING WITH OBJECTIONS AND OTHER PROBLEMS

Assuming that you have stipulated to preserving objections except as to form, the absence of objections from the other side is not necessarily a good sign. Your assistant should be listening to you with the critical adversary's ear and should alert you to objectionable questions. Even though the appropriate objection is not as to form, most questions can be rephrased to get the same information in non-objectionable form. If the testimony may be useful at trial, attempt to rephrase. You should catch these problems; the clever adversary will not waste the objection that can be saved for trial when it will be too late for you to attempt correction.

Nevertheless, the other side will object. If counsel's motivation is to interrupt your deposition momentum and reassert some measure of con-

trol, then a brief argument accomplishes this purpose and you can move on. If the goal is to keep out information, counsel may instruct the witness not to answer.

You will undoubtedly be confronted with invalid objections. Sometimes objections are strategic; at other times opposing counsel confuses deposition practice with trial practice. For example, a frequent objection is that you are asking for inadmissible opinion. You clearly have the right to ask such questions in a deposition, even though inadmissible at trial.

Rephrasing your question enables the deposition to continue with only a short break in the action. It also may appear as though the opposing attorney has backed you down and your appearance of control will be diminished. These implications must be weighed. Some attorneys suggest that arguing before rephrasing gives you an opportunity to gauge how important the particular issue is to the opposition.

If rephrasing eliminates the objection, the probabilities are overwhelming that the objection has nothing to do with your question, but was simply an opportunity to break your momentum. If the attorney's purpose is to keep something out, then obviously your rephrasing is likely to meet further opposition. If the objection is that the question is so improper as to be prejudicial, then you must make some attempt to rephrase the question in proper form.

In both state and federal courts, the record must clearly reflect your efforts to work out any disputes. If counsel still instructs the witness not to answer, restate your question very clearly, and make certain that the deponent's response is a clear re-

fusal to answer. If the objection appears to be to only a part of your question, you should separate out the acceptable portion from the unacceptable portion and get a response from the deponent on both questions.

The information you are seeking may be important enough to you to seek an order compelling the answer. You may want the deponent and opposing counsel to believe that you are willing to go to court. Then again, it may not be worth all this trouble at all. Whatever your strategy, restate the question in a different form later in the deposition; it is entirely possible that you will get a response.

Weigh carefully before deciding to have the problem resolved by a court; it may not be a practical solution. Some judges and magistrates seem to think that it is more trouble to order something than not to, and there is extensive pressure on the parties to work out the problem independent of judicial interference. As in all aspects of discovery practice, the actual burden frequently ends up being on the wrong party. Even if you succeed in obtaining an order, it is likely not to be as specific as you would like, and you may find yourself with almost the same stalemate when you go back into the deposition situation. You should discuss the situation with someone who has had discovery experience with your judge.

If you do choose to move to compel the answers, you should be certain that the:

- Question is clearly stated
- Refusal is clear
- Attempts to resolve the dispute are on the record

You should practice going through this procedure beforehand so that you will have a set ritual for estab-

lishing these things. The more clearly it appears that you are reasonable and flexible and the opposition is unreasonable and foolishly obstructionist, the better chance you will have in court.

WHEN YOUR SIDE IS DEPOSED

The deposition setting can be very unsettling for a deponent. The witness sees an event which is dominated by an adversary, in which his or her own attorney is relatively silent and fails to give the expected opportunity to tell the side of the story not revealed through the opponent's questioning, and at which there is not even a judge to give an appearance of neutrality and authority.

At the same time, the examining attorney will probably be playing on the deponent's feelings of fear and abandonment, either by attempting to psychologically seduce the witness by being friendly and understanding, giving opportunities to explain, or by driving the witness to anger and resentment. Either way, the opposing attorney has total control of the deposition. Just as one of the most important success factors in taking a deposition is asserting control, one of the most important factors when your side is deposed is to prevent that from taking place. The first step is to prepare the witness extremely carefully.

The concept of the deposition can be explained in two different ways: (1) you have been summoned to appear and answer questions at a time and place chosen by the adversary, and it is your responsibility to give them as little information as possible about your case; or (2) we are going to have the opportunity to see the opposing party's case.

The first approach puts the burden on the witness and raises the level of apprehension substantially. The

most common legal services client is intimidated by legal proceedings, wants the attorney to handle things, and is afraid of messing things up. For this client, the second approach is probably preferable, stressing as it does the team effort (we instead of you) and indicating that the experience will be useful for our case.

The witness must understand what is going to happen and why, what the other attorney will be trying to do, and what your role will be. Setting out the deposition goals in a positive way ("we want to force them to reveal as much as possible about their information and their style") rather than in a defensive way ("we have to hide the ball") makes it easier to explain to the witness why it is necessary to avoid detailed explanations. For example, because we want to hear the types of questions the other side asks, we want to make it necessary for them to ask as many questions as possible.

Putting the emphasis on having the opportunity to watch the other side operate, rather than on telling the whole story, makes it easier to explain why you will probably ask few, if any, questions.

You will know many of the substantive areas into which opposing attorney will inquire. Discuss these areas at length with your witness. Also explain that unanticipated areas of questioning will probably arise for various reasons; e.g., red herrings or demonstrative of the examining attorney's knowledge. Tell the witness to answer these questions directly without gratuitous explanation.

During the deposition listen for rhythm, not for legitimate objections, unless you have legitimate objections to the scope of discovery. Interrupt in order to re-establish contact with your client, to diminish adversary

control, and when necessary to break the opponent's momentum. Since no fact-finder is present to be annoyed by your interruptions, your purposes can be served if you object and argue briefly when it suits your purposes. Be careful about objecting only when something is actually very important to you since it can flag the opponent.

Maintaining contact with your witness is critical. Think about seating. You may want to sit close to your witness for symbolic reasons; if you sit directly beside your witness, eye contact will be almost impossible. If a question obviously confuses the witness, be supportive ("That question was not at all clear, counselor"). Notice if your witness needs a glass of water, an ashtray, etc. You should do anything possible to break the hypnotic effect of the adversary's questioning and to remind the witness that she or he is not alone.

Usually no advantage exists by asking questions of your own witness. Do question the witness however if the witness has misunderstood a question, said something you know to be both mistaken and potentially damaging, and you are certain the witness will correct the information with a few questions. Some attorneys ask two or three questions about some insignificant area to maintain client confidence in their lawyering ability. Solid preparation should achieve the same goal. Don't forget to de-brief your witness after the deposition. Ask whether any questions remind the witness of any information that you should know. Gauging the psychological effect the deposition on the deponent also is helpful.

