

# abt REPORT

NORTHERN CALIFORNIA

Volume 11 No. 2

MARCH 2002

CHIP RICE

## On SECURITIES

**S**ecurities litigators take a lot of depositions, so I've seen a lot of good and bad techniques. Here are a few tips.

### Decide What You Want

Start preparing for a deposition by making a wish list of the factual data points that you want to get from the deponent. That requires thinking through what you need to prove and disprove at trial and how you or the other side will ultimately use this witness. Then, prepare an outline of every relevant question that you can think of.

### Ask Lots of Questions

It is almost always the question that you didn't ask — not the one that you did — that comes back to haunt you. If the witness will be at the trial, it is better to get a "bad" answer than none at all. Nothing is more frustrating when preparing a cross-examination than to realize that you don't know how the witness will respond to a key question.

Ask the important questions several times in different — and increasingly succinct — ways, so you will have a choice of answers to use as evidence or for cross-examination. You are shooting the rough cut, not the final cut, of a movie. Take lots of footage so you will have plenty of options when you splice it together for trial (or use it for a motion or settlement conference).

### Don't "Save" Questions

Fight the instinct to try to surprise your adversary at trial. There may never be a trial, and you will have lost evidence that could be used in motion practice or settlement. And you will be the one surprised if the witness has a good answer. It's better to take your best shots in the deposition. Just make sure to ask enough follow-up questions to make it very difficult for the witness to change answers later.

### Be Spontaneous

Try to use all of this preparation to make you more, not less, spontaneous, confident and direct when the deposition starts. Engaging with the witness is crucial to a good deposition. Your outline should be nothing more than a checklist to make sure you cover everything.

Look the witness in the eye and ask him or her what happened. Listen to the answer and try to connect with the witness. Ask follow-up questions like "why?" and "how?" Most witnesses believe that, if only someone would listen to them, everyone would see that they are right. You will be pleasantly surprised by what you learn if the witness knows that you are listening. Many wit-

nesses will start ignoring and even resenting their own counsel's objections for interrupting their story.

At some point, you need to go back to your outline to make sure that you get your wish list of key points. But leave those questions, which are necessarily more pointed, to the end of your examination on a particular subject area, so you don't start by putting the witness on the defensive.

### Be Nice

You want the witness to feel as comfortable as possible so the answers will be more candid and expansive. Be gracious from the moment that the witness enters the room. Let them know that they can ask for a break whenever they want. Ask them if there's anything that you can do to make them more comfortable. Juries notice how trial lawyers treat witnesses and other non-lawyers. So get in the habit of being on your best behavior.

### Don't Let Opposing Counsel Distract You

Defending lawyers will often try to bully you or get you into arguments. Such tactics usually diminish if they don't work. Listen to genuine objections and correct your question if appropriate, but don't be distracted. Keep eye contact with the witness and stay focused on the questions and answers. Remember that such tactics usually mean that you have hit a sensitive area, so just bear down.



Chip Rice

### Feel the Power

Socrates taught our law professors the pleasures of being the one that gets to ask the questions. Take full advantage of that power. If the witness is evasive, keep asking your question — or have the court reporter read it back — until you get a straight answer. Use any opening that the witness gives you. Long answers should be broken down and examined. Any sign of emotion or anxiety should be probed.

In particular, ask follow-up questions whenever the witness acknowledges doing or knowing of something bad. For example, don't stop when you get the witness to admit that a prior statement was false. Ask them why they didn't tell the truth. Ask them if they cared whether they told the truth. This is your chance to try out the tough, argumentative questions that you might want to ask in front of the jury. You may get an objection, but not an instruction not to answer.

Depositions are a unique opportunity to get to the point: to focus on how you can win or lose your case and to make the deponent and defending counsel understand — and feel on a gut level — the weaknesses of their case. I hope these tips will help you do that.

Mr. Rice is a partner at Shartsis Friese LLP in San Francisco. [crice@sflaw.com](mailto:crice@sflaw.com)

