

Button Up

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Resist the voluntary spirit when defending a deposition

In the last issue of this publication, I explained my approach to taking depositions. Now it's time to cover the other side of the coin.

Whether you're taking or defending a deposition, good preparation is essential. Defending also requires you — and your client — to resist your natural instincts. In particular, you both must fight the urge to “win” the deposition by trying to persuade opposing counsel that you are right. Doing so will just end up giving your opponent more material to help prepare his case.

As I wrote last time, the questioning lawyer is trying to develop as much information as possible. He or she wants to discover every relevant piece of information that your client knows and thinks, assess how your client will respond to both friendly and unfriendly questions and obtain admissions and other grist for cross-examination at trial. But your opponent has a limited amount of time and skill and has to face many distractions so he will never manage to ask every question that he should.

The worst thing that your client can do in this situation is to help your opponent by answering questions that haven't been asked (like “Why?” or “How did you feel about that?”). Simply put, the deponent is not there to help. She is obligated to answer questions truthfully but not to volunteer information. Anything more — such as trying to speed up a desultory examination or even making a joke — is just asking for trouble.

Of course, even the most inexperienced lawyers know that a deponent is not supposed to volunteer information. Even so, almost every deponent does just that. Chalk it up to human nature. Most people want to be liked and understood, and volunteering information seems to be particularly tempting to exactly the type of person who should make a great witness: smart, articulate and engaging. In particular, people who have made a career out of talking will find it very hard to break old habits, as I was reminded when I was recently deposed. My lawyer had to remind me to stop being so chatty and eager to please.

With that in mind, it's your job to convince your client to play defense and not try to score. In other words, a deponent who is doing a lot of explaining is also losing. The best approach is to focus on the question at hand without thinking about what could come next. To use another sports metaphor, advise your client to hit the ball squarely back over the net, take a deep breath and wait patiently.

Don't expect your client to avoid volunteering without doing some practice beforehand. You will need to spend some time role-playing in order to develop the discipline to stop an answer as soon as possible. Try to get someone else to play the role of the deposing attorney so that she can ask the tough questions in a confrontational way without upsetting your relationship with the witness. That will allow you to play the same role that you will play at the deposition itself: making objections and sometimes instructing your client not to answer. Your client can also practice pausing before answering a question so that you will have time for any objection or instruction.

Such role playing will help witnesses get comfortable (but not too comfortable) with the process so they don't freeze up under pressure. You may be surprised how many witnesses flub easy questions, such as whether they have produced all of their documents. To take another example, if asked if they have talked to anyone about their deposition, many witnesses will quickly say no without thinking. You have to remind them that they have talked to you and that they should say yes and then wait for the next question. Reassure them that you will object and instruct them not answer the next question if that would reveal the substance of any privileged communications.

While you're at it, consider videotaping the rehearsal session so that your client can see how he is doing. It's important to practice presenting a calm and reasonable demeanor even when facing hostile questions or making an unavoidable admission. Getting angry will make it much more difficult to focus on simply and briefly answering the questions. And a tantrum is almost guaranteed to yield some fruitful material for your opponent.

Be careful, however, that you are not sending the wrong signal. Remind the witness, early and often, that it is essential to give a completely truthful answer to any question that is actually asked. Testifying falsely is perjury and almost always backfires.

It may be tempting to give a false answer when the heat is on but reality is very sticky and can trip up a liar in many different ways. There is almost always a document, a witness or some other piece of evidence that the deponent does not know about that will contradict false testimony — remember Monica Lewinsky's famously stained dress. You and your client should assume that, by trial, your opponent will find any evidence that refutes your client's testimony and that this will damage his credibility, perhaps irrevocably.

Litigators disagree, however, about how hard the deponent should work before the deposition to remember the truth. Many lawyers seem to think that ignorance is the best defense and that opposing counsel will not be prepared to refresh — or contradict — their witness' recollection with documents or other evidence. So they do nothing before the deposition to help their deponents recall what happened. I think that approach is short-sighted because someone on your side will have to explain the bad documents and other bad facts in the case at trial, if not before. A witness who does not remember anything at his deposition will have a very hard time doing that.

In other words, if you want your witnesses to preserve their ability to be effective, it is not enough to simply tell them to be honest. Instead, you should help them by showing them what the documents and other evidence will show. Almost no one can remember all of the details of a complicated transaction or other series of events that happened years ago. Because we can't simply play back a memory tape, we have to connect the dots that are accessible both in and outside our own heads.

I try to show a prospective deponent every important document and tell them as much as I can about what other witnesses and our own discovery responses say. Otherwise, the deponent may reconstruct a facile but faulty version of events that can be conclusively contradicted. That will be very disconcerting to the witness if confronted with the contrary evidence during a deposition, especially if it's caught on videotape. By contrast, a witness who knows about all of the important evidence before the deposition will have a much more complete recollection of the relevant events that is consistent with the key documents and other testimony.

The process of reviewing evidence and recollections takes time so try to have more than one preparation session and spread them over a few days or even weeks. I've found that the more time that witnesses spend mulling over what happened, the better they do at deposition and trial.

I've dealt mostly with preparing for the deposition because that is when the most important defense work is done. Once the deposition starts, make sure that your client feels comfortable and don't let your opponent bully or badger him. But don't try to steer the deposition. Your opponent will be more impressed with your client if she answers the questions without you coaching her with speaking objections. And the worst thing that you can do is begin objecting only when your opponent starts to draw blood. Any good opposing lawyer will take that as a signal to slow down and bore in. If you are going to make a lot of objections, start early so that your objections don't become a barometer of your anxieties and the weaknesses in your case.

By the time the deposition starts, most of your work should already have been done. If your witness has been well prepared, you can sit back and watch — or at least try to give opposing counsel the strong impression that you are doing so. Your client will feel more confident and comfortable — and your opponent less so — if you project those qualities yourself.