Questions, Period - The art and science of depositions

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Taking depositions may seem easy. But it is difficult to do well and almost impossible to do perfectly. At some point, whether it's the moment that you're stepping into the elevator right after your deposition has ended or later on, when you're reviewing the transcript to prepare for trial, you will almost certainly think of at least one more question that you should have asked.

Part of the problem results from having to manage conflicting demands and impulses while juggling exhibits, watching the clock and fencing with opposing counsel. You need to focus on the questions and issues that you've identified in advance but still be prepared to pursue any surprising answers or other openings. You also need to overcome your natural instinct to avoid questions that might make you or the witness feel uncomfortable. At the same time, you need to keep the witness talking by being polite and engaged.

The primary point of a deposition is to find out everything you can about what the witness knows. You don't want to be surprised by something that the witness says later in a declaration or testimony. In addition, a deposition is a great opportunity to get particular admissions in easily digestible form that you can use in motion practice or cross-examination – what I like to call "sound bites." You need to use both open-ended questions that invite the witness to be expansive and leading questions that force him or her to accept particular propositions.

One of the questioner's biggest advantages is that most witnesses believe that they are the hero of their own story and are eager, if given the chance, to explain why. If you listen carefully, the deponent will keep talking to try to convince you that he is right. And he may also be willing to concede certain points to show you that he is fair-minded.

GETTING PREPARED

First, find and review all of the relevant documents, particularly every document from or to your deponent, in chronological order so that you can understand the sequence of events. Then pick the documents that you may want to use as exhibits. Err on the safe side because you don't want to get caught without a document that you may need. Next make enough copies for the people attending and put them in folders by date or topic so that you can quickly find them as needed. You don't want to be fumbling with documents when you should be giving the witness your full attention.

I like to go into the deposition with three sets of tools: a basic outline of the topics to be covered; a highlighted set of the potential deposition documents; and a wish list of the admissions that I think I can get.

The last item is the most idiosyncratic but I think is also the most important. By the time I have read everything that the deponent has written or reviewed, I usually have a good sense of what and how the witness thinks. I also know what documents help my case and what will be difficult for the deponent to deny.

I like to come up with a list of short, declarative sentences that the witness will have to admit (or look bad refusing). It could be as simple as verifying a signature on a contract or confirming that a letter wasn't answered. But I try to think more broadly about all of the requests for admissions that I would serve if I didn't think that opposing counsel would parry the effort at great expense by debating about the meaning of each word of my requests. By contrast, in the flow of a deposition, a witness will admit to facts that are obvious and undeniable to anyone but a lawyer.

GETTING STARTED

Because I hate to be distracted by having to take notes, I usually arrange for a live feed of the rough transcript through a laptop. Doing so lets me pursue a line of questions without breaking eye contact with the deponent, check how the answers look in print and then ask any clarifying questions that may be necessary. It also helps to have an immediate record of the exact phrases used by the witness in order to set up more probing questions.

Most lawyers, including me, start the deposition with an explanation of the process in order to preclude the

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deponent from subsequently repudiating testimony by saying that she did not understand what was happening. Keep this part as short as possible because it eats up time better spent on the witness talking. Emphasize that the transcript may be used as evidence in court and ask the witness to tell you if she doesn't understand a question. I usually end with the following series of questions:

? Do you understand that what you say may be used as evidence?

? Do you understand that you have to testify as completely and honestly in the deposition as if you were in court?

? Are you aware of any reason that you might not be able to testify completely and honestly?

? Are you under any medication that could affect your ability to testify completely and honestly?

The last question is a judgment call. It often comes as a surprise to a deponent and can be a healthy reminder of who is in charge. But it also may chill the rapport that you are trying to develop so make this choice carefully.

ASKING QUESTIONS

Once you are through with the preliminaries, get to the point while you are still fresh and before the witness is too comfortable. Ask real questions that matter, including some of your favorite difficult ones, before the first break. Save the questions about educational and work experience for the afternoon, when your energy may be flagging.

The biggest mistake that you can make – maybe the only real mistake – is not to ask enough questions. I ask every question I can think of, and I ask the really important ones several times in different ways. One relatively easy way to do this is to walk the witness through the key events before you show him any documents and then work through your deposition exhibits in chronological order. This approach provides you with many opportunities to revisit all of the core issues in the case and to refine your sound bites each time. But be prepared to break from your pattern and show the witness a key document during the first phase (or out of sequence in the second phase) if that is the best way to focus the witness. And be willing to follow up immediately on any line of inquiry that is bearing fruit and then going back to your planned order when you are done.

There's almost never a good reason not to ask a question. Your instincts, however, may occasionally pull you away from certain questions. Even seasoned lawyers sometimes find it hard to ask a question if they fear the answer will hurt their case. And yet that is exactly the kind of question that is the most crucial to ask. After all, it's better to know the worst now so you won't be surprised at trial. You also need to be able to understand your adversary's best case in order to realistically advise your client about settlement and going to trial.

Even more important, you need to steel yourself to ask questions that will make the witness uncomfortable. Why did you do this? Why didn't you do that? Were you concerned that so-and- so did not know what you knew? Did you ever think that you should tell him? When forced to justify themselves in ways that they don't expect, many witnesses will come up with transparently flimsy excuses. But if you don't get them on the record, they (and their counsel) will have much more considered and persuasive explanations by the time of trial.

Don't let the deponent evade your questions. Be firm, fair and persistent. Instead of arguing with the witness, try to make your questions shorter and clearer. If necessary, explain why the answer wasn't responsive and then reframe your question. Deponents can run but cannot hide if you refuse to give up. But don't be a bully. If you feel your temper rising, take a break (or at least a deep breath) and try a new line of questions. You can always go back to the topic later.

Just as you want to stay as engaged as possible with the deponent, you want to do the opposite with the deponent's counsel. Make sure that you understand any bona fide objections so you can frame a better question and get the answer admitted as evidence. Act quickly and decisively to squelch any speaking objections or coaching. Otherwise, try to ignore opposing counsel. The worst thing that you can do is get into an argument with the other lawyer. This is almost sure to distract you, and just about any colloquy between lawyers is a waste of valuable time and transcript pages.

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In fact, if you keep showing the witness that you want to hear what he has to say, you may both stop listening to opposing counsel. Getting that kind of undivided attention is so unusual and flattering that it can be downright intoxicating to a deponent. Oddly enough, if you remain attentive and respectful, the deponent starts hearing his own lawyer as a buzzing distraction that keeps getting in the way of telling his story. When that happens, the deponent may forget what he was told before the deposition about not volunteering information and might also stop paying attention to the cues in his counsel's objections.

Finally, when the bell rings and the deposition begins, try to relax and enjoy yourself. You can't engage witnesses — much less focus on their areas of weakness as revealed in real time — if you are thinking defensively or rigidly or if your nose is stuck in your outline or exhibits. Instead, be prepared, pay attention and stay aggressive. Good things will happen.

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