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On LITIGATION SKILLS

Taking the deposition of a hostile witness is difficult and stressful, especially when the deponent is not just adverse but downright antagonistic. But, as the questioning lawyer, you gain a tremendous advantage if you keep your cool and the witness or opposing counsel doesn't. Conversely, you have much more to lose by getting angry than does the witness or opposing counsel. You need to get information and admissions as efficiently as possible, so don't waste time squabbling. Focus on making your record, not on winning arguments or friends.

Hostile Deponents

I recently deposed an expert witness who simply dripped with contempt. An Ivy League professor with high-level government experience, he conspicuously returned "important" phone calls during breaks in the deposition and simply could not believe that I was going to waste his time for a whole day. So he took every opportunity to lecture me about why my questions, my clients and my case were stupid.

It was a tough day, but I had an inherent advantage. I got to keep asking questions and he didn't get to leave. By being cordial but persistent, I think I eventually convinced him that the fastest way out of the room was to answer my questions. And his contempt made him careless, so his answers often contained good fodder for subsequent cross-examination. Best of all, he gave me plenty of information about how to push his buttons and how to show him at his worst at the trial.

When faced with a cantankerous witness, your most important weapons are preparation and discipline. You need to be ready to show the witness the most important documents — especially the ones that will shake his or her self-righteousness. And you need an outline of questions and desired admissions. It can be used as a guide when things are going smoothly, and as a more rigid script, if you are feeling really battered, until the mood in the room calms down.

Once the deposition starts, be as courteous as you can. Remember that your finder of fact may be reading or hearing the transcript, so try to sound like the "good guy" if there are disputes. And some hostile witnesses respond to courtesy so it is always worth a try.

But that doesn't mean that you should back down from your questions. You are entitled to answers — and even the crankiest deponent knows that — so don't be put off by filibustering. Just have the court reporter read the question back and ask the witness to answer your question. And do that as often as it takes to make a clear record. If you are truly getting nowhere, change topics and come back to the area later from a different angle.

Take your time, no matter how uncomfortable the witness (or opposing counsel) is trying to make you feel.

Finally, be prepared to seek relief. Some people just won't play fair if they think you have no remedy. Make sure that you understand the particular rules for calling your court or arbitrator and, if possible, try to make arrangements in advance. Such arrangements usually have a very healthy effect on everyone involved.

Hostile Counsel

Witness hostility can work to your advantage if it makes the witness more loquacious and expansive, but a hostile opposing counsel is just a nuisance. Unlike the witness, the less opposing counsel talks on the record the better, so you are better off engaging as little as possible with an adverse attorney who wants to argue with you.

Opposing counsel who pick fights in depositions are often just jerks who can't help themselves, but sometimes they are consciously trying to upset and divert the questioning attorney. They figure that every line of colloquy in the transcript is one less line of information that could help you, and they realize that many lawyers, especially inexperienced ones, lose their concentration when under attack and start rushing to complete the deposition.

The best way to handle intentionally antagonistic lawyers at a deposition is to ignore them as much as possible. Complain briefly but repeatedly on the record if they are coaching the witness with "speaking" objections, but avoid getting into lengthy arguments, even if it means letting them have the last word. Keep your eyes and attention on the witness, and be ready to ask another question as soon as the defense counsel stops speaking. If the other lawyer is consciously trying to rattle you by being hostile, he or she will probably stop if it isn't working, especially because obstructionist posturing can end up distracting and annoying the witness.

The true jerks are more difficult, but ultimately less dangerous, because they are driven by their own internal demons instead of their clients' interests. Just make sure that their tantrums and threats are preserved in the transcript. And, if necessary, state on the record that they are shouting or doing anything else that is inappropriate but otherwise wouldn't be captured by the court reporter. But stay focused on the witness, who will often respond to such counsel shenanigans by being more eager to get his or her own story out.

Hostility is an unpleasant fact of life for litigators, but you can turn it to your advantage by keeping your head while others are losing theirs.



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