LITIGATORS CORNER:

Some Deposition Dos and Don'ts

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The Deposition Handbook: Strategies, Tactics and Mechanics describes depositions as "the most important of the pre-trial discovery tools." It is therefore very important that depositions be taken in a way that is most advantageous to your client and your case. There are some observations and simple tips I'd like to pass along in this column that I have gleaned from my years of practice. First, taking depositions is messy and imprecise. It's hard work. The process is so complex that I sometimes wind up making notes about my notes because I am trying to cram everything into my head.

But depositions provide a great opportunity to get evidence that supports your case, or undermines your adversary's. There are some themes — I don't call them rules because they aren't fixed and sometimes shouldn't be observed — that improve your chances of a useful result.

There are several points to keep in mind when planning to take a deposition. First, prepare. By that, I do not mean only looking at the stack of paper produced by the litigants. We lawyers are so oriented to paper in patent cases that it tends to capture and shape everything that we do in a lawsuit. If you bury yourself in paper in preparation for a deposition, you run the risk that you will not achieve your goal, and that the deposition result will be influenced too much by what is in the documents. That's particularly bad if the documents you are using are those produced by your adversary. It's even worse if your adversary has done a selective job of production.

You need to think hard about the role the witness who is being deposed plays in the case. Step back and think carefully about which questions asked of the witness will help your case. Our firm has a case where the witness was exposed to our client's trade secrets, and then passed them on to another company. The use of the trade secrets was necessary because the witness's company was having trouble developing its own technology. Thus, our goal was not to question this witness about every piece of paper bearing his name — a problem which is accentuated by today's widespread use of email. Instead, we wanted to establish his close contact in conversations with our clients and with the persons ultimately using the trade secrets. A timeline and contacts were more important than the huge amount of paper.

Don't be just a page-turner at the deposition. Many lawyers get themselves a big stack of paper and work their way through the stack. They mark each page or group of pages, drone out the bates numbers, and pass each one to the witness in turn. Then they ask questions like "Did you write this?" and "Read the first sentence of the third paragraph, and tell us what those words mean to you." If something doesn't help your case, skip it. One of the best prosecutors I knew in my days as an Assistant U.S. Attorney taught me not to use a document at trial just to over-prove my case. Minimize the number of exhibits. If it doesn't add something to your case, out with it. Juries and judges need and appreciate brevity and simplicity.

Don't get me wrong. There are documents that you will want to question a witness about. For example, in our case, we asked about a confidentiality agreement in order to pin down the fact that the witness had seen and signed it. We also asked the witness about seeing our client's presentation of its confidential and new technical developments. Those documents are crucial to proving our case, and questions about them are therefore important. But don't lock yourself into the paper. Don't think that you have to ask questions about a document simply because it was produced by the defendant and bears the witness's name.

A number of my guidelines boil down to preserving your time and using it as efficiently as you can. The time limitations imposed by the Federal Rules of Civil Procedure allow seven hours of testimony. You might get more than one day with a witness who is a party to the lawsuit, but seven hours is probably all you will get with third parties. Many lawyers these days have the court reporter or a videographer run a time clock, so that they can know exactly how much time has been used and how much remains. You must use your limited time as efficiently as possible. You should have your exhibits ready and copied, and perhaps even marked, before the deposition begins. Give copies to the opposing party and the witness's lawyer, if there is one. Otherwise, every lawyer has the right to see a document before the witness sees it. If there is only one copy of the exhibit, they can all scrutinize the exhibit while you cool your heels.

Consider how much you need to know about a witness's background before deposing him. If you are deposing an expert or an inventor, his or her background may be important. But remember that experts have résumés; you don't need to question them about what is on their résumés unless, for example, you have reason to believe the résumé is phony, as occurred in one of my cases. I was doing commercial litigation at the time, and the parties were disputing who was owed a commission for a sale of a business property. After studying the broker's résumé, I realized that he could not possibly have all of the academic creden-

tials he claimed. He had lied to everyone, both to the buyer and to the party selling the real estate.

But most of us have seen a lawyer drone on for the better part of a hour, and sometimes much longer, delving into where a witness lives, where he grew up, where he went to high school and college, and his entire employment history. I saw a lawyer do this for most of the morning in one deposition. Consider whether this background information is really needed. Don't ask it just because someone put it on an outline.

Don't waste any time arguing. I remember a deposition where I made an objection. The lawyer questioning the witness decided to respond to my objection with an argument of his own. I thought, well, if he wants to argue, I can do that too. So I responded to his comments. To my amazement, he responded again. So it went, back and forth and back and forth, until one of the other lawyers allied with my adversary interjected, "Gentlemen, gentlemen, we're losing our time!"

Another expensive time-waster is videotaping. It can be tactically intrusive, too. Just when you get on a roll with a witness, and are getting some good answers to your string of questions, the videographer puts a note in front of you that you must stop so that he can change his tape. That isn't an interruption you want. Then there is the additional equipment, which can be cumbersome, as well as the delay when one of the lawyers tries to walk out of the room with his microphone on.

One exception to this rule about videotaping is when the witness is an important one who is not expected to be available at trial. In cases like this, some lawyers will videotape as a means of dealing with or preventing abusive tactics. But be aware that videotapes (or CDs or DVDs) also make preparation of pretrial orders more complex. And this additional organizational effort comes at a time when everyone is heavily burdened with trial preparation, and requires advance planning and some additional technical skills. In one of our trials, the opposing law firm videotaped every witness. At trial, we designated testimony for the videotaped witnesses. But our opponents prepared videotapes that included only their designations, and not ours. The court excluded the tapes.

Ask short questions. This serves two purposes. One, a short question is clear and less easily evaded. A long question loses a lot of its value for quotations and for impeachment at trial. The trick is to keep your question short, and not change it. If the witness evades it, you must be able to repeat it precisely, so that the transcript shows the witness is evading. You cannot do that if your question is more than a few words long, or if you modify it in midstream, or if you include two or more questions in the guise of one. Here is an example of a question that is too long and was asked before the examiner had decided what question he really wanted to ask:

> I'm not looking for the inference. We'll jump back to that, but I want to get specifically at your discussions and the knowledge that you had at the time you signed. Had you given or had you - strike that. Had you asked outside counsel, either Mr. Smith or Mr. Jones, as to whether they had reached an opinion that claim 15 was invalid in view of Adams?

This question has over sixty words, several sentences, and a change of direction in midstream. It's easy to do this. We all have made this mistake. Train yourself to avoid it.

For more routine questions, where you are not chasing an evasive witness, you should generally use read-backs by the reporter; unfortunately, lots of questioners tend to repeat, and then modify, their questions. Why is a read-back better? Three reasons. One, it preserves the question exactly as asked; this cuts down the witness's ability to evade by "misunderstanding." Two, it eliminates the need for the witness's attorney to restate objections. Many attorneys will repeat their objections anyway; if so, a short reminder that it isn't necessary to do so may be appropriate. Three, if the witness still persists in not understanding a simple question that has been read back exactly as asked, or if the witness's attorney repeats objections, you have a much better basis to charge the witness with wasting the allotted time.

Don't use "patent-ese" if you can avoid it. "New" and "old" are shorter words — and clearer to a jury or judge — than "unanticipated" and "anticipated." Another time-waster is questioning a witness about the complaint. Everyone knows the lawyer wrote and signed it. There may be exceptions. If an injunction or a temporary restraining order is being sought, the party moving for that relief probably filed a verified complaint, which is effectively an affidavit. But that is the rare exception. Frankly, I think that grilling a witness about a complaint can be made to look a bit unfair. Even if it isn't, it is definitely a time-waster.

Listen to the witness and follow up. If there are two of you at the deposition, have the other person take notes. You concentrate totally on the witness. You don't want to miss a stunning admission, like the following, because you have your head buried in your notes:

Question: So, Mr. Smith, what happened to your wife on Monday?

Answer: I murdered her and stuffed her body into the furnace.

Question (lawyer studying his notes): So is this your signature on Exhibit 3?

Follow up. Follow up. Years ago, an in-house lawyer asked me for a copy of my deposition outline. I laughed and said I never did one. I have always found it preferable to rely on (1) knowledge of the case and (2) a general list of topics I want to pursue. Some of you are probably more comfortable with an outline. But you have to know when to ignore the outline and look up from your notebook. You may start getting good testimony from a witness on a topic not on your list. You have to pursue it immediately, ignoring your outline. So listen to the witness, and take advantage of unexpected opportunities.

Complete your questioning. I can't count the number of lawyers who don't adequately probe a witness's full recollection. The conversation may be crucial to your case; make sure the adverse witness has told you what was said in words as close as possible to the original, as well as who said them, and when and where this occurred. Corner the witness. Don't leave any gaps that the witness can escape through at trial.

Any good questioner can come up with more rules. I think the only real rule is that there are no rules. There are simply things that are good to do, or not good to do, in a deposition. They can change. I suggest you think about your theory and how the witness can be used to support it. Study the evidence. Then grill the witness with short questions. Leave your outline at home. IPT