Your First Deposition

by Ronald M. Sandgrund

The difference in preparing for the first deposition and the one-hundredth is this: nothing. In the first deposition, and in each succeeding deposition, the attorney needs to:

1) know the facts of the case cold;
2) prepare meticulously; and
3) listen to the answer before asking the next question.

The minute you forget the need for rigorous deposition preparation, you become that loathsome creature, *advocatus lethargus*. If you have never met *advocatus lethargus*, this attorney is easily identifiable by the newspaper or the Internet-linked notebook computer brought to the deposition, and the familiar words uttered: "I could do this deposition in my sleep" or, sometimes, "I represent only a small player."

This article describes how to prepare for and take or defend a first deposition—and every deposition after that. The discussion focuses on practical, not legal, concerns. At the end of this article is an appendix including summaries of five depositions, with examples of some things to do and not to do in deposition. The reader can consider these examples in light of the information presented in this article.

Taking a Deposition

A deposition often is the most adrenaline-producing drama a trial lawyer can enjoy next to the actual trial. The joy does not come from browbeating or embarrassing the witness—such behavior only causes the witness to withdraw and to guard his answers. The fun comes from developing a rapport with someone who knows your purpose is to undermine his or her case, harvesting the fruits of a thorough preparation, and garnering the facts and admissions you need to maximize your client's chances of a good result—all of which flow from the give-and-take of a well-managed deposition.

Taking an effective deposition means knowing the case, understanding the rules, properly gauging the witness's state of mind, fully engaging the witness in a dialogue that is at once disarming and elucidating, and knowing when and how to alter your game plan. Before stepping into the conference room for a deposition, consider the following pre-deposition checklist:

1) know the rules of procedure and rules of evidence;
2) know your case;
3) try to understand how the witness thinks, whether he or she is a fact witness or an expert witness;
4) identify your goals and prepare an outline;
5) anticipate objections; and
6) make a clean record.

If you follow these steps, you will be prepared for every deposition. If you are prepared, you will be less nervous; if you are less nervous, you will perform better.

Know the Rules of Procedure and Rules of Evidence

A deposition is a legal proceeding. Detailed procedural and evidentiary rules apply. Every lawyer should study these rules, consider how courts have interpreted them, and evaluate how they will affect the usefulness of the deponent's testimony. Unless you know what testimony is admissible at trial, you cannot know what testimony you need to elicit. What good is it to secure a seemingly damning admission when it rests on hearsay or speculation, rendering the testimony useless at trial or in support of a summary judgment motion? The attorney needs to know when to question the witness further and try to turn an inadmissible statement into one that is admissible.

For example, if a witness testifies that he or she heard a nonparty say something valuable to your case, turn that hearsay testimony into a nonhearsay statement. Establish that the nonparty's statement is not hearsay because it falls within one of the hearsay exceptions under C.R.E. 803(1) to (4): (1) it is a spontaneous present sense impression;[1] (2) it is an excited utterance;[2] (3) it is a statement of the declarant's then existing mental, emotional, or physical condition;[3] or (4) it is a statement made for purposes of medical diagnosis or treatment.[4]

If a witness speculates that a company employee "might" have done something useful to your cause, turn this speculation into admissible testimony under C.R.E. 406 by confirming that the testimony simply describes the "habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses," that is relevant to proving that the "conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." If you know the rules of evidence well, you will have a leg up on transforming interesting, but potentially useless and leaden testimony, into the lawyer's equivalent of gold—admissible evidence.

Similarly, knowing that Rule 30(d)(2)[5] places a presumptive limit of seven hours on a witness's deposition allows you to consid-

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er in advance and be prepared to address the following potential problems:

- What if you need more than seven hours to question an expert regarding the content of his or her highly technical, 400-page report concerning defects in a 200-unit condominium complex requiring repairs exceeding $20 million?
- What if another attorney squanders six deposition hours with a repetitive, argumentative, and mostly irrelevant examination, and you still have three hours of legitimate questions?
- What if, during two hours of examination, opposing counsel unfairly establishes on the record that your questioning is wasteful, unnecessarily slow, often irrelevant, and seemingly intended to wear down the 87-year-old diabetic client who suffers from angina; and that opposing counsel and client are leaving in thirty minutes, so you better ask what you need to ask about the plaintiff's slip and fall accident?

There is no magic formula regarding how to handle these problems. The lawyer must approach these issues with common sense, be fair, communicate with counsel with an eye toward reasonably resolving the dispute, and make sure the record reflects all these efforts if the matter cannot be worked out.

Know Your Case

A good lawyer simply must know the case cold. Such knowledge includes the case facts, the parties' legal theories, and the primary areas of dispute. Previous deposition testimony and exhibits, written discovery, document productions, and every other relevant scrap of paper should be reviewed. Notes and outlines can be useful reference material, especially during breaks and when others are questioning. However, some of the best testimony is developed during the give-and-take of seemingly innocuous exchanges, provided the examining attorney knows the admissions needed to support his or her arguments and is prepared to weave the available facts into a line of questions that bring the witness as close as possible to making the concessions sought. In the trial lawyer's "deposition heaven," all witnesses become "bobble-heads," nodding and answering "yes" when you want them to answer in the affirmative, because you have led them down a testimonial path from which they cannot emotionally or logically escape.

However, even the best laid plans go awry, and flexibility and preparation are key. For example, consider an attorney who conducts a telephone interview with an amicable and important witness the night before the deposition. Beginning the scheduled two-hour deposition the next day, the attorney knows the witness's articulate testimony will be devastating to the other side on several important issues. The witness, friendly as ever, promptly contradicts himself or herself on everything said to the attorney in the phone interview and gives very damaging testimony. Now, the lawyer could choose to challenge the witness on the differences between what the witness told him or her the night before and what the witness had just testified to, but what good would that likely do, other than turn the lawyer into a possible witness? Fortunately, the careful lawyer thoroughly prepares for the deposition regardless of what the witness said during the interview, and over the course of six hours is able to obtain sufficient ammunition to effectively neutralize most of the witness's testimony through cross-examination at trial.

Know the Lay Witness

A person's self-image is closely tied to the his or her values, beliefs, and ego. This is important to keep in mind when questioning a witness.

Generally, a deponent knows that the examining attorney will try to challenge his or her truthfulness, reasonableness, and/or knowledge regarding important events. By first asking questions that allow the witness to present an honest, reasonable, and knowledgeable image, the attorney can subtly let the witness know when testimony begins to deviate from prior admissions, the exhibit record, common sense, and most important, from the self-image the witness desires to show the world.

For example, a witness may consider himself or herself a careful driver, a conscientious builder, or a prudent product designer. By working with this internal image, an attorney's thoughtful questions can help the witness to embrace an ever-tightening circle of questions consistent with this perspective. When asked about the very conduct for which he or she is being sued, the witness very well may acknowledge that what he or she did was a "mistake," or that he or she would agree that much less risky choices were known and available. Although not necessarily an admission of "negligence"—a harsh word fraught with negative meaning, embarrassment, and legal consequences—a jury may not perceive a big difference between "negligence" and admitting to a mistake or having chosen a risky course of action.

Know the Expert Witness

All the strategies that apply to preparing for lay witness depositions apply doubly for expert witnesses. It often is worth the expense to consult with your own testifying expert or a hired, nontestifying expert to prepare for deposing the other side's expert, especially in complex cases. It is helpful to request and obtain a copy of the expert's file, work notes, and time sheets before deposition; however, if this is not feasible, subpoena these papers to be produced at the deposition and take the time to go through them either before the deposition starts or during a break, even if it becomes necessary to pay the expert for time spent.

Many lawyers try to read every published paper and written report generated by the expert that reasonably relates to the case at hand or the way the expert thinks. "The way the expert thinks" refers to the extent to which the expert has demanded hard data, valid statistical analysis, peer-reviewed papers, or other concrete evidence to support past opinions and conclusions. Then, if the expert is relying on soft or incomplete data, idiosyncratic measures, intuition, or past experience in the case, by highlighting this disparity you can try to show that the expert is less certain of his or her opinions and conclusions, and more willing to "bend" internal rules on what qualifies as a proper record.

Taking a competent, experienced, and well-credentialed expert's deposition may be a difficult task. Even seasoned lawyers find that they might spend eight hours deposing an expert only to garner ten minutes of useful cross-examination at trial. The best way to learn how to examine savvy experts is to watch and learn from an experienced lawyer plying his or her trade.

Identify Your Goals and Prepare an Outline

Equipped with knowledge of the rules, the case, and the deponent, you are ready to identify your goals and prepare your deposition outline. Your goals might be to find out if the witness's credibility is subject to attack because of an interest in the lawsuit's outcome or an inability to accurately report what was perceived.[6] The deposition preparation outline should identify the issues you wish to explore with the witness and on which you need to pin down his or her testimony. The outline is not a script; it is merely a checklist to help ensure you have covered all relevant issues or to assist in formulating your next question.

Good starting points for this outline are the elements of each claim for relief, the elements of all affirmative defenses, and the claimed damages. Then, identify the relationship between these matters and the witness's potential knowledge. If you are deposing a witness with special knowledge of a particular subject, such as an eyewitness to an accident, a doctor who treated the accident victim, or a friend who observed the plaintiff's rehabilitation over time, focus and expand on these subjects in your outline.[7] Other areas you may want to ask about are whether the witness will support, impeach, or rebut other witness testimony; whether the witness is aware of any party admissions; and whether the witness can supply or undermine foundational elements necessary for the admission of key evidence. As you identify your goals and prepare your outline, think about how you might elicit the testimony you seek, keeping in mind that you may have to approach the issue from a number of angles. The outline is a foundation, not a limitation. If you do not get the answer you seek, consider approaching the matter later from a new perspective. Pouting or acting disappointed or incredulous to a response usually does not help; such behavior is only effective in undermining your own standing and credibility.

Carefully consider whether testimony on certain subjects is best obtained at a deposition or left for trial. Simply because you can ask a question does not mean you should. Similarly, you should not avoid a question simply because you are not sure you should ask it.

"Zingers" and saving your best for trial. Perhaps the most difficult choice a lawyer makes during deposition is when not to ask a zinger that might be better saved for trial. A "zinger" is a question you believe the witness will answer poorly and help your cause. You must balance the strong desire to "pound" the witness before trial against the possibility that by revealing your hand in deposition the witness or opposing counsel can defuse the effect of the zinger.

Because so many cases settle before trial, and such settlements are based on what is disclosed during discovery, it often makes sense from an economic standpoint to score points during deposition. This may be especially true if the witness is a party, and effective deposition cross-examination undermines his or her confidence such that the witness or opposing counsel fear going to trial knowing that the zingers will be difficult to explain or overcome. On the other hand, in some cases, opposing counsel hopes that the worst flaws in the case will be revealed during a client's deposition, because even very damaging testimony often can be effectively managed ahead of time by disclosing and massaging the "bad facts" early during trial, such as during *voir dire* or opening, and by presenting the facts at trial in a mitigating context by "softening" or rebutting those facts before opposing counsel cross-examines the client.

The false economy of an "overly efficient" examination. With each deposition, a lawyer gets better at the task. Many experienced lawyers complain that less-experienced attorneys waste deposition time. Some of this criticism may reflect the impatience or even the laziness of the complaining lawyer. It is not always possible to predict the relevance of information known to a witness until a case more fully develops. Lawyers must balance the desire to be efficient and not waste a client's money and make the best use of limited deposition time against the fact that this likely is the last chance they may have to hear from this witness before trial.

Lawyers often face the quandary of whether to ask a question to which the witness may supply an answer that hurts the lawyer's case. Whether to ask the question depends on factors such as whether:

1) you might learn the answer from the witness outside the deposition and, if helpful, you have sufficient confidence the witness will not change his or her answer[8] and will be available at trial;
2) you might learn the answer from the witness outside the deposition and, if not helpful, the other side will not learn this fact; and, if the witness testifies to the matter at trial, whether you will regret having passed on an opportunity during deposition to have developed means to undercut the witness's credibility; and
3) the other side might learn the answer, you will fail to learn this fact, and you will be surprised by the trial testimony and have passed on a chance to have obtained information during deposition to weaken the witness's credibility.

An attorney may end up deciding to ask the "scary" question during deposition; however, failing to reasonably analyze options just to get out of the deposition sooner is always the wrong choice.

Be "on deck." Some of the most difficult decisions a lawyer must make concern the scope of any examination following the other lawyers' questioning. After identifying your goals and preparing the deposition outline, you must (1) be ready in the event the other examining attorneys drop the ball; and (2) decide whether to go over ground already covered and during which testimony helpful to your cause has been elicited.

Never rely on another lawyer to ask all the relevant questions. Too many lawyers have found themselves scrambling to put together a good deposition examination on the spot, without adequate preparation, because the primary defendant's lawyer first scheduled to ask questions has settled the claims against his or her client the morning of the deposition or because that lawyer simply was unprepared.

Take care when revisiting areas where the witness already has given helpful testimony. All too often, lawyers will return to matters on which other lawyers already have obtained powerful admissions. What is likely to happen is that the witness will not say anything more damning and may figure out a way to repair testimony, perhaps with the help of an off-the-record discussion during a break. If the witness even partially cures problems created by previous testimony, the other side will be permitted to show such "prior, consistent" statement to the jury at trial under C.R.E. 802(d)(1), to bolster the witness's credibility and to rebut the use of the earlier deposition testimony as an inconsistent statement.

Anticipate objections. Knowing what testimony you want to elicit is helpful only if you can elicit it with proper questions and you can respond when necessary to opposing counsel's objections. A good trial lawyer knows he or she is striking pay dirt by the logarithmic increase in the number, volume, and frivolity of opposing counsel's objections.[9] If the objection is to the "form" of the question, you should choose to ignore the objection (and the objector) and get your answer; if the answer is useful, you can rephrase the question to meet any meritorious grounds on which the objection is based. If a lawyer instructs the deponent not to answer the question due to a discovery privilege or limitation, you may need to explore with the witness whether the proper predicate exists for not answering. First, however, you need to anticipate such objections, research their required legal and factual bases beforehand, and be ready to lay the necessary foundation with the witness establishing that the objection is unfounded.

For example, a defense lawyer may instruct a claims adjuster not to answer questions about the adjuster's investigation because it occurred "in anticipation of imminent litigation" or constitutes "mental impressions and work-product." Similarly, a plaintiff's lawyer may instruct a wrongful discharge claimant not to answer questions about communications with his or her spouse or emotional issues discussed with a therapist, based on the spousal and patient-therapist privileges, respectively. Armed with the knowledge of the legal and factual predicates for these privileges, you can investigate whether a foundation exists for the witness invoking the privilege; if not, you can explain on the record why this is the case and attempt to persuade opposing counsel to permit you to continue your inquiry.

If opposing counsel rejects your position, state on the record that the deposition will be suspended, but not terminated, pending resolution of issues relating to the disputed testimony. Making such a record has several advantages. First, it may save attorney and court resources by preventing unnecessary discovery motions later if opposing counsel concedes the point and allows the line of questioning to proceed. Also, if you timely make your record, and the issue is plainly resolved in your favor, you may increase your chances of obtaining sanctions.[10] Such a record should not be made antagonistically; such conduct often is self-defeating and can escalate to unprofessional levels.

If the disputed deposition testimony is likely to be used at trial in lieu of live testimony, you must treat the proceeding and related objections as if you were present in court. If objections are raised, you must be convinced that your question is not objectionable and that the answer is admissible. If the testimony is important and the objection seems valid, try to rephrase and obtain an admissible response. You may need to protect your record by asking for the basis for the objection, so that you can rephrase the question to meet the objection; however, by doing so, you may allow opposing counsel to educate the witness and, perhaps, even influence the witness's testimony with an improper "speaking" objection.[11] Moreover, opposing counsel may refuse or fail to further explain his objection. Such refusal may be justified; if not, it may result in waiver of the objection.

Make a Clean Record

Depositions typically result only in a written record. Because the written record lacks audio or visual features,[12] a lawyer must take great care to preserve and make a clean record. The sidebar entitled "Making and Cleaning Up the Record" shows some of the most common problems in maintaining a clean record, and provides suggested ways to deal with these issues.

Defending a Deposition

The information in "Taking a Deposition" above also provides a good framework for preparing to defend depositions. Knowing the procedural and evidentiary rules is equally important when defending a deposition. The relevant rules are neither difficult nor extensive, and taking the time to learn them early will pay great dividends over time. Knowing the witness, the case, and your goals for the deposition is necessary to determine when to make objections, when to ask follow-up questions, and how to properly prepare the witness and support him or her during the deposition.

Preparing a Witness for Deposition

Too many lawyers fail to prepare to defend a deposition as well as they prepare to take one. However, it makes sense for a lawyer to put himself or herself in the shoes of the opposition and try to anticipate the lines of inquiry and problem areas that the other lawyers will try to exploit when questioning the client. The attorney must explore these issues with the client ahead of time, as well. Although still useful, this practice is less effective when preparing a nonclient, including an expert witness.[13]

Many witnesses are unfamiliar with the deposition process and enter a deposition thinking a lawyer can get them to say whatever the lawyer wants them to say. Alternatively, witnesses may come in prepared to "fight" the lawyer on every question. Both mind-sets can mean trouble. Much is achieved if the witness is educated about the deposition process so that anxiety does not interfere with giving accurate testimony.

Similarly, many clients and witnesses attend a deposition with a version of events that is inconsistent, confused, and filled with gaps.

Making and Cleaning Up the Record

At the beginning of the deposition, it is prudent to state on the record the first four points described below. Then, if the witness later alters his or her testimony by making changes on the deposition testimony amendment sheet the witness is entitled to submit under C.R.C.P. 30(e),[1] consider using this record to try to suggest an ulterior motive for such changes to undermine the witness's credibility.

1. Ensure that the witness understands the questions.

Tell the witness at the beginning of the deposition that you will assume he or she has understood your questions, unless the witness asks you to rephrase or repeat the question before answering, and confirm with the witness on the record that he or she understands this ground rule.

2. Discourage nonverbal and incomplete answers.

Advise the witness at the beginning that he or she must answer using words, and that saying "uh-huh" or nodding the head or gesturing cannot be accurately recorded by the court reporter. Also, explain that you will assume the witness has completed answering when you ask a new question, but if you are mistaken or have inadvertently cut off the witness, ask to be told immediately, so the witness can be given an opportunity to finish responding and, again, confirm that the witness understands this ground rule.

3. Express appreciation for the promise to tell the truth.

Have the witness acknowledge that he or she understands that the oath just taken to tell the truth is no different from the oath taken in court before a judge and jury.

4. Confirm ability to testify.

Have the witness confirm that he or she is not suffering from any illness or other condition that might impair the witness's ability to give accurate and complete answers to your questions. If the witness denies this is the case, discuss on the record rescheduling the deposition with the witness and counsel. Nine times out of ten, the witness will insist that the illness or other condition will not affect his or her memory or ability to testify accurately.

5. Avoid compound questions whenever possible.

Generally avoid compound questions, although they often are helpful in moving the deposition along. If you obtain a useful answer, you should rephrase the question so it is not compound, and obtain a clean answer that can be used to impeach the witness at trial.[2]

6. Pay attention to narrative (lengthy) answers.

These answers typically are useless for impeachment purposes, but can provide a lot of information from the witness and may be helpful during summary judgment motions practice. If a narrative supplies particularly useful information, consider following up with discrete questions, so that you can obtain clean answers that can be used later for impeachment purposes. Impeaching a witness with a prior, narrative deposition answer is unwieldy at best.

7. Manage exhibits.

Every document relevant to the witness's testimony should be carefully reviewed in advance and, if possible, marked by the court reporter with a deposition number *before* you or the witness refer to the document. Highlighting key language often is useful, although such emphasis can alert a witness and opposing counsel to potentially troublesome areas of inquiry. You also should contemporaneously and fairly describe on the record a witness's important gestures or vague references to exhibits. For example, "The record should reflect that during the witness's last response regarding where and how far Mr. Jones was standing from him when the witness overheard Mr. Jones's confession, the witness held his hands about three feet apart and then pointed to the vestibule depicted on Deposition Exhibit 1. Sir, do you agree with my description of your actions?"

8. Create and use drawings.

Drawings can be very helpful in explaining some concepts, such as the relative position of people and objects, which otherwise are difficult for the witness to articulate. Consider having the witness sign and date any drawing he or she creates. Also consider preparing clear and reasonably accurate drawings of your own ahead of time and asking witnesses if they fairly reflect the substance of their testimony or their recollection of a particular scene.

9. Be alert to opposing counsel's verbal and physical intimidation.

If a lawyer acts in a verbally or physically intimidating manner toward the witness, it is nearly impossible for the sterile record to capture this conduct. It is up to any lawyer who objects to the conduct to make a contemporaneous verbal record of what is happening and the objectionable behavior. Most lawyers try to do this in a nonconfrontational and measured manner. Sometimes, a break may be necessary for everyone's heads to cool. For some lawyers (*juris jerkus*), such behavior is sport, and the test for them is how far they can go and what they can get away with. Judges likely are familiar with these lawyers' tactics; however, without a clear and contemporaneous record of the offending behavior and related objections, you stand little chance of controlling these actions. Sometimes, it may be necessary to consider tape-recording or videotaping depositions solely for the purpose of documenting and managing opposing counsel's behavior.

10. Mind the court reporter. Remember to give the court reporter occasional breaks, to spell technical terms and unusual names for the record, and to mind the reporter's subtle (and not so subtle) hints when you or the witness are talking too fast or over one another, creating an unclear record that will be useless at trial.

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1. *See* C.R.C.P. 30(e) (deponent making changes to the form or substance of the deposition shall sign a statement of such changes and the reasons for making them).

2. One must lay a required foundation before using a deposition to impeach a witness with prior statements, such as deposition testimony, inconsistent with his trial testimony. *See* C.R.E. 602(a); C.R.C.P. 26(a)(1).

These responses are simply the way many of us express ourselves in life. However, a deposition is not a simple conversation. A deposition creates a legally binding record, often with significant consequences. Therefore, a lawyer must thoroughly prepare a witness for deposition. *See* the accompanying sidebar entitled "Preparing a Witness for Deposition."

After reviewing these ground rules, assure your client that you will be present throughout the deposition, paying close attention to the questions asked and the answers given. Remind your client to call you with any questions.

Review the Facts

Some lawyers believe that when defending a client's or a cooperative witness's deposition, preparation is either unnecessary or improper, at least to the extent the attorney seeks to "shape" the deponent's testimony. Many trial lawyers disagree with this perspective. In the simplest vein, consider the difference between a witness testifying that a glass is half-empty or one testifying that a glass is half-full. The statements are equivalent, but they convey different messages to the jury about both the glass and the witness.[14]

Many lawyers believe that the key to a strong lawsuit is having good facts and knowing the case's weaknesses. To this end, many lawyers prefer to get the "dirty laundry" on the table early at trial, and to treat the messy stuff as inconsequential to achieving a just result. In preparing your client or a witness for deposition, it is critical to use the opportunity to locate the dirty laundry and try to subtly lead the witness to present the unhelpful facts in as frank and favorable a light as possible.

Preparing a Witness for Deposition

Some clients and witnesses are familiar with the deposition process; most are not. Understanding the purpose and process of a deposition can increase client comfort and the accuracy of testimony. Some lawyers' practice of simply sending the client a preparatory letter generally describing depositions and some rules of thumb, although useful, is insufficient to adequately instruct a witness for a deposition. Only an in-person, "real-time" preparation session works. Below is a short checklist of some of the main points one may wish to cover while preparing a witness for deposition. If these points are the only things the witness remembers going into the deposition, then the attorney will have achieved many of the important deposition preparation goals.

- Depositions are intended to do two things: obtain information and limit people to a single version of what they know or remember.
- You, not the other lawyer, are in control of your answers.
- You will never get in trouble or hurt your case by telling the truth.
- Make sure you understand the question before you answer it.
- Ask for clarification if you have any doubt about what is being asked.
- Never answer a question you do not understand.
- You should not volunteer information you have not been asked to provide because doing so unnecessarily extends the length of the deposition.
- Silence is golden. If you have answered the last question, and no new question is pending, do not say anything.
- Do not assume anything about the question or in your answer you do not know to be true.
- Answering "I don't know" or "I don't remember" is a perfectly appropriate response.
- Do not guess either at the meaning behind a question or when giving your answers.
- You may be asked to provide reasonable estimates of time, speed, or distance; however, you are not required to guess.
- If you are guessing at something, say so in your answer.
- Think carefully before answering any complex or seemingly important question.
- Do not make jokes and do not be sarcastic.
- There is *no difference* between being "on the record" or "off the record" when you are speaking in the presence of anyone other than your lawyer and his staff.
- Be careful when summarizing; make sure your summary is fair and accurate.
- If a lawyer summarizes your earlier testimony, refer back to your earlier testimony if you have any discomfort with the lawyer's summary.
- Review your discovery responses and other important documents before your deposition.
- Read word-for-word all exhibits you are shown during the deposition, *especially* a document that you recognize; familiar papers often take on new meaning during a deposition.
- Privately consult with your lawyer regarding questions that you think may be asking you to disclose privileged or confidential information.
- Give your lawyer a chance to make objections.
- Listen to your lawyer's objections. If your lawyer objects to a question on the basis of privilege, do not answer the question; if your lawyer objects to the form of the question, think about the question carefully and make sure you understand it before answering.
- Take breaks when you need them or if your lawyer suggests that you need to take a break; trust your lawyer to monitor your stamina and coherence.
- Try to relax and not worry about answers; you will have a chance later to review and correct or clarify the written record of your testimony.

A common practice is for lawyers to show important documents to deponents ahead of time to refresh their memories and to sensitize them to important issues. An equally common practice is for lawyers to ask witnesses to list and describe what documents they have reviewed in preparation for their depositions. Although most attorney-client communications are privileged, it is unlikely that the existence or content of nonprivileged documents are similarly free from inquiry and disclosure. Thus, expect that any document you share with a witness before deposition will be the subject of inquiry. Also, remember that privileged documents can lose their privileged status under C.R.E. 612, if the witness testifies that after reviewing the document, his or her memory was refreshed:

> If a witness uses a writing to refresh his memory for the purpose of testifying . . . before testifying, if the court in its discretion determines it is necessary in the interests of justice, *an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon*, and to introduce in evidence those portions which relate to the testimony of the witness.[15]

Explain Legal Theories

Some witnesses are savvier than others. A witness may quickly grasp the limits of the other attorney's power and authority during a deposition. An attorney preparing this witness can explain the broad themes of the case, and the other side's defenses. This explanation may allow the witness to better appreciate how his or her testimony fits into the big picture, and what questions bear most strongly on the important issues, so the witness can mentally with caution map out his or her answers before responding.

Explain Objections

Objections may distract and confuse a witness unfamiliar with the deposition process and should be explained during preparation. It is good practice to advise a witness during preparation that if the attorney objects to the form of the question, the witness should consider the question carefully before answering it, because the objection indicates a concern about the "form" of the question. The witness should consider whether the question can be fairly answered or whether it is confusing, vague, or ambiguous and needs to be rephrased. Objections to the form of the question should be distinguished from objections that may result in the witness being instructed not to answer.

Privileged Versus Nonprivileged Deposition Preparation Discussions

Preparing clients for depositions is necessary, and it often is wise to prepare other witnesses for depositions, as well. However, it is important to remember that communications with these witnesses are not privileged. For example, counsel representing plaintiffs in personal injury cases often incur the expense of meeting with a treating physician to learn how the physician will respond during deposition. A lawyer sometimes can help shape how an expert witness expresses opinions simply by the questions the lawyer asks during the preparation session. Again, the lawyer is not improperly asking the physician to alter testimony in any material way; instead, the lawyer is prompting the doctor to think carefully before making assumptions about what appears in office notes, what the patient intended to communicate during the physical examination, the relative weight to give various causes implicated by a diagnosis, and about the patient's prognosis. Remember, however, that everything the lawyer says to the doctor is discoverable during the doctor's deposition.

Despite the many advantages of preparing a nonclient witness for deposition, there is one serious risk—the lawyer turning himself or herself into a witness. It is always possible that a nonclient witness will testify that a lawyer said something during a preparation session that was never said.

Maintaining Composure and "Woodshedding"

In almost every deposition, the witness has both helpful and hurtful things to say about the case. An attorney must be prepared for this reality so as to avoid reacting to the testimony during deposition. An attorney's reaction may clue opposing counsel to the attorney's concerns. It also may create witness concerns that further aggravate the testimony, especially if the witness is your client who then tries to "shape" his or her testimony to mollify you. If concerns are expressed, they are better directly expressed to a client during a break.

A great deal of emotion and frustration can build when lawyers are forced to remain silent while defending a witness whose every statement seems to undermine the lawyer's cause. It is critical for the lawyer to control his or her emotions. It is a common practice, however, for counsel to "woodshed" a client or a friendly witness during a deposition break. Such woodshedding or off-the-record witness preparation can run the gamut from gently reminding the witness of matters discussed earlier, to helping fill in or refresh his

or her memory, to placing things in context. Woodshedding also can include intense and personal criticism of the witness's motives or performance; however, this approach may frighten some witnesses or undermine their confidence. Under all circumstances, it is improper to try to direct the witness's testimony toward anything other than the plain truth.

In the case of a client, where woodshedding discussions generally are privileged, the lawyer has more freedom to discuss the client's deposition performance, including specific questions and answers. With nonclients, such discussions are not privileged, and it is common practice for others to ask a witness about all communications that occur during a break. Some lawyers will tell a nonparty witness just before a break that they will be asking the witness, when returning, about everything seen or heard during the break, so as to sensitize opposing counsel to the risks of trying to influence the witness's testimony.

With regard to party-witnesses, an examining lawyer may try to establish that the witness had the opportunity to speak to his or her attorney during the break and then ask whether, since the break, the witness now wishes to alter or amend any of his or her testimony. If the witness answers in the affirmative, the examining lawyer often will leave it up to the witness to "correct" the testimony during his or her attorney's later examination or on the post-deposition correction sheets. This is done because the examining lawyer seeks only to establish on the record that the witness intends to change his or her testimony following "secret" discussions with his or her attorney. Sometimes, however, the examining lawyer immediately will inquire as to what testimony the witness wishes to change. There is no hard or fast rule regarding how to proceed; such further inquiry is purely intuitive and depends on the circumstances.

Criticizing a client's deposition performance or telling the client his or her testimony gravely undermines the cause can have devastating effects on a client's self-confidence. It often is best to place a positive light on what occurred so that the client does not leave the deposition or go into trial second-guessing himself or herself. If the client's testimony hurt the case and has significantly affected the case's settlement value, counsel must carefully consider how to present this fact to the client so that, again, the client does not lose confidence if the case does not settle and he or she later is required to testify at trial. One way to help manage the situation is simply to remind the client that all he or she did was tell the truth as required, and that no case depends on one piece of testimony for its outcome.

Making Objections

The opportunities and need to make valid, good faith deposition objections generally are few and far between if the examination is conducted by competent counsel. However, attorneys should be prepared to make (and, if challenged, explain the basis for) the following objections.

Objections to the form of the question. These are raised when the question seems vague, ambiguous, confusing, threatening, or inconsistent with the rules of civil procedure or is asked in an unfair manner.

Objections that may result in the witness being instructed not to answer the question. The most common bases on which a client is instructed not to answer a question involve invoking, on the client's behalf, the attorney-client, work-product, or other privilege or immunity against discovery. Someone might argue that although a lawyer technically can properly instruct a client not to answer a question, instructing a nonclient not to answer may exceed the attorney's authority and could lead to unanticipated liabilities.

In rare cases, an instruction not to answer might follow a question involving a highly personal or similarly confidential matter with no or limited relevance to the case, but for which there is no express privilege or immunity from discovery. In these gray areas, many lawyers try to work through the issue by expressly stating the legal basis for the privilege or relevancy or Rule 26(c)[16] concerns on the record, and inviting the questioner to explain the relevance and/or nonprivileged nature of the inquiry. If highly personal or similarly confidential matters are raised, some lawyers try to seek agreement on the record among all counsel to treat the matter as confidential and subject to a protective order, and to seal that portion of the record, reserving to the parties the right to have the court formally rule on the parties' respective positions. Short of reaching such a stipulation on the record, you can object and seek a protective order under Rule 26(c) and (d)(3), automatically staying the discovery at issue, including further questioning directed at the same general subject matter.[17] These suggestions seem to be reasonable ways to deal with the problem and to mitigate the risk of sanctions later.

You might consider explaining to a nonclient witness on the record that he or she has the right not to answer a potentially inappropriate question without the court first reviewing the question and deciding whether it must be answered. If the witness elects not

to answer the question, you might consider advising that you will "file papers" supporting the witness's objection. Such advisement or offer to file papers can create unintended consequences, but there often are few good alternatives available if a witness wishes to decline to answer a question but does not have the financial wherewithal or personal motivation to retain private counsel to protect his or her interests. Courts may be sympathetic to witnesses placed in this quandary, especially as to inquiries regarding obviously privileged or highly sensitive matters.

Many lawyers believe that they have a positive ethical duty to advise a witness of his right to invoke an applicable attorney-client or similar privilege once it becomes apparent that a privileged subject matter may be implicated by a question. Other lawyers will not pursue the line of questioning further until the witness has had a chance to consult with his own counsel.

Instructing a witness, particularly a client, to become obstructive or "dense" when you object "to the form of a question" violates both the letter and the spirit of the ethical rules. Also, a lawyer's discomfort with the question—either because he or she thinks it is phrased poorly or because it pertains to a sensitive matter—does not mean it is not a valid question. Moreover, such a "tactic" often results in confusing the witness or in the witness giving an evasive answer to a straightforward question that will look bad to the fact-finder later.

Questioning the "Friendly" Witness

When to ask questions of your own client or of a friendly witness often involves a difficult and intuitive analysis. Most lawyers have a hard and fast rule of rarely questioning their own clients during deposition. Generally, this is a good rule, because you do not want (1) to supply the other side free information, (2) to give the witness the opportunity to say something hurtful to his or her cause, or (3) to allow the other attorneys an excuse for another round of cross-examination. Also, most problematic testimony can be managed by privately discussing it with the client before trial.

Sometimes, however, a lawyer must try to correct or explain a client's particularly troubling testimony during the deposition to avoid a summary judgment motion premised on the testimony, as well as allegations that an explanatory affidavit contradicts his or her deposition testimony and is a sham.[18] Also, in the case of personal or emotional injury that opposing counsel simply glossed over, you may want to develop these facts on the record with your client to sensitize the other side to your client's injuries and credibility, to underscore why a jury will identify with his plight at trial, and to facilitate settlement discussions.

Conclusion

Deposition discovery often is the most important pretrial event. Taking useful depositions and properly preparing witnesses to testify requires much study early in and throughout a lawyer's career. However, heavily investing today in such study and developing good deposition habits and a broad knowledge of the rules of civil procedure and applicable law will pay extraordinary dividends later. Effective deposition examination is both rewarding and great fun. It also provides excellent practice for effective trial examination.

Notes

1. C.R.E. 803(1) defines "spontaneous present sense impression" as:
a spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition.
2. C.R.E. 803(2) defines "excited utterance" as:
a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
3. C.R.E. 803(3) defines "statement of then existing mental, emotional, or physical condition" as:
a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.
4. C.R.E. 803(4) defines "statement made for purposes of medical diagnosis or treatment" as:
a statement made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
5. *See* C.R.C.P. 30(b)(2):
Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. By order, the court may limit the time permitted for the conduct of a deposition to less than seven hours, or may allow additional time if needed for a fair examination of the deponent and consistent with C.R.C.P. 26(b)(2), or if the deponent or another person impedes or delays the examination,

or if other circumstances warrant. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

6. The term "interest" is not limited to a financial interest in the outcome or a familial affiliation with the opposing party. For example, impartial witnesses may acknowledge that they would like to see a badly injured plaintiff receive significant compensation for his injuries. Such an admission is a completely human response, yet it opens the door for a jury to infer that the witness would prefer not to say anything that might stand in the way of such an outcome. If the witness denies this sentiment, a jury may infer the witness is willing to perjure himself regarding an obvious truth.

7. Good "generic" question outlines for certain kinds of witnesses should be refined and improved over time. Civil trial attorneys build a library of deposition outlines for a variety of witnesses, such as personal injury plaintiffs, drivers involved in accidents, treating or independent physicians, claims adjusters, home builders, homeowners, product designers, risk managers, elevator and escalator specialists, building product experts, and building subcontractors.

8. You might consider having the witness sign a written statement memorializing what he or she knows. However, you then must produce the statement pursuant to Rule 26(a)(1)(b) and (e), which will eliminate the element of surprise and may allow the witness's deposition to be reopened.

9. Such objections often only confuse and agitate the witness, allowing counsel to elicit even more useful testimony. Further, when a "bad" or objectionably phrased question is thrown into the mix, a valid objection that might prompt the witness to think a little longer about the question and his answer loses all effect. This is because, by now, the witness no longer even hears the valid objection, because it has been lost in a noisy avalanche of baseless objections.

10. By not threatening or seeking sanctions, opposing counsel and courts may look more favorably at the merits of the client's position and allow counsel to secure more information at less cost.

11. *See* C.R.C.P. 26(d)(1), providing that deposition objections "shall be stated concisely and in a non-argumentative and non-suggestive manner." An instruction not to answer may be made only when necessary to preserve a privilege, to enforce a court-ordered limitation, or to present a motion premised on improper deposition conduct.

12. Videotaped depositions often are done to preserve testimony because a witness resides outside the jurisdiction's reach or may be otherwise unavailable to testify. Sometimes, taking a "discovery" deposition before a "preservation" deposition is advisable and permitted; other times, it is not. *See generally* C.R.C.P. 32. Remember that you may appear on the videotape, so dress, act, and speak as if you were appearing in court. Also, you may need to mark and handle exhibits on camera, as may the witness. Think ahead of time about the necessary foundation that must be laid for admission of the exhibit, and how to effectively handle and refer to the exhibit so that the jury knows and can see to what the witness is referring. A party need not give advance notice that a deposition may be used at trial in lieu of live testimony, if the conditions for admission of the testimony are met. C.R.C.P. 32(3)(A) to (F).

13. This practice could cause the witness to focus on or testify to hurtful matters the other lawyer did not even consider. On balance, though, most lawyers will explore these sensitive areas in advance, and do so in subtle ways that will not cause the sensitive issues to become the center of the witness's attention during the upcoming deposition.

14. The engineer who testifies that the "receptacle is over-designed for its contents" tells a whole other story!

15. C.R.E. 612 (emphasis added). C.R.E. 612 then provides:

> If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing *in camera,* excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

16. C.R.C.P. 26(c) provides:

> Upon motion by a party or by the person from whom . . . discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppressions, or undue burden or expense. . . .

17. C.R.C.P. 26(d)(3) provides that on motion of any party or of the deponent and a showing that the deposition is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court may stop the deposition or limit the scope and manner of the taking of the deposition. On demand of the objecting party or deponent, the deposition is suspended for the time necessary to make a motion. C.R.C.P. 121 § 1.12.1 provides that, pending resolution of any motion pursuant to C.R.C.P. 26(c), the filing of the motion stays the discovery at which the motion is directed. Many practitioners read these provisions together as permitting the suspension of only the part of deposition involving the disputed subject matter, so that the balance of the deposition may proceed.

18. *See Andersen v. Lindenbaum*, 160 P.3d 237 (Colo. 2007), *as modified on denial of rehearing* (June 11, 2007) (party's affidavit directly contradicting earlier deposition testimony on an issue of material fact can be rejected as a sham affidavit only if it fails to include an explanation for the contradiction that could be found credible by a reasonable jury). ■

See Appendix on page 129.

Appendix

The strategies described in this article are easy to state, but applying them to the varying circumstances during a deposition is hard. Only experience gained by conducting many, many depositions and, just as important, watching highly competent counsel ply their deposition talents, allows an inexperienced lawyer to develop the tools and hone the decision-making skills necessary to conduct effective examinations. This appendix provides examples of exchanges occurring during depositions from five complex cases.

After reviewing the material in this article relating to both taking and defending depositions, the reader should consider the choices the lawyers had to make and the effectiveness of their deposition approach in each of the five cases. As you consider the left-hand deposition summary below, stop and ask yourself what was effective and what was ineffective about the approach taken by the examining lawyer. Then, after you read the right-hand response, consider whether the lesson is valid or your reasons for disagreeing.

Deposition 1: Psychiatric Malpractice

In this case, an at-risk teenaged girl's mother sued three mental health care providers for prematurely releasing her suicidal 14-year-old from a walk-in facility; the teenager allegedly was raped while heading home. Co-defendant's counsel led the young girl through an excruciatingly detailed and graphic examination of the rape, during which the girl's lawyer stopped the deposition, led the client to his office, and returned to accuse examining counsel of raping his client a second time. Twenty years later, plaintiff's lawyer still complains about co-defendant's counsel's conduct.

Difficult as it might have been for plaintiff's counsel to bear, co-defendant counsel's questions about the alleged rape were appropriate. At times, one might have found co-defendant counsel's tone too accusatory or insincere, but because one of the client's defenses was that the rape never occurred, no matter how some questions were framed, the questions were bound to be received badly. Further, it was not unfair to intensely press, with civility, the witness—an alleged victim of a disputed rape—during deposition. Judges often grant great leeway on cross-examination that goes to the heart of a claim or a defense.

Deposition 2: Wrongful Death

The client's youngest daughter was killed when the garage door slammed down and crushed her head after the door's spring broke. The garage door manufacturer's counsel carefully examined the client regarding every moment before, during, and after the accident, and concluded by asking, gently, "So, is it possible you made a mistake once you realized the spring was broken and left the garage door up, not down, when you went in to call the repair service, unaware your 3-year-old had come around the front to hug you hello?"

The question, "So, is it possible you made a mistake once you realized the spring was broken and left the garage door up, not down, when you went in to call the repair service, unaware your 3-year-old had come around the front to hug you hello?" was rhetorical. Opposing counsel knew that the client would answer "No" and that, psychologically, he could only answer "No." However, counsel's careful and sensitive examination underscored for both client and counsel the reality of a trial, and the potentially devastating emotional effect on the family of an adverse jury verdict. Had the examination been conducted in a hostile or insensitive manner, both client and counsel would have steeled themselves for trial in response to such an intemperate attack. Instead, the case amicably settled a few months later because examining counsel's desired effect—to illuminate the risks of trial—was achieved.

Deposition 3: Construction Defect Class Action

In a construction defect class action, an inexperienced associate for the defense for the builder instructed a witness—an independent project engineer—not to testify to his predeposition discussions with the lawyer on the basis that the lawyer had been "retained" to "represent" the witness for "purposes" of the deposition. After this obstructive conduct occurred, plaintiffs' counsel prefaced questions to key future witnesses about such predeposition meetings by first laying a foundation that the witness never retained the other lawyer's law firm and did not consider the firm to be acting as the witness's lawyer.

At trial, the project engineer gave unexpected and very damaging testimony during his direct examination by the defense. Defendant's lead trial counsel, a nationally known lawyer who was not heavily involved in the discovery process, then attempted to undermine the engineer's credibility. His considerable efforts were for naught when the witness established during the examination that the lawyer's own firm "represented" the witness—of which representation the examining attorney was unaware, likely because it was manufactured by the associate earlier in the case.

Appendix continued on next page.

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Deposition 4: Product Liability

In a personal injury case arising from an elevator accident, counsel asked the plaintiff's experienced electrical engineering expert, who had no hands-on experience with elevators, whether, given the nature of the reported malfunction, he would have thought it prudent to inspect the elevator's ratchet-sheave after the incident. The following exchange ensued:

"Yes, perhaps."

"Do you even know where to find the ratchet-sheave and, once located, how to evaluate its operation?"

"Not that I can recall sitting here."

"You can't even tell me what a ratchet-sheave is or what it does, can you?"

"I'm not sure of the specifics."

"You do not even know enough about elevators to tell me whether there is such a thing as a ratchet-sheave in an elevator, do you, or whether I just made that term up?"

"True."

The case did not settle. At trial, plaintiff's counsel adequately anticipated and mostly defused his expert's ostensibly damaging deposition testimony. Had the line of questioning been saved for trial, it likely would have been quite effective.

Deposition 5: Insurance Bad Faith

Following a five-minute break, defendant's counsel spent ten minutes questioning plaintiff's insurance expert regarding everything that was said during the break between him and plaintiff's counsel, with whom he was seen chatting. Defendant's counsel questioned his mental facility, memory, and truthfulness after the expert consistently responded he could recall almost nothing of what was discussed.

During the ten minutes spent questioning the insurance expert, the expert was peppered with questions. At one point, examining counsel stood up and roared with disdain at the expert's evasive answers. He was met with multiple objections to both his conduct and his asking the same questions over and over.

Although the initial questioning was proper, counsel's frustration resulted in spending much too long on a collateral issue with the witness, with counsel embarrassing himself, not the witness, in the process.