
Chapter 6

Techniques for Taking an Effective Deposition

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§600 Techniques for Taking an Effective Deposition

This chapter deals with tactics of taking an effective deposition. In beginning, however, let us emphasize that the most important “tactics” are covered in Chapter 4, *Preparing to Take or Defend a Deposition*. If you are thoroughly prepared to take a deposition, you will find that your preparation will help you be an effective questioner during the deposition. This chapter merely helps you put that preparation into use by being more effective in your questioning.

Remember, your tactics for questioning the witness should be designed to accomplish the objectives in taking the deposition. For example, if your objective is “discovery” — to learn as much as possible about the knowledge of the witness relevant to the lawsuit — you want him to talk openly and freely. What tactics will best accomplish those objectives — a friendly, calming demeanor, or an aggressive, belligerent attitude? Should you, at least initially, display a demeanor of accepting everything the witness says, or display an attitude of skepticism? Should you impeach when each opportunity arises, or hold impeachment for the end? Do you want to phrase every question narrowly, calling for very short responses, or propound broader questions calling for a narrative? What approaches make the witness search his mind and open up in his responses? Perhaps the approach must change during the course of the deposition.

However, if you have already exhaustively interviewed the witness, and now you want a deposition for use as substantive evidence at trial, you should use the same techniques as in trial: if he is a hostile witness, use leading questions or questions calling for narrow, short answers. If a friendly witness, use broader questions with just enough follow up questions to keep the witness on a clearly defined path with guideposts for the jury to follow the testimony.

Suppose you are seeking discovery from an adverse witness. If you believe that the testimony will be adverse, perhaps jump around in the subject matter so that the transcript is not a clear, coherent story, and yet you still obtain all the information that you need. Think of your objectives, then plan the tactics that can best accomplish those objectives.

See also §611 , *infra*.

§610 Techniques for Questioning the Witness

Over the years, each of us has developed our personal style for asking questions. Much of our daily informal communication revolves around questions and answers, just as in a deposition. Certainly, none of us would hesitate to question a friend or colleague about an event of interest. The questions we use to obtain that information should come out naturally without much thought. The same should be true for a deposition, but that is not always the case. If your questions are phrased in plain English, they will be easy to follow and simple to answer. If instead they are phrased in stilted English and meander from clause to clause, they will draw objections and little else. Model your efforts after those of the best reporters or TV interviewers and you will be headed down the right path. If an interviewer does not ask clear questions or pay careful attention to the answers, he will not last long in his profession.

Depositions differ from other types of communication because of their purpose and your power to compel answers to your questions. If your goal is to pin down the witness to a particular story , you must develop the questioning techniques to do so. Conversely, if you seek wide-ranging information, you must develop the necessary skills to get the witness talking. A deposition should be taken

with one or more specific goals in mind and your questions must be tailored to achieve those goals. Fortunately, there are a host of techniques to aid you in this quest.

*§611 General Techniques for the
Substantive Examination*

There is no right or wrong approach to the organization of your examination. However, a few thoughts can be provided.

Order Of Examination

Should you begin with the important questions, or gradually lead into them after developing all of the background information? No definitive answer can be given; it depends upon you, your objectives, and the circumstances. It is a judgment call. Sometimes you may want to create a good relationship with the witness before getting into more serious substantive material. You also may want to engage in a sufficient amount of questioning before inquiring into key areas in the hopes that the witness will have relaxed and forgotten the cautionary instructions he was given by the defending attorney.

On the other hand, you may want to capitalize on a witness's initial nervousness by going to the heart of the deposition before the witness becomes confident of his ability to handle the situation. Most witnesses tend to relax more after the deposition has been underway for awhile. Depositions are seldom as intimidating as most witnesses fear .

In many cases it is easier for you and the witness to proceed in chronological order. If you proceed chronologically, you will find it easier to keep track of what has and has not been covered. It is clearly easier for the witness to give his testimony in a chronological manner. (Some lawyers believe that jumping around makes it more difficult for a witness to follow a rehearsed script of his testimony.) If the deposition will be used at trial, a chronological sequence will be easier for the jury to comprehend. In a few cases, it is easier to proceed by subject matter. Even though each subject matter overlaps factually in time with others, it is easier to keep each subject matter distinct, and tie them together later as appropriate.

However you approach the deposition, do not tie yourself to your notes or your original plan for the deposition. Your notes should provide a checklist for your examination; they should not prevent you from following the deposition through its natural progression. Follow up on answers and give the witness leeway in the direction the deposition flows, so long as you ultimately come back to your outline to check that all important subject areas have been covered. If you simply follow your outline, you will not follow up on the witness's answers and will fail to explore the by-ways and side roads given to you by the witness and which, if pursued, may reveal helpful information.

Type of questions

Even with a hostile witness, you will want to elicit as much information as you can through broad non leading questions. If you want information, use non leading questions calling for the witness to answer with a narrative. If you want admissions, or confirmation of facts, use leading questions. Remember, however, that leading questions seldom elicit new facts or unexpected testimony.

Leading questions are allowed under Rule 30(c) in the circumstances described in FED. R. EVID. 611(c):

- when the witness is hostile, an adverse party, or identified with an adverse party
- in cross-examination
- when necessary, in direct examination to develop the witness's testimony.

In some cases you may want to take the deposition of an adverse witness twice (in one sitting). The first time go through the subjects of the deposition with minimal documents, broadly framed questions, and a nonadversarial attitude. This places the witness in a confident frame of mind. The witness usually becomes freer in his responses, more talkative, and generally relaxed. The second time around, you will be armed with the documents and the earlier testimony of the witness. As the questions become more pointed, more leading and more adversarial, the witness may dig in his heels as he assumes an adversarial posture but it will be too late because you have the required information. Be careful in using this technique that you don't duplicate earlier questions because opposing counsel may object to repetitive questions.