

CONDUCTING THE DEPOSITION

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Before you undertake to conduct the deposition, the purpose for which the deposition is being taken should be considered. There are a number of reasons why one would want to take a deposition.

1. Discover facts that are favorable and can lead to favorable testimony.
Look upon a deposition as a means to discover what you need to know to fully pursue and defend the case, as well as to find out what you don't know and simply confirm what you do know.
2. Pin down witnesses to their story. A deposition is a means by which you can have a witness, under oath, pinned down as to their position. Acquiring admissions of a witness, whether a party or witness, is very important.
3. Narrow the issues. A deposition is a prime opportunity to narrow the issues that the case really consists of.
4. Identify your opponent's theories and themes. Learn what your opponent's theories are and what then they are attempting to prove and discover what the theme of their case is.
5. Lay the foundation and authentication for documents. Use this means to authenticate documents and establish their foundation. This can be used for trial or merely to discover facts and lead you to more witnesses that will know something.

6. Evaluate the witness and the attorney. Look at the witnesses; how they react, how they act under questioning, what sets them off, and how the attorney acts and responds.
7. Purpose. In thinking of a deposition, always ask yourself whether or not the deposition is really necessary. If it isn't, don't take it. If the deposition is taken, however, take only what you need. More is not necessarily better.

Before you conduct the deposition, develop a discovery plan. This allows you to plan for what you need to prove, and how you will prove it. Who are the sources of the proof, and how can you get the witness to say what you want them to say, to prove the facts that you believe are in issue. The fact, the proof needed, and the source is a simple discovery plan that should be looked at with every witness. For every deposition, have a plan as to what you want to get out of it and how you will do it. A discovery plan is essential before conducting the deposition.

The technique in conducting a deposition will vary with your style and with what your discovery plan is. Some general techniques in conducting the deposition are:

1. Information gathering. Here you try to learn as much as possible about each witness. This can be conducted by:
 - a. Open-ended questions. What were you doing before the collision? What was the traffic like? Describe the vehicle. When did you see the plaintiff's car?

- b. Clarification. Here you seek details. What was your speed? How long did you watch the car? How do you know what your speed was? How fast was the car going?
 - c. Closing off. The importance of closing off is to prevent any surprise at a later point. Here, you ask questions such as: What else? Anything else? Is that all? Have you told me everything you know about the collision? Tell me the names of all the witnesses who were there. Closing off eliminates the future surprises and attempts by the witness to change their story.
- 2. Eliciting conversations. The technique here is to get the witness to respond through conversation what was said and what they heard. What did the driver say? What did the witness say? What did the passenger say?
- 3. Listen. Listen to what the witness says and follow up questions based upon what the answer was. Hearing and listening are different. Don't be so tied to a script or an outline that you don't listen to what the witness says. Always follow up from what the witness says.
- 4. Summarize. An important technique here is to get the witness to agree to a summary of statements that you state. Let me see if I've got this right. Is it fair to say? What you're saying is. There are means by which you can summarize what the witness has said favorably to you and then get the witness to agree to it.

The manner in which you approach a subject can vary. It is important, though, to exhaust the subject.

1. Chronology. In this instance you start out conducting the deposition by asking the witness to go over the collision scene or their medical treatment all in a chronological order. What they were doing immediately before the collision, taking them all the way through the accident, their medical treatment, up to the present date.
2. Subject matter. Take each subject separately with signposts to inquire of that subject matter by questions.
3. Documents. Conduct a deposition based upon a review of documents and what the witness knows about each document that is in issue, including its foundation, authenticity, and the witness' knowledge.
4. Hop, skip, and a jump. Sometimes this is effective because it doesn't allow the witness to anticipate what the next question is. Although it can appear unorganized and choppy, it allows the interrogator to move from subject to subject, in a sense one step ahead of where the witness is.

In beginning the deposition, introductory questions vary with the style of the attorney, but are very important. The importance is that it can set up a record if you are using the deposition for impeachment purposes, and it boxes the witness in to areas. Beginning questions are:

1. Have you ever had your deposition taken before?
2. Do you understand what a deposition is?
3. Do you understand you need to give an audible response?
4. Have you had an opportunity to talk to your lawyer?
5. Is it fair to say that if I ask you a question you don't understand, you'll ask me to rephrase it?
6. Is it fair to say that if you answer a question, you will have understood the question?
7. If you need a break, feel free to ask me.
8. If you want to talk to your lawyer, feel free to ask me.
9. If you want some refreshments, feel free to ask me.
10. You understand you're under oath?
11. You understand a court reporter has given you an oath?
12. You understand that you have an obligation to tell the truth?
13. You understand your testimony here is the same as testifying in Court?
14. Do you have any questions for me?

All of these introductory questions and answers are simple and standard, but they can help to box the witness in and limit the ability of the witness to backtrack or change their testimony.

Another approach, however, is that once the person identifies himself in the deposition, to jump right into what the issues of the case are. I have done that many times in depositions and foregone the introductory phase and start out immediately with questions such as: You ran a red light, didn't you? Why did you drink before you got

behind the wheel? Do you have any idea of the injuries that you caused Mrs. Smith? Sometimes the direct approach, the forceful approach, can be an unnerving means of interrogation and can be very fruitful in getting what you need in a deposition.

In concluding the deposition, it is always a good idea to ask several general questions to the witness such as:

1. Did you understand all of my questions?
2. Are there any answers you would like to change?
3. Is there anything you would like to add or make more complete?
4. Is there anything you recall about a subject now that you didn't remember earlier?

When the deposition is concluded, a record should be made as to the exhibits that were introduced, who has possession of them, and what about signatures of the depositions.

There is no such thing as a perfect deposition. Even with all the preparation in the world, there is never a deposition where you get everything out of every witness. But always remember that most people, if they prepare and follow general techniques, will probably get ninety percent of what they need no matter what technique they use or how it is conducted. And of the deposition that is taken, probably only a small percentage of it will ever be used at trial for admissions or impeachment purposes. Justice doesn't depend on perfection. Always remember, the greatest value of any deposition is probably that both sides learn what the case is about and what the case is worth.