

Outside Counsel

Getting the Most Out of Deposition Defense

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Many lawyers treat defending a deposition as if the lawyer and witness had each taken the Hippocratic Oath to "do no harm." They train their witnesses to say as little as possible. They get in and get out of the deposition as fast as they can. They ask the witness no questions because they fear that the witness might inadvertently say something damaging. Plus, anything helpful the witness says cannot be used at trial by the witness' own lawyer except in limited circumstances, so better to spring that testimony at trial during the witness' live testimony.

Such a conservative approach to deposition defense can be short-sighted. Although doing no harm is the first goal of deposition defense, it is not the only goal. Each deposition is an opportunity to create a record that will help win your case. Accordingly, lawyers defending depositions should take that opportunity to ask their own witness a few focused questions at the end of the deposition that are designed to advance your client's case.

The potential benefits of this approach are many. Starting with the obvious, asking your own witness questions can clean up any unclear testimony that should be clarified. The witness can also provide missing context for an answer that, viewed in isolation, may appear unhelpful. In these situations, asking your own witness questions is usually an easy choice.

Summary Judgment Motions

Even if your witness was a model of clarity, you should still strongly consider asking some questions. For example, while you generally cannot use your own witnesses' deposition testimony at trial for any purpose, if you are considering making a summary judgment motion, asking your own witness questions could go a long way toward getting your motion granted.

Several years ago, my firm represented a company and certain of its officers who were accused of making a false and misleading statement in a registration statement. After opposing counsel finished his questioning, I asked each witness a series of questions allowing him to explain why he believed that the statement was true at the time it was made. Each witness gave a full explanation, referring back both to prior testimony and exhibits as well as additional documents marked as exhibits. In granting summary judgment to the company and officers, the court repeatedly cited that testimony.¹

One might justifiably ask: Why not just provide that testimony in an affidavit or declaration with your summary judgment motion? The answer: Written testimony provided with a motion may carry less weight than oral testimony given during a deposition because oral testimony can be subjected to cross-examination. If you want the judge to believe that your opponent has not and cannot raise an issue of material fact, then it is better to get that testimony on the record at a deposition.

You also put your opponent on the spot. At least the first time you ask your own witness questions, opposing counsel may be surprised. Many lawyers expect the deposition to end after their questioning and are unprepared to mount an effective counter-attack.

Opposing counsel will presumably be more prepared for your questioning at the next deposition. That is usually a risk worth taking. If opposing counsel can mount an effective cross-examination of your witnesses either before or after your questioning, then your odds of success on summary judgment were probably not that high to begin with. It is also better for you to hear that cross at a deposition than for the first time at a trial.

Other Benefits

Even if you are not contemplating a summary judgment motion, asking your own witness questions can yield important benefits. For example, if for some reason the deponent becomes unavailable to testify at trial, Federal Rule of Evidence 804(b)(1) and state analogues provide an exception to the hearsay rule that may allow you to play or read your own witness' testimony at trial for any purpose.² If you do not ask your witness any questions at the deposition, then you are stuck with the deposition testimony as is and may never have the opportunity to elicit the testimony you intended to elicit had the witness been available to appear live.

By contrast, your opponent will presumably always be able to use your client's deposition testimony at a trial as an admission of a party opponent under Federal Rule of Evidence 801(d)(2) or the applicable state analogue.³ Indeed, in the age of videotaped depositions, counsel regularly plays to judges and juries unflattering clips of opposing party deposition testimony. Asking your own witnesses questions at the deposition may give you the opportunity to create

positive clips for counter-designation, thereby immediately neutralizing unhelpful deposition testimony.

Video clips of your own witnesses under friendly questioning can also be very helpful in conducting mock jury studies. These studies are now common in high-stakes cases heading toward a jury trial. They are often conducted using video clips of deposition testimony because it is typically impractical to use live testimony.

If the only video clips you have of your witnesses are of them under hostile questioning by opposing counsel, the mock jury likely will not give you an accurate read on how your witnesses will appeal to a real jury. You will want some clips of your witnesses answering questions under direct-style questioning. Those clips should give the mock jury (and you) a more accurate sense of how your witnesses will come across under both direct and cross-examination. In other words, your mock trial will look and sound more like a real trial.

Many cases also settle before trial as a result of mediation or other forms of alternative dispute resolution (ADR). Helpful deposition testimony that you elicit from your own witnesses can be used in mediation statements and during the ADR process to demonstrate the strength of your case both to the neutral and the other side. Saying that your witnesses "will testify" as follows without having the actual testimony to back up that statement is less effective.

Approach to Answers

Finally, if your witness knows that you will be asking him questions at the end of the deposition, he hopefully will not feel compelled to try to battle with opposing counsel in a misguided attempt to win every exchange. The best deposition answers are usually short and fair. In other words, the witness answers the question directly and truthfully, but also succinctly provides any necessary context so that the answer does not leave an inaccurate impression.

By contrast, long-winded answers can be dangerous. The witness may appear not to be answering the question, which can hurt his credibility. In addition, long answers often contain information that is neither responsive to the question nor helpful, thus giving the questioner additional fodder for follow-up questioning. A witness who knows at the outset that he is going to be given the opportunity to tell the main points of his story under friendly questioning will hopefully be less inclined to give a speech in response to a simple question for fear that he will not get to tell his side of the story in full.

Indeed, in almost every case, there are some "bad" facts for your side. Some lawyers train their witnesses to be cagey and tell them to "give the other side nothing." That is a mistake.

Witnesses should be prepared to admit "bad" facts that cannot be credibly denied. What you do not want is the witness to make a "bad" fact worse by appearing (through tone, body language, or otherwise) defensive and uncomfortable admitting the fact or talking about it. If the witness knows that you are going to ask questions that will allow him to put that perceived "bad" fact into a larger context, then he may appear more at ease when asked about the fact. That is exactly what you want.

None of the foregoing is intended to suggest conducting a lengthy examination of your witnesses at the end of each deposition. That would normally be a waste of time and potentially dangerous. Many witnesses are tired at the end of a long day of answering questions, and thus more susceptible to making mistakes.

Short and carefully targeted questions are usually the most effective. Although there is no hard-and-fast rule, consider eliciting five to 15 minutes of testimony concerning key issues on which your witness can comment. Prepare the witness to answer those questions during the deposition prep as if you were preparing the witness for direct testimony at a trial. If handled properly, you will have done no harm and hopefully substantial good for your case.

Endnotes:

1. See *Briarwood Inv. v. Care Inv. Trust Inc.*, No. 07 Civ. 8159(LLS), 2010 WL 5422549, at *4-6 (S.D.N.Y. Dec. 29, 2010).
2. Federal Rule of Evidence 804(b)(1) provides a hearsay exception for "former testimony" that "(A) was given at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination."
3. Federal Rule of Civil Procedure 801(d)(2) states that an "opposing party's statement" is not hearsay if the statement: "(A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's co-conspirator during and in furtherance of the conspiracy."

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