



How To Effectively Take Depositions of Opposing Parties & Witnesses

Metropolitan Washington Employment
Lawyers Association

Jennifer Klar
Partner
Relman, Dane & Colfax
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Summary of Topics

- **Planning & Preparation**
 - Creating an Outline
 - Anticipating Issues
- **Taking a Deposition: Strategy**
 - Big Picture Points
 - Questioning Techniques
 - Inconsistencies, Negative Responses, and Common Missteps
- **Dealing with Difficult Witnesses**
 - Hostile/Know-Nothing/Rambling/Timid Witnesses
- **Using Exhibits**
- **Strategies for Dealing with Opposing Counsel**



Deposition Planning & Preparation



Before You Begin Your Outline

- Review all relevant documents in the case
 - Especially look for documents that involve this witness in some way (the witness signed it or knows about its contents; it relates to an event about which the witness could have knowledge; it contains handwritten notes that could be the witness's etc.)
- Talk to client(s) about the witness
 - Ask client(s) what they know about the witness, the witness's relationships with other key players, any "dirt" on the witness
- Google the witness
 - Look for anything that could be relevant to showing bias/prejudice, understanding your witness better, public comments about the case, etc.
 - ✦ Posts on blogs, facebook accounts, articles, other lawsuits involving the witness, etc.



Drafting an Outline: What to Consider

- Why are you deposing this person?
 - What are the key points you want to get from this witness?
- What else *might* this witness know?
- Has this witness made prior statements about relevant facts?
 - Interviews, internal investigation notes, performance evaluations, emails, etc.
 - Consider what documents you have in discovery
- What have other witnesses and/or client(s) said about this witness?
 - Key events/conversations the witness took part in
 - How does this witness relate to other key players
 - ✦ Friendships, disagreements, supervisors/supervisees, “more than friends” relationships, alliances, possible sources of bias?
- Are there documents I need to ask this witness about?



Content of Outline

- **Key Points/Facts**
 - Include key facts you want to address (if exact words used are important, write them out)
 - Anticipate areas for follow up questions
 - Get the details (Who else was there? Who said what? When? What gave you that impression?)
- **Broad questions to determine what the witness might know**
- **Questions designed to confirm or contradict prior statements or statements from other witnesses**
 - Inconsistencies between witness accounts of the same events or changes in a witness's testimony over time are important evidence of pretext and can be vital in establishing discrimination claims
- **Discovery Questions: what documents exist/existed about that?**
 - Emails, Notes, Reports, etc.
 - Still have it? How long normally kept for? Something that is normally retained?
 - Where are those documents/records normally kept?
- **Questions about Exhibits**
 - Understanding how to read the document; the purpose of the document; prior versions of the document, etc.



Structuring Your Outline

- Easy questions first to build rapport & avoid turning your witness against you from the start
 - Save offensive questions for last (i.e., did you have an affair; what were you convicted of?)
- Spacing to Hide Ties Between Topics and Conceal Your True Goal in Asking the Question
 - Hide important questions in “background” questions
 - ✦ Example re: correct performance evaluations
 - ✦ Create distance between topics so witness won’t anticipate where you are going or the connections you are making
- Know what to prioritize if time becomes an issue
 - Decide ahead of time what is most important, second-tier important, and least important.
 - ✦ Bolding/Italics/Notes to self to allow for quick decisions.
- Consider putting each topic on a new page



Preparing for Conflicts & Planning Ahead

- Identify ahead of time any issues that might require Court involvement and have argument notes & research ready in case you need to call the Court.
 - Medical records issues, sexual history questions, etc.
- Don't be afraid to call the Court if necessary
 - If you are prepared, it can be beneficial to call the Court and have the Judge make a ruling on the spot, rather than wait and brief the issue later (which gives your opponent an opportunity to do its own research and find conflicting case law).
 - Have the number for chambers with you and let your opponent know you have the number and aren't afraid to call.
- Read Local Rules
 - Some have specific rules about the conduct of depositions



Taking a Deposition: Strategy



Big Picture Points

- Most importantly: *Listen* to the witness & ask follow-up questions
 - Don't be so focused on your outline that you aren't hearing the witness
 - ✦ If you're buried in your outline you may miss key admissions the witness is making and you won't be able to develop a rapport with the witness
 - Make eye contact
- If the witness raises an issue you were intending to bring up later, follow the witness's lead and ask those questions out of order. [Unless those questions were placed later for strategic reasons]
 - If you cut off the discussion and try to address it later, the witness may not be as forthcoming or may be more rigid/confined in his/her answers when you raise the issue formally later-- as opposed to addressing the subject under the guise of follow-up when the witness brings it up.
- What witness doesn't know is as important as what witness knows
 - Ask follow up questions to confirm all witness does *not* know anything about
 - ✦ [Sgt. Hance Example]
- Lock in the Witness
 - Anything else?
 - Use summary/wrap up questions



Locking in the Witness: Basic Questioning Techniques

- (a) Ask open-ended question (describe, explain etc)
 - “What did you consider in making the decision to []?”
- (b) Ask necessary follow up questions to get/understand full answer.
 - “Anything else you considered?”
- [optional]: Get sound-bite on good fact:
 - “So you considered x in making that decision?”
- (c) Summary/Clean-up Question:
 - i.e., “So, in deciding to [], the three things you considered were x, y, and z, right?”



Exhaust the Witness's Knowledge

- Be sure to get the witness's full answer to your question
 - Keep asking follow-up questions until you get the entire answer
 - ✦ i.e., "So far you've mentioned that you talked to A, B, and C about Plaintiff's conduct, is there anyone else you talked to about it?"
- When the witness gives a longer narrative answer, go back and ask follow-up questions to unpack it.
 - If necessary/helpful, jot down 1-word reminders of the issues you want to follow up on.
- Get the details re: important events/conversations
 - Who/What/When/Where/Why/How?
 - ✦ Who was there? Where were you? What was said to whom? Best recollection of exact words used? Describe demeanor/reaction. What gave you that impression? Discuss incident with anyone? Send any emails about it?



Eliciting Negative Information & Limiting its Harm

- Do not be afraid of negative answers—you must know how the witness can hurt you at trial—what he/she could say.
- If get answer that hurts your case:
 - 1) Get the negative information out—find out what the witness will say
 - 2) Cabin the answer/Limit the harm
- Anticipate ways to cabin negative answers
 - Personal Knowledge vs. Second Hand?
 - Generalize criticisms of Plaintiff: identify others who did same thing; not unusual/not big deal?
 - Consider potential biases: friends with source? Had conflict w/ plaintiff?
 - Get the witness to defer to others:
 - ✦ Get the witness to admit that others would know better about the issue.
 - (i.e., I assume that so-and-so, plaintiff's immediate supervisor would know more about her day to day performance than you, right?)



Develop & Preserve Inconsistencies

- **Develop conflicts between defense witnesses**
 - Ask different witnesses about the same topics/incidents in an effort to get witnesses to disagree about what happened, who was involved, etc.
- **Save your killer cross for trial: don't allow the witness to correct inconsistencies—developing conflicts within Defendant's testimony is important for establishing pretext**
 - If witness testimony conflicts with witness's prior statement—don't show prior statement to witness unless what was said before helps you.
 - If witness testimony contradicts with what other witnesses said—don't alert them to the inconsistency by raising it or showing documents.
 - Get all the ingredients you need for an effective cross examination but stop there.



Confirming Prior Statements

- If the witness's current testimony is inconsistent with witness's prior statement and the prior statement helps you, use the prior statement to get the testimony you want
 - Show the witness the prior statement and ask questions to get the witness to confirm the accuracy of the prior statement
 - (i.e., You wrote this when the incident was fresh in your mind? And you would have had a better recollection of the events right after it happened as opposed to now, right? When you wrote this statement it was true, right?)



Let the Witness Teach You

- You can often get more information out of the witness if you play on the witness's superior knowledge of a subject and ask them to explain the issue to you so that you can better understand it.
 - Reed's Zanesville Example: Witness as Teacher
 - ✦ Have the witness draw you a diagram or map (then mark the final product as an exhibit to the deposition).



Know Your Witness's Interests

- Use their allegiances or loyalties to your advantage
 - Use a co-worker witness's reluctance to bad-mouth a fellow employee to get good testimony about your client & your client's performance
 - Be aware of the witness's friendship with or dislike for other key players and take advantage of those biases.
- Avoid using labels people have difficulty assigning
 - Rather than asking about "discrimination" or whether someone is "racist" start by asking about whether the witness noticed any differences in how John Doe treated some [employees/tenants etc.] compared to others; whether John Doe had "favorites" etc.



Asking about Discrimination

- Think carefully about the timing and concentration of the most explosive questions (e.g. not comparator questions but have you ever used the N-word, etc.)
- Possible Strategies
 - Sprinkled throughout so less concentrated, less expected
 - All at end so don't destroy rapport for rest of deposition
 - Timing with breaks: most likely to get an answer when someone is ready for a break, say "one more topic and then we will take a break"; most ready to fight when fresh off a break



Miscellaneous Do's and Don'ts

- **Do not chat on the record**
 - You want to be friendly but let the witness do the talking—otherwise it will mess up your transcript & you will not be taken seriously.
- **Do not be sarcastic**
 - Sarcasm does not come through on the record
- **Avoid verbal responses to the witness's answers**
 - Fight the natural tendency to okay or give other verbal responses following the witness's answer—nod to the witness if you feel you need to give some signal that you're listening.
- **Correct double-negatives**
 - It's annoying but otherwise you can make it very hard to use the witness's answer later.
 - [You can warn the witness ahead of time in your initial instructions that double negatives sometimes happen and if they do, you will ask the question again just to correct the double-negative]
- **Articulate the witness's gestures so they are on the record**
 - If a witness is gesturing to explain something—state for the record what the witness is doing because testimony that “Bob Smith then went like this and said...” is not helpful
 - ✦ i.e., after the witness says “Bob Smith then went like this..” you say: let the record reflect that the witness is placing both of her hands on her hips.
 - Or, ask follow up questions to the witness to explain the gesture: “you said Bob Smith went like this—explain in words what you mean by that”



Dealing with Difficult Witnesses



The Hostile Witness

- Listen for word games and change your questions to eliminate wiggle room
 - (i.e., when asked about complaints the witness says “there were no formal complaints”—your next question: “When I say “complaint” I mean complaint of any kind—were there any complaints of any kind, formal or informal, written or oral?”)
 - A: “Not specifically” ... Q: “Ok then, what about generally”
- Read the witness and adjust your strategy based on what works best.
 - If the witness gets combative or clams up when you are assertive, adjust your tone to be more friendly/less aggressive.
 - ✦ (i.e., try to blame the word game on your own imprecision: I’m sorry, I wasn’t clear in my question- when I said complaint, I meant complaints of any kind...”)
 - If the witness is trying to take control of the deposition, don’t be afraid to be assertive.
- Play to the witness’s own interests
 - If the witness is overly defensive, ask questions geared toward absolving the witness of responsibility/fault and placing the blame on someone else if that will create conflicts between defense witness testimony
- Be persistent on the points that are important to you
 - Go at the same information from multiple angles
 - ✦ If the witness refuses to admit he/she is close friends with a key “bad guy” – ask questions to establish the closeness of their relationship without the label (i.e., how long known each other? Socialize outside of work? How often? Know each other’s families, etc.)



The Know-Nothing Witness

- (A) The witness who claims not to remember anything:
 - Try to make the witness seem evasive/unbelievable—*unless* the lack of knowledge helps you establish pretext.
 - ✦ Secret Service Example (“So, you were present in 50 different meetings discussing promotions candidates and you can’t remember a single thing that was said at any meeting?”)
- (B) The witness who claims not to know anything:
 - Lock the witness in re: everything they don’t know so that the witness can’t later claim to have knowledge about it.
 - Try to get the witness to identify the people that *do* know about these subjects so that you can (a) depose them if necessary and/or (b) create conflicts in testimony by asking them if your know-nothing witness was present, etc.
 - For purposes of creating conflicts , it may be helpful to pin down whether the witness is claiming that he/she never had knowledge (i.e., wasn’t present for that meeting/conversation etc.) or had knowledge at one point doesn’t remember.



The Rambling Witness

- If a witness is gives 5 min answers to each question:
 - Keep the rapport going but make sure to stay on schedule and not let witness take over the deposition. Possible approaches:
 - ✦ Politely advise the witness that you'd like to get the witness out of there as soon as possible, but in order to do that, it'd be helpful if he/she tries to limit answers only to the question that's asked.
 - ✦ Gently cut-off a rambling answer if it's not relevant (i.e., let me just stop you there for a second to be sure I understand...[insert next question]”
- But, be aware of when you want a long answer and be sure not to interrupt the witness in those circumstances
 - i.e., you may get better/more information if you allow the witness to give a long answer to a “what happened” question than if you ask a series of more closed questions.



The Timid/Intimated Third-Party Witness

- Turn on the friendliness
- Start off with basic background questions to get them warmed up.
- Ask them broad, open-ended questions to get them comfortable talking
 - Can you explain..? What was that like? Describe..”
- Be aware of your tone with opposing counsel
 - Still be firm when necessary but be aware that being overly aggressive/confrontational with opposing counsel may cause the witness to clam up even more.



Handling Exhibits



Introducing Exhibits

- (1) Ask the Court Reporter to mark the Exhibit
- (2) Hand the exhibit to the witness and a copy to opposing counsel
- (3) Describe the exhibit on the record *including bates number* (to give context in the transcript)
 - i.e., “You’ve been handed what has been marked as Exhibit 7, which is an email from so and so dated such and such, with bates number ###”
- (4) Establish the witness’s familiarity with the exhibit**
 - If the exhibit is something the witness saw, signed, may have seen, etc.—ask questions to establish his/her familiarity with the document. These foundation questions are important for getting the exhibit in at trial.
 - ✦ Seen it before? When/what context? Familiar with it? Is that your signature?
- **But, not everything you show to a witness at a deposition is something he/she has come in contact with before—so there’s no need to ask these foundation questions unless the exhibit is in some way connected to the witness
- No need to show witness every doc they’ve touched—only use exhibits you have questions about



Possible Questions About Exhibits

- **Informational questions:**
 - Understanding how to read/interpret certain documents, notations, abbreviations etc.
 - Identifying handwriting
- **Questions about the purpose/intent/creation of a document:**
 - Why did you write this? What did you hope to accomplish?
 - Write it on own or have input from others?
- **Other Versions**
 - Prior drafts? Change a prior version to create this document? Why make that change?
 - Prior versions still exist? Where? [Ask counsel to produce]
- **Circulation/Discussion of Document**
 - Who document given to? When? Why that person? Any discussions about it?
- **Basic foundational questions useful for admission of the document at trial**
 - Is this a record that is normally created in your business?
 - Are you familiar with these types of records? Are these records that you regularly review or come in contact with? So you would have seen this record when it was first issued?



Using Exhibits

- Be aware that the transcript won't reflect gestures, pointing, etc. unless you narrate what's going on.
 - When drawing the witness's attention to specific parts of a document, do so verbally rather than by pointing
 - ✦ ["Directing your attention to the third paragraph that starts with ..."]
 - If the witness points or gestures, describe it on the record.
 - ✦ ["Let the record reflect that the witness is pointing to the image on the bottom right corner of the photograph"]
- Use the witnesses to explain how to read a document
 - If you don't know how to read a document or what abbreviations mean, use the witness to explain them to you.



Creating New Exhibits

- Ask the witness to draw, circle, highlight, or otherwise mark up an exhibit if it will help you.
 - Possible examples:
 - ✦ Marking locations on a map or blueprint;
 - ✦ If a document was written by more than one person, have the witness identify what parts he/she wrote vs. what parts were written by others.
- [Be sure the marked up version is then given to the Court reporter to be attached to the deposition]



Strategies for Dealing With Opposing Counsel



Handling Objections

- Be firm with opposing counsel.
 - Do not let counsel take advantage of you.
- Cut off speaking objections immediately.
 - Object on the record to counsel's speaking objection. If he/she does it again object and be prepared to show local guidance on speaking objections (local rule, judge's standing order). If it happens again, threaten to call the Court. If it continues see options if it's really bad.
- Don't let frequent objections rattle you.
 - If you believe the objection is valid, you can rephrase your question to fix it.
 - If you believe the objection is invalid, you can:
 - ✦ Just ignore it and keep going. Counsel sometimes objects just to get you off your game and break up your rhythm or rapport with the witness.
 - ✦ Give a standing objection to not waste time/allow repeat of the objection/interrupt flow.
 - ✦ Call him/her out on it—assert the objection is baseless and ask them to articulate the basis of objection.
- If there is an instruction not to answer:
 - Ask what the privilege is. If no privilege ask the basis.
 - If you don't agree, indicate will have to resolve with the Court and leave open.



Asking the Deponent to Leave the Room

- Know when to make deponent leave the room.
 - If responding to counsel's objection, question, or comment will require you to reveal some aspect of your strategy or where you are going with certain questions, have the witness leave the room before you respond to counsel.
 - If opposing counsel is being inappropriate and you have to have a discussion.
 - Make the deponent leave the room if you are calling the Court.



What if it's really bad?

- Options:
 - Letter to opposing counsel with examples
 - Call court (if allowed)
 - Ex. Judge who has depositions in chambers (not bad for opposing counsel control)
 - Suspend deposition & submit transcript Court
 - Finish deposition & submit transcript to Court
 - Videotape future deposition
 - May improve behavior and can show the Court tone, volume



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Going On & Off the Record

- Make sure your exchange with counsel is on the record when:
 - The issue may become the subject of a future motion or call with the Court. For example:
 - ✦ If Defense counsel is advising the witness not to answer a question- be sure you get counsel to state on the record the basis for the instruction (what privilege etc.)
 - If you come to an agreement w/ counsel that should be memorialized.
 - If most of your exchange with Defendant's counsel was done off the record- you can summarize the exchange once you go back on the record.
- Go off the record if:
 - Time is an issue and dealing with the dispute/issue will take up a good amount of time/argument.



Leaving the Deposition Open

- While simply saying the deposition is open doesn't mean a Court will agree, if you think that it should be left open, best to say on the record you are leaving it open
- Reasons:
 - Inappropriate objections with instructions not to answer that need to be resolved
 - You don't have all discovery you are entitled to/have requested and would use with witness
 - You learn about missing documents during the deposition that you would want to use