New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 53
FRIDAY, SEPTEMBER 13, 2019

Outside Counsel

Don'ts and More Don'ts Of Taking Depositions

By **Scott M. Himes**

Taking depositions is fundamental to every trial lawyer's civil case practice. What will the other side, and the key witnesses, say about what happened to bring the parties to court? As every lawyer learns early on, a deposition is taken for several purposes. But I have found over the years that one critical purpose all too often gets lost in the shuffle: *getting evidence to use at trial.* This purpose seems so obvious. Nonetheless, after countless hours in the deposition room, I'm convinced that trying the case is frequently the last thing on opposing counsel's mind. It is worthwhile to reiterate the basics based on the admonition of what *not* to do.

Don't Blindly Rush Into 'Depose Everybody' Mode

Litigators instinctively believe that they must start deposing the opposing side once documents are produced. Before following through on that knee jerk reaction, pause and ask yourself whether you really *need* depositions. The question might seem like heresy: We litigators are programmed to go after the other side by pretrial interrogation, and we believe the other side will feel the same.

But before following the program, take a deep breath. Think through whether the case truly must go through the time, expense and delay of depositions, or, at least, who really *must* be deposed. Criminal defense lawyers generally are not armed with deposition testimony when they go to trial, and the high stakes of guilt or innocence are on the line. Parties arbitrate typically without pre-hearing depositions. (But not always, because sometimes arbitrators relent to a request for depositions.) And, as I have experienced in at least one significant case, a preliminary injunction hearing can be consolidated with the trial on the merits (see Fed. R. Civ. Pro. 65(a)(2)) before any discovery has occurred. Each of these situations could be said to be a "trial by ambush" that the Federal Rules of Civil Procedure are, in theory, supposed to prevent in trying a civil case. Yet, can anyone say, in general, that justice is denied in these proceedings? I think not.

> Thinking about and preparing for a deposition boils down to what good journalism focuses on: who, what, when, where, how and why. Dig out those facts.

While not the usual path, every lawyer should weigh the costs and benefits before going down the deposition road. It will be rare, but it might be the better part of valor to forgo extensive, or even any, depositions in a particular case.

Don't Ignore the Reasons for Taking a Particular Deposition

After considering *whether* to depose, the questions should be *who* and *why.* Again, think strategically. That is especially important because the number of depositions that can be taken and the time for each is usually limited. In both federal court and the Commercial Division of the New York Supreme Court, a party generally can depose no more than 10 witnesses, each limited to seven hours. Fed. R. Civ. Pro. 30(a)(2)(A)(i) and (d)(1); 22 NYCRR §202.70, Commercial Division Rule 11-d(a). Use that number and time wisely.

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The "who" and "why" questions meld into the reasons—and there usually is more than one—for taking the deposition. Some of the reasons are to learn the facts of the case beyond the pleading allegations; to preserve a person's recollections (such as an elderly or sick witness); to evaluate your own case, whether as plaintiff or defendant—which can be very important for advising your client because often clients have unrealistic or ill-founded expectations; to authenticate documents, thereby making it easier to get documentary evidence admitted at trial; and to evaluate a witness's demeanor and credibility.

Important for trial purposes is to "lock in" a witness's recollections, or "disable" the witness for trial. That is, what the witness testifies to at deposition should be what that person will say at trial—and if not, you are armed to confront the witness on the stand with her prior inconsistent testimony.

Of course, a main purpose in deposing the opposing party is, proverbially, to "get good stuff." What will the witness say that helps your case—for settlement, summary judgment and trial? The other side's admissions to facts that support your claims, defenses or positions are what every lawyer wants from a deposition. But temper your expectations. Don't expect that the other side will "break down" under your riveting questioning and give away the store.

Cases are typically built incrementally. At trial, usually you present a mosaic of facts that leads the jury to find in your favor, most persuasively by enabling the jurors to see for themselves the picture you paint. You prove your case at trial, or defeat the other side's case, by assembling and ordering the facts so that the fact-finder reaches your desired result on its own. The deposition is a major tool for being able to do that convincingly.

Don't Overlook the Kind of Witness You Are Deposing

Keep in mind the kind of witness to be examined. That will guide and inform the questioning technique. Too often, I have seen an examiner ignore the evidentiary-rule differences that exist, for example, between a party and nonparty witness. Remember: You are taking the person's testimony potentially to introduce it at trial. The often constant "objection to the form of the question" from the other side at deposition has different implications at trial for an adverse-party versus a nonparty deponent.

The rule of evidence is that an adverse party (or a hostile witness) can be asked leading questions. Thus, for an adverse party, an objection based on "leading" to a deposition question is unlikely to be sustained at trial to prevent that testimony from being admitted. Not so for the testimony of a nonparty witness. When deposing the nonparty fact witness—e.g., the bystander who saw if the traffic light was red or green—you should not ask leading questions. If the other side objects on the basis of leading, and you don't rephrase, the witness's testimony might not come in at trial.

Party versus nonparty is the most frequently blurred distinction when it comes to deposition questioning technique. But the reasons for an examination and the consequent questioning technique also differ, for example, when examining an expert witness, a Rule 30(b)(6) corporate-representative witness, or a custodian of records. Very briefly (and putting aside myriad complexities of deposition practice): For an expert, you often want to explicate the analysis, assumptions, data used and opinion in detail, without cross-examining to expose the expert's mistakes (which the expert might then be able to "correct" for trial); for a corporate representative, you mainly will explore the company's practices and procedures that bear on your issues and are beyond the knowledge of any one fact witness; and the custodian of records is the person who can authenticate documents and, more importantly, walk you through a company's electronic communication and storage systems to pinpoint the specific ESI you should focus on.

Don't Argue With the Witness

Arguing with a witness is a waste of precious time. That means, don't fight with the witness when she doesn't respond with the answer you expected or would prefer. Instead, explore why the witness gave that response and on what basis. Doing so effectively will, if necessary, give you ammunition to rebut the testimony or challenge the witness's credibility at trial.

For example, a witness says that an important meeting occurred in February, not January as you believed and is important for your case. So: "How do you know the meeting occurred in February?" "Why do you believe the meeting occurred in February?" "Do you have any documents that would refer to the date of this meeting?" "Do you know of any such documents?" "Do you keep a calendar?" But baiting the witness with "As you sit here today, are you telling me *X* is the case" is unlikely to lead either to the facts that you need or, even more unlikely, to the admission you were hoping to get.

Similarly, don't argue with opposing counsel. Anyone who has taken more than a handful of depositions has been there, and done that. No lawyer "wins" an argument at a deposition. If the argument is about opposing counsel's obstructing you from eliciting necessary information through proper questioning, you might want to stop and try to get the judge (or the law secretary in state court) to intervene

and rule. But pick this battle very carefully, and judiciously. No judge wants to be involved in depositions. Go this route only where absolutely necessary because you're being prejudiced.

Rather, when the arguing starts, make your record. State your position specifically and without histrionics. Refute the other side's position pointedly. Move on. You've preserved the issue for a ruling down the road, if it ever comes to it. More often than not, the issue will get resolved later on or become unimportant.

Don't Waste Your Limited Time on the Unnecessary

The limited hours for a deposition are too few to waste. It is standard to elicit a witness's background, which of course must be done where you know that the background is relevant to the issues. But don't overdo it. True, you never know what you might uncover that could be helpful (e.g., that the witness has a criminal record, perhaps for perjury!); still, in my experience, a significant surprise occurs infrequently. Certainly eliciting detailed personal information about a witness usually wastes time. (I have been in depositions where the examiner asks the ages of the witness's children!) Granted, preliminaries are used to "warm up" the witness, hopefully so that the comfortable witness might drop her guard when the meaty questions follow. But the best use of the seven hours is to get into the important questioning without much ado.

A word about the often-heard "usual stipulations." As an examiner, I don't bother with this. A deposition is taken under the Federal Rules of Civil Procedure or, in New York, under the CPLR. Agreeing to "the usual stips, counselor?" is unnecessary, can lead to misused time, and is mostly an artifact from long ago.

Don't Lose Sight Of Establishing the Facts

Overarching everything is asking questions that nail down the facts through proper questioning. *Don't examine from a script.* Flexibility in your questioning is crucial. *Listen* to what the witness says and follow up on that answer. "Did you speak with Ms. Smith about *X* transaction after the August 2019 meeting?" [*Who*]. "How soon afterwards … on what date?" [*When*]. "Did you talk by phone … or in person? How did the discussion come about … did she call you, or vice versa?" [*How*] "What did she say? What did you say? What did she then say in response? What did you say in response to that?

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What else was discussed in the conversation? Have you now described everything you recall about that discussion?" [*What*] "Why did you call her/what's your understanding why she called you?" [*Why*] "What happened next with the transaction?"

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Too often an examiner gets caught up in trying to get the good stuff. "Isn't it a fact that…" coming too early is a give-away to your goals and is unlikely to succeed. You must ask who, what, when, where, how and why *as to specific facts* that will build your story. Simple questions that are limited to discrete facts work best.

You will then use the facts you've learned through depositions to frame cross-examination questions for trial—typically always leading—to reveal the evidence you want the judge or jury to hear. Deposition questions versus trial cross-examination questions can be thought of as having a "180-degree" relationship. "What date was the meeting?" at deposition becomes "The meeting occurred on *X* date, right?" at trial. Asking open ended questions to learn the facts at deposition enables you to reformulate those facts into the answers to leading questions you want and can expect at trial—and thereby build your evidentiary story.

Conclusion

Keeping these "don'ts" in mind when taking a deposition will focus you on the "dos" for a successful deposition and, relatedly, a well-tried case in the courtroom.