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Taking Depositions in Discovery for Effective Cross-Examination at Trial

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Frequently when defending my client at a deposition, I have been astounded by the opposing counsel's questioning. I find myself wondering "how does counsel possibly think these questions will get any answers to help at trial?" "Doesn't counsel realize that the testimony my client is giving should be the stuff of cross-examination in the courtroom, where it matters much more than in the deposition room?" Failing to ask your questions the right way at deposition can leave you without the ammunition you need to cross-examine that person effectively at trial.

A key part of your deposition preparation should be planning for the day when the deponent takes the stand in the courtroom. Plan as if the case *will* get tried. The questions posed and testimony elicited at deposition are intrinsically related to the questions to be asked and the testimony you will want to elicit on cross-examination at trial—related in content, but *very different* in how that content, the evidentiary facts, is presented at trial. For trial, you need to reformulate the prior deposition questions to extract specific testimonial admissions of key facts previously disclosed at the deposition. That is, you must reassemble the deposition questions and answers for an effective cross-examination at trial. Questioning at a deposition and cross-examining at trial are two sides of the same coin.

Taking the Deposition With Trial Cross in Mind

The first step on the road to the trial cross-examination is to plan the deposition questioning carefully. The deposition of an adversary party has several purposes—learning more about the facts at issue, essentially gathering information about the case; identifying the other side's theories and themes of the case, and testing yours; authenticating documents; evaluating the deponent as a witness, including her credibility; preserving the recollection and knowledge of a witness who might not be available for trial; and developing matters for settlement negotiations. Which of these purposes is most important for a given deposition depends on the nature of the case, the deponent's place in the narrative, the extent of the deponent's knowledge, and other case-specific factors.


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But a critical purpose also is to elicit evidentiary admissions from the other side to use for summary judgment or at trial. For the case being tried, this means eliciting answers at deposition that then can be elicited through cross-examination questioning to produce admissions at trial. How do you accomplish that critical purpose?

It begins with understanding an effective approach for asking questions at deposition. Although no one size fits all, and experienced litigators employ various techniques, often the manner of questioning for a deposition is referred to as an "upside-down pyramid," or a "funnel." Questioning proceeds incrementally and progressively from the general to the more-and-more specific and particular. E.g., "*When did the first meet-*

ing with Ms. Smith occur? Who else was present? What was discussed? What did Ms. Smith say? What did Ms. Smith say about topic 'X'? About topic 'Y'? What did you say about topic 'X'? What did Ms. Smith say in response to that?" And so on. You winnow down to elicit the facts as concretely and precisely as possible.

As the questioning becomes more specific, it can become increasingly more *leading*. Questions change in style from "*What did you say about 'X'?*" to "*You said that 'X' was 'such-and-such,' correct?*" Consider a defamation plaintiff's questioning of the defendant: "*What did you say about my client?*" becomes "*You said my client was a crook, right?*" The bottom point of the pyramid becomes the most pointed—or leading—questions to elicit a discrete admission that supports your case. This is cross-examination testimony at the deposition.

Reasonable and experienced minds differ on how far to the end point this questioning should go. Usually you will want to expose the deponent fully on cross-examination at the deposition to elicit the evidentiary admissions to support your case and expose major weaknesses in the other side's position.

But, like everything in litigation and trial practice, no one rule governs all. Sometimes an examiner might conclude that she "has enough," and decides to hold the zinger—really powerful stuff—for trial. After all, exposing the witness at the deposition gives him the opportunity to prepare for what he knows will be coming at trial. At trial, he might come up with a way to explain away the deposition admission (although of course credibility then becomes a key issue). Also, a well-known deposition pitfall—which holds true equally for trial cross-examination—is asking one too many questions, where the last one allows the witness to explain and recast a prior answer on his own terms. So, the deposition examiner might have decided that the odds are strong that the case will go to trial and thus conclude not to go the last mile in cross at the deposition, keeping her powder dry for trial. But that should always be a *strategic* decision—one informed by your prognosis for the case going forward, whether the deponent's testimony is enough to support summary judgment, the prospects for the deponent being able to clean up the answers favorable to your case, and the like. Litigation is always about calculated but informed strategic risk-taking.

There are also exceptions to using the pyramid deposition-questioning technique. In some cases, it might be more effective to go after the witness with cross-examination style questioning aimed at garnering admissions. For example, you might already have thoroughly developed the facts through depositions of other witnesses, from your client's internal information, based on extensive document productions, via third-party interviews or depositions, or other means of discovering information. You conclude that you can independently authenticate all the important documents, and both sides' theories and positions are clear.

So, in those circumstances, have at it with the witness from the get-go. I once began a deposition in a complicated dispute over a joint venture with the very first question "*Why are you suing my client.*" The weaselly answer, which included "well, my lawyer thought it was a good case," revealed an objective ignorance about her case, thereby undermining the strength and credibility of her claims. Again, that was a calculated risk, based in part on my sense that the witness would not be well prepared and had an arrogance about her position that could be exposed. Again, starting the deposition like that was a considered strategic call based on the specific case circumstances.

I also frequently ask a deposition witness "how did you feel" about a particular event, discussion or interaction. Some say "feelings" don't matter evidence-wise. Not so. Cases typically involve a party's state of mind and motive. Did a party act purposefully and intentionally, knowingly, deliberately, maliciously, willfully, in or without good faith, with bad intent, scienter, mens rea, and so on. State of mind generally is proven by inference. How a person felt about something—"I was angry when she did that"; "I was upset when he said it"; "I thought your client had no right to do so"—provides insight, and probative evidence, on the state of mind determination.

Importantly, don't confuse eliciting admissions from a deponent with "getting the witness to say what you want." For example, questioning like "Are you telling me now, as you sit here at your deposition today, that 'such-and-such' didn't happen?" Or, "How can you be telling me today, under oath, that *X* never really occurred?" That kind of questioning is just arguing with a witness. You are not asking for—and are not going to get—facts. You will not "win" the argument with the witness. And you will not obtain any testimony from the deponent that can be converted into cross-examination material for trial.

Formulating the Cross-Examination Based on the Deposition Testimony

Cross-examination at trial typically should be geared to accomplishing two goals—eliciting testimonial admissions that support your case, and undermining the witness's credibility in order to rebut your opponent's case. Facts testified to at a deposition are the building blocks of both for cross-examination at trial.

A good litigator is, first and foremost, a storyteller. To litigate a case is to develop the story concerning your client and her travails that led to the lawsuit—and why that story justifies an outcome in her favor. Discovery, and particularly depositions, help you assemble the pieces of the story. Trying the case is telling your story with the pieces properly assembled. Cross-examination is so important because, done effectively, you tell your story through *the other side's* witness. When your story comes out through your adversary's words, it is inherently more believable to the jury or judge than when your client tells the story. The more you can use the opposing party to tell your narrative, the more likely it will be that the factfinder accepts your story and finds in your client's favor.

What we lawyers label "admissions" is nothing more than your opponent agreeing to your narrative, to your view of the case, and thereby contradicting its own case. But an admission is powerful evidence. An admission is an exception to the hearsay bar—the inadmissibility of certain out-of-court statements—or is even deemed not hearsay, precisely because an admission is considered *reliable* evidence. That a witness said (or wrote) something before there was a lawsuit that acknowledged an adversary's later position, or is contrary to the witness's present view, carries indicia of trustworthiness and veracity. Eliciting admissions at trial thus goes far in proving your case.

Cross-examination is the tool to bring out those admissions. Deposition questioning is the tool to enable you to construct an effective cross. In preparing your cross-examination, your questions pick up where the pyramid-structured deposition questioning ended. That is, the end of a line of deposition questioning is the *start* of that witness's cross-examination.

From the deposition, you know what the witness probably will, or should, say. Those answers are the stuff of the cross-examination outline. Start with a particular fact important to your case that you want to elicit as an admission from the witness on the stand. Work "backwards" from there. This is the *line* of cross. Your cross questioning should be linear—very specific—and unlike the upside-down pyramid style of deposition questioning. Each question from the start of the line should be short, direct and *leading*—i.e., a question that, truthfully answered, allows for only one answer, typically "yes," or "I agree." And the answer is a piece of *your* narrative, in the form of your question, thereby proving your case through the other side. The fact you want by an admission is the logical and inescapable end of the line.

For example, in a case where your client asserts that the defendant manufacturer knowingly induced your client to buy defective goods, you cross-examine an executive from the defendant who had discussed the goods with the company's CEO:

"*Ms. Jones, your company's CEO at the time was Mr. Johnson, right?*

And you met with Mr. Johnson on Sept. 1, 2020, correct?

Just the two of you, right?

Mr. Johnson, your boss, talked about the widgets your company sold to my client, correct?

He said that he'd inspected the widgets before they shipped, right?

He talked about the condition of widgets, right?

In fact, he said at the meeting, that there was a problem with the widgets, right?

So he knew, didn't he, that there was a problem with the widgets, right?"

You ask these questions based on how Ms. Jones had described the meeting discussions during her deposition. By leading Ms. Jones to agree with your questions, she is confirming your narrative—precisely what you want from the witness.

The deposition questioning makes this possible. At the deposition, open-ended questions, working downward on the upside-down pyramid, do the trick. Learn as much as you can from the witness. The order of the deposition questioning doesn't matter much; what matters is to get all the information possible from the witness, and exhaust her recollection. That information, then presented selectively through carefully structured leading-question cross-examination, going one fact at a time, becomes the testimonial evidence you want the judge or jury to hear at trial.

Obtaining admissions on cross is also persuasive because admissions are at the heart of good advocacy. Admissions *show* the factfinder how to decide something rather than *telling* the factfinder what to decide. Advocacy is most persuasive when it enables the factfinder to reach a conclusion by its own reasoning and analysis, in contrast to advocacy that screams at the factfinder to reach the result you want. You want the judge or jury to reason, to deduce, to calculate that 4 is the sum of 2 + 2, by providing the 2s and letting the judge or jury conclude that they add up to 4.

As one of the greatest trial lawyers ever, Abraham Lincoln, put it long ago:

When the conduct of men is designed to be influenced, persuasion, kind unassuming persuasion, should ever be adopted. It is an old and true maxim that 'a drop of honey catches more flies than a gallon of gall.' So with men … . [But] to dictate to his judgment, or to command his action … and he will retreat within himself, close all the avenues to his head and his heart (A. Lincoln, Address to the Washington Temperance Society, 1842).

Or, as noted, your cross questions are based on what the witness *should* say at trial. Meaning what? At Ms. Jones' deposition, the examiner should have locked down her recollection of the meeting, covering everything that occurred and was said at the meeting. If she doesn't testify the same way at trial, you use her deposition testimony—you confront her with what she previously testified to—to impeach her on the stand, exposing her as a liar. Little is more powerful at trial than catching a witness on the stand in a lie.

Of course, the old saw about cross-examination—"don't ask a question you don't know the answer to"—remains gospel. The qualification, of course, is not to ask that question unless you don't care about the answer, that whatever the answer is it won't hurt you. In the example above, you could ask the non-leading question "*How long did the meeting last?*" because the duration of the meeting, unlike what was said, probably doesn't matter. (Conversely, however, you would never ask at trial the open-ended and potentially harmful question "*How did you feel?*" without being sure you'd get a good answer.) But, changing the style to non-leading questions typically breaks up the flow of cross-examination Q&A, where you want the witness to agree with you repeatedly, question by question. More importantly, the old saying's admonishment represents a time-tested trial truth because you never know how a witness might surprise you. An essential rule of trial practice: *Expect the unexpected.*

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Preparing for and taking a deposition means playing the long game. What you do at the deposition arms you for cross-examination at trial—as long as you handle the deposition with trial cross squarely in mind.

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