"How to Take a Deposition Like a Pro"

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A deposition is an invaluable tool of discovery in civil litigation. By taking an effective deposition, a litigator will enhance the value of his/her client's case. During this CLE, the facilitators will discuss strategies for young attorneys on how to effectively take and defend depositions. The facilitators will also discuss common deposition "pitfalls" to avoid. The facilitators will discuss the following topics: reasons to take a deposition, preparing to take a deposition, taking a deposition, defending a deposition, using deposition testimony to your advantage, and common deposition "pitfalls" to avoid.

I. Reasons to Take a Deposition

There are several reasons to depose a witness. First, one may elect to depose a witness in order to preserve the witness's testimony. Litigation can be lengthy. It may take several years before the parties can resolve their dispute by having a trial. In the intervening time, a witness may become unavailable due to death, illness, or incapacity. Rule 32 of the Federal Rules of Civil Procedure and the Alabama Rules of Civil Procedure, allows a party to present deposition testimony to the jury in lieu of having the unavailable witness appear in court.[1] Preserving testimony via deposition is especially important in cases where the Plaintiff's health is at the center of the dispute and the Plaintiff is suffering from a terminal illness. In such case, it is important to preserve the Plaintiff's testimony via deposition.

[1] Rule 32 of the Federal Rules of Civil Procedure and Alabama Rules of Civil Procedure also allows a party to use deposition testimony if the court finds that the witness is 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition.

Secondly, one may elect to depose a witness to commit the witness to his/her version of the facts. In preparing for trial, it is important to know the opposing party's position on key issues. One way to commit the witness to a version of the facts is by asking the witness questions under oath. Taking a witness's deposition will alleviate the element of surprise during a trial. If taken effectively, a deposition will commit the witness to his/her version of the facts in a way that will prevent the witness from changing their story later at a trial.

Finally, one may use a deposition as a fact-finding tool. One may choose to depose a witness to simply find out what the witness knows. The testimony may lead you to other evidence that you would not have discovered.

While there are many reasons to take a deposition and this list is not exhaustive, it is important that the practitioner knows why he/she is taking the deposition. To be successful, the mission must be clear regarding why you are taking the deposition. As a young attorney, you may not be the master-mind behind the goal, but you must make sure you sufficiently understand the reasons why the deposition is being taken. This can be accomplished by talking extensively with your managing attorney. During this stage, an associate must understand the case's theory, defenses, and the overall litigation strategy.

II. Preparing to Take a Deposition

Preparation is a key factor in taking a successful deposition. If you are a Plaintiff's lawyer, you bear the burden of proving your client's claim(s). As such, you must ensure that you have the evidence in the form of documents and testimony to prove every element of your client's claims. It is advisable to only depose the opposing parties' witnesses after the opposing party has produced requested documents to your client. Once receiving the documents, it is

important that you review the documents for key evidence that will help you prove the elements. Reviewing the produced documents will also assist you in determining what topics need to be covered with each witness and identifying the witnesses best suited to answer questions regarding a topic.

During the preparation phase, it is equally important to develop an outline that identifies the major topics that you wish to cover with the witness. Developing an outline will ensure that you cover every topic and will prevent you from meandering. The topics that you cover should further the goal of proving the elements of your client's claim. Additionally, the topics should be arranged in some logical manner. You may choose to arrange the topics in a variety of ways, but you should have a strategy on how you arrange the topics. While some practitioners prefer to include every question in their outline, others prefer to only draft a topical outline. As a young attorney, it may be beneficial to include questions in your outline and work your way towards only using a topical outline. The important thing is to make sure that you can cover every topic.

Next, you should prepare the exhibits that you plan to admit to the deposition. Many times, there are more than one lawyer defending the deposition. As such, you may want to prepare no less than four copies of every exhibit: one for the witness, two for opposing counsels, and one for yourself. Additionally, you should have the exhibits organized in a way that you can easily retrieve them to prevent delay in the deposition. More importantly, having the exhibits prepared prevents you from becoming flustered and potentially missing covering an important topic.

III. Taking a Deposition

For a young attorney, taking a deposition is a great primer to trial. As such, it should not be taken lightly. At the beginning of the deposition, the parties will stipulate to certain rules that will govern the deposition. The stipulations "are binding agreements and will be given full force and effect" by the Court. *McKelvy v. Darnell*, 587 So. 2d 980, 983 (Ala. 1991).[2]

In *McKelvy*, the parties agreed that objecting to the deposition questions were unnecessary unless the objection was to the form of a leading question. When counsel failed to object to the predicate of a question, the Court found that he waived his right to object when the deposition transcript was introduced at trial. *Id*. at 983-984. As demonstrated in *McKelvy*, the stipulations can have major consequences to the presentation of your client's case and what evidence is presented to the jury. Most often, the parties will agree to limit objections to the form of the question. Additionally, the parties often agree that the deponent will read and sign their deposition transcript after it is produced. The parties should put the stipulations on the record at the beginning of the deposition.

While examining the witness, it is important to listen to the witness's answer. While having an outline is important, one should remain flexible so that he/she can ask follow-up questions to the witness's answer. Often, young attorneys are tethered to an outline in such a way that they miss opportunities to get key information from the witness. It's important to remember that you are attempting to elicit testimony that can help prove elements of your client's claim. The witness may volunteer helpful testimony. However, you must be listening so that you can ask more pointed follow up questions. Alternatively, the deponent's answer may create a fact question that will allow your client's claims to survive a motion for summary judgment.

[2] See also McMillian v. Wallis, 567 So. 2d 119 (Ala. 1990).

Finally, depositions are a great time to gauge the demeanor of a witness and preview how the witness will present to a jury. For example, it's important to note if the witness appears overly anxious, shifty, or untrustworthy. Alternatively, you should also note if the witness appears likeable, trustworthy, and forthright. These notes will come in handy when preparing to present your case to a jury.

IV. Defending a Deposition

Many people have never been deposed. As such, it is important that you thoroughly prepare your witnesses before they are deposed by the opposing party. The witness needs to be aware of potential topics that may be covered during the deposition. Below are some additional tips to give to the deponent to prepare them for their deposition.

- Only answer the question asked
- Only answer the question if you know the answer (don't speculate)
- Always be truthful
- Always read a document before answering questions regarding the document
- Take a break when needed
- If you don't understand the question, ask the examining attorney to clarify the question

Likewise, the attorney defending a deposition must be adequately prepared. While defending a deposition is less vocal than deposing a witness, "it is not less important than the examiner. At every stage of the examination, deponent's counsel must be alert to question improper in form or outside the scope of the deposition and must be prepared for any situation in which he is called upon to protect his client's interest." Jerome F. Facher, *Taking Depositions in*

the Litigation Manual: A Primer for Trial Lawyers (American Bar Association, 1983). It is of utmost importance that the defending attorney be prepared to object to the form of the question when needed. This simple objection preserves the attorney's right to raise objections if the opposing party attempts to use the deposition testimony in trial or in a motion. While most parties stipulate that the only objection should be to the form of the question, the defending attorney should know the basis of his/her objection. Below are some common reasons for objecting to the form of the question.

- Question calls for the witness to speculate
- Question calls for hearsay
- Question requires that the witness draw a legal conclusion
- Question is a compound question
- Question is a leading question

While this list is not exhaustive, these are common objectionable questions that arise in nearly all depositions. A young attorney should always review the rules of evidence to ensure that he/she is prepared to challenge objectionable questions.

V. Using Deposition Testimony to Your Advantage

Deposition testimony is crucial to your client's case. Each party will use the testimony as a weapon to advance their client's interest. Most defense attorneys are seeking to obtain summary judgment for their client. Undoubtedly, defense attorneys will use deposition testimony to persuade a court that there is no genuine issue of material fact. Likewise, plaintiff attorneys will use the testimony to persuade a court that there are significant fact questions that must be

decided by a jury. This end goal should be in mind when deciding who to depose, while preparing for a deposition and during the deposition.

After taking the deposition, a practitioner should have a system on when to complete a first reading of the transcript. During the first read, one should identify and highlight the testimony that helps your client's case. It's also helpful to draft a summary of the transcript. This summary will aid you in responding to a motion for summary judgment in an efficient manner and aid you in planning trial strategy. It is advisable to complete a second reading of the transcript. Inevitably, you will find a key piece of testimony that you missed during the first read. As litigation drags on, the issues of a case are streamlined, and deposition testimony becomes more relevant. The second reading will help you refine the key testimony.

VI. Deposition "Pitfalls" to Avoid

Litigation is an adversarial process. As a young lawyer, you will encounter opposing counsel who will attempt to use intimidation and demeaning tactics to throw you off your game. Don't take the bait. It's important to remained focused on the goal and remember why you are taking the deposition. Additionally, remember that a deposition is not a trial. Depositions are a discovery tool. As such, you should avoid the temptation to only ask questions that benefits your case theory. You would rather know about damaging testimony prior to trial than to be surprised when you get to trial. Another common pitfall is simply "winging it". You should always be prepared for the deposition. Likewise, you should prepare your client when they are being depose. You should also ask your client about the deponent prior to the deposition. Your client may have information about the deponent that may advance his/her case. However, you will need to know that information so that you can ask the right questions during the deposition.