

# **WINNING DEPOSITION STRATEGIES**

**TEXAS TRIAL LAWYERS ASSOCIATION**

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**ANDREW L. PAYNE  
HOWIE & SWEENEY, L.L.P.  
Suite 1400  
Park Place on Turtle Creek  
2911 Turtle Creek Boulevard  
Dallas, Texas 75219  
214/523-8800  
214/523-8888 FAX**

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## **PREPARING FOR AND TAKING AN EFFECTIVE DEPOSITION**

The first step in preparing for and taking a deposition is to determine the objective of the deposition. Depositions will typically fall into two categories, discovery depositions or a deposition to preserve the testimony of the witness for use at trial. Regardless of the objective of the deposition, you should take the deposition as if it were going to be used in court. Discovery motivated depositions typically utilize broad, open-ended questions. In contrast, trial depositions are tightly focused on the particular evidence being presented to the jury. A deposition may be used at trial for impeachment, as a statement of corporate representative, if witness is unavailable, or for rehabilitation of a witness. When preparing for and taking the deposition, keep in mind the purpose of the deposition -- to get and preserve testimony. Your questioning should be thorough enough to ensure the witness has fully disclosed his recollection. Frequently, the most valuable question you can ask is "Why"? Before concluding the deposition, you should be comfortable that you have committed the witness to a complete story, so he cannot go to trial and surprise you with new facts.

### **I. PREPARATION FOR THE DEPOSITION**

Preparing for a deposition entails a thorough familiarity with the facts and legal concepts of the case. To familiarize yourself with the factual and legal materials, you should review the pleadings to refresh your recollection as to the claims you are making. Make a short list of the claims, then pull the pattern jury charge for each of the claims so you know the elements to prove up for each claim. In every deposition you should attempt to prove as many elements of your prima facia case as the witness's scope of testimony will permit. Next, review all of the discovery produced in the case. This serves two functions. First, to familiarize you with the facts and materials available and second, it allows you to pull out documents to use for exhibits at the deposition.

The more knowledge you take to the deposition, the more effectively you can question the witness. Research your witnesses' background and that of any corporate affiliations.

Many of the governmental agencies, such as the Securities and Exchange Commission, Federal Energy Regulatory Commission, Food and Drug Administration, National Transportation and Safety Board, have online database which provide information at no cost. Utilize the Internet, state computer deposition banks, the list serve, TrialSmith and your network of acquaintances to come up with prior deposition testimony of the witness you are going to depose or persons similarly situated within the same company if you are deposing a corporate representative. It is possible that a person with a very similar job title or the witness's predecessor has been deposed in another case and you may gain valuable insight by skimming that deposition for jargon and insight into the corporate structure and procedure. Next, develop your questioning approach, whether it be by topic, subject matter, or in chronological order. Keep in mind that any order to your questions will give the witness and the defending attorney an idea where you are going. Therefore, consider laying out your questions so you can ensure that you covered all of the areas that are important and then mix the questions up during the deposition. You can keep track of questions you have asked by checking off areas on your outline as you ask questions on them.

## **II. CREATING AN OUTLINE**

With the information gathered from the investigative phase, you should develop an outline that is comprehensive enough to allow you to remember every point necessary. Do not, however, compile a laundry list of complete questions. The problem with a detailed outline is that the questioner merely reads off the outline and does not ask questions in response to the witness's answers. It is important to listen during a deposition and observe the body language of the deponent to fully develop lines of questioning and obtain information that you may not have known existed. By having the questions scripted, your spontaneity is severely impaired and you may not be able to recognize that the witness has information which will be helpful and relevant, but which you had not considered when you developed your outline. Additionally, a detailed outline may allow the witness and the defending attorney to know how much longer the deposition will take and the areas you will

be covering. In limited circumstances, however, it is important to write out a question word for word. For example, when you are attempting to elicit testimony to fit a particular law point for a pending motion or to ask an expert witness a hypothetical question which must contain numerous elements to stave off an incomplete hypothetical objection.

With practice, you will develop an outline and note-taking system which suits your particular style. One popular method is to have a three-ring binder with the outline of subjects you wish to cover. Beneath the subjects write key words which will jog your memory. These outlines should be spaced to allow room for writing down notes and checking off those areas which you have covered. For less experienced attorneys, it may be advisable to include checklists for proving up documents, medical bills, or the questions necessary to lay a foundation for later questions. You can not ask too many foundational questions such as: Who was present?; What happened?; What was said?; What documents exist?; Is there anything else you remember? It is easier to have a standard foundation/prove-up checklist which you can refer to during the deposition rather than put it under each exhibit or document which you will be proving up. A practical way to handle checklists is to make a page with all of the necessary checklists on one sheet in a small font. This sheet can be two sided and laminated so it can be used in any deposition.

### **III. ITEMS TO TAKE WITH YOU TO THE DEPOSITION**

Prior to leaving for the deposition, preferably the night before, you should put together your briefcase of items you will want to have at your deposition. You may want to consider giving your legal assistant a checklist to help with preparing your deposition notebook. You should notice all depositions so that you have a means to enforce a nonappearance should it occur. A copy of the Notice should be taken to each deposition and given to the court reporter so the reporter has the style of the case. You may also want to consider making the notice and duces tecum an exhibit to the deposition when you ask the witness if they brought the items listed on the duces tecum. This will establish a record if the witness later shows up with responsive documents that were not produced. You should also ask the witness if

any documents were withheld and the basis for the documents being withheld, e.g., privilege. If the deposition is a continuation of a prior deposition where the exhibits are being marked consecutively, you should know the last exhibit number to determine the proper number for the next exhibit. Always remember to take business cards for the defending counsel and the court reporter so they know how to get in contact with you and where the transcript is to be delivered. In technically complex cases, it may be helpful to give the court reporter a glossary of relevant terms to which they can refer. For example, in an aviation case, there are many acronyms and specialized terms which the court reporter will likely not be familiar. Unique names or spellings should also be included in the glossary of terms. You should consider taking a copy of the applicable Rules of Civil Procedure, Rules of Evidence, and any local rules governing discovery which may become the subject of dispute during the deposition. If the court has a telephone number for the magistrate judge or special master who is in charge of deciding discovery disputes, you should take it to all depositions. Having this number handy you can call the defender's bluff and stave off improper instructions not to answer or disruptive defense tactics. You should take your calendar or Day Timer with you so that you can schedule other depositions, production of documents, or other dates relating to the case at mutually convenient times for all of the attorneys and parties. You should have your outline in your deposition notebook, along with your annotated copies of exhibits from which you will be asking questions. One of the most efficient ways to use documents is to highlight and annotate those which you plan to discuss with the witness. By writing on the document, you can focus on it and the witness rather than having to refer to questions in your outline with regard to the document. While not necessary in every deposition, sometimes a copy of the pleading is helpful to dispel any argument that questions are beyond the scope of permissible discovery.

#### **IV. BEGINNING THE QUESTIONING.**

Once you are on the record, remember that everything you say will be recorded, so present a professional demeanor. It is important that you set the tone for the deposition by being cordial to the witness and speaking loud enough for the reporter to hear clearly. When

you ask your questions, make eye contact with the witness. Do not read questions from your outline. If necessary, read the question to yourself first silently, then make eye contact with the witness and ask the question. Always wait for the witness to complete an answer. Occasionally, a witness will pause and then continue to give important information. Never start another question until you are sure the witness has completely answered the previous one. If the witness nods or gives other nonverbal responses, you should verbally explain what the witness is doing so it is captured in the record.

Most depositions follow a similar format in the manner the questions are asked. First you should begin with open-ended questions to promote the witness to talk and give narrative answers to your questions. This is the most important time for the attorney to be observing the witness' behavior, the attorney's objections, and the answers given. Based on the way the witness is answering the questions, you should make notes on areas where you think the witness may have further knowledge that he is withholding or where the attorney appears to be overly defensive without a valid reason. Your next level of questioning should be narrower questions to develop particular topics or documents. You may need to use a combination of open-ended and leading questions to fully explore each subject matter area. Finally, the third type of question is a closure question to lock the witness in to his testimony so that he does not come up with new testimony trial. If you get inconsistent answers, leave them alone and do not give the witness the opportunity to explain them away. Depending upon the type of witness you are deposing, you may want to consider asking the foundational questions first or cutting straight to particular topics and then go back and pick up the foundational questions later in the deposition. Some of the foundational questions that you should consider are:

- Have you had your deposition taken before? If the witness answers yes, you should follow up with questions about the type of case, the attorneys involved, and the court reporters who took the deposition. Ask the witness if he has copies of the previous depositions, if he does you should ask him to produce copies of them.
- Ask the witness what he did to prepare for the deposition, including what documents

were reviewed, if any notes made in preparation, if he read any depositions or summaries.

- You should get the witness to confirm on the record that he is represented by counsel. This will foreclose the witness from later saying that they did not understand the deposition process. If the witness is not represented by counsel, then a third party does not have the ability to instruct the witness not to answer. Finally, if the witness is not represented by counsel, you can ask the witness about any discussions that they had with the other attorneys without being barred by the attorney client privilege.
- Consider telling the witness that you will take frequent breaks throughout the deposition for everyone's convenience and comfort. It is advisable not to say I will take a break when you ask because the witness and the defending attorney may use this to interrupt productive lines of questioning.
- You should ask the witness about his preparation for the deposition. While you cannot ask the subject matter of the attorney's conversations with the client, you can ask if they consulted, on how many occasions, and the approximate length of time they consulted. You should also ask who was present at the meeting because that may be a way to prove that the attorney/client relationship was waived.
- Get the witness to state his name, address, and phone numbers on the record. This will ensure the information is properly recorded. If you are deposing an expert, go through the witness's background, curriculum vitae, and question the witness on potential bias based on the witness's affiliation and prior relationship with the party.
- If your notice included a Duces Tecum, you should ask if the witness was requested to produce documents gathered in response to the duces tecum and if you have not already done so, mark the duces tecum as an exhibit. Ask if any documents were withheld and the basis for their being withheld. If the documents are not covered by either the work product or attorney/client privilege, you should ask for them to be produced. It may also be helpful to ask where the documents were found, who assisted in gathering the documents, and to see the originals if you think there may be

notes on the backside or if the copies appear altered in any way.

## **V. USE OF DOCUMENTS AT A DEPOSITION**

Using documents at a deposition can be difficult if the documents are not organized prior to the deposition. An effective way to use documents at the deposition is putting them in a three-ring binder with tabs dividing each of them and a folder filled with several copies of the documents and tabbed corresponding to your deposition notebook. The notebook documents are annotated with your notes so that you can go through each document with the witness while making additional notes on the document and reviewing your notes from your preparation and previous witnesses. Using the folder with the copies of the documents allows you to have ready access to each of the documents and to present one copy to the witness, a copy to the defending attorney, and a copy to any other attorneys attending the deposition. This speeds the deposition by allowing each attorney and the witness to simultaneously look at the documents. Because you have already highlighted and annotated your copy of the document, you can efficiently ask the witness questions about the document and move on to another one. This approach also allows you to skip around among the documents without losing track of the order. If the exhibits are being numbered sequentially from deposition to deposition, you should have a deposition binder with the documents that have already been numbered under their corresponding exhibit number tab. This allows you to know the ending number from the last deposition. Additionally, you have your notes and annotations on the documents to carry with you from deposition to deposition. It is also a good way to compile a master annotated document by writing each witness's comments on the documents so you can question later witnesses about what the previous witness's testimony.

For a document to be admissible into evidence, it must be authenticated, subject to a hearsay exception, and in compliance with the best evidence rule. To authenticate a document, you generally establish a witness's familiarity with the document in that it is a true and correct representation of what the witness recalls. If you wish to offer a document for the truth of what it says, you must have a foundation laid which qualifies the document for an exception to the hearsay rule. One of the most common hearsay exceptions for documents

is the business record exception pursuant to FRE 803 (6) where you must establish that the document is a compilation of acts, events, conditions, opinions or diagnosis made at or near the time the events took place by or from information transmitted by a person with knowledge of the event or act and kept in a normal course of business and that it was a regular practice of the business to make such records. Another popular hearsay exception is the Public Records Exception under FRE 803 (8). Admission of a government report can lead to admission of more than just the government agencies factual observations. In *Beech Aircraft v. Rainey*,<sup>1</sup> the United States Supreme Court held that a public record which qualifies for admissibility under the Public Records Exception is admissible not only for its factual observations but also any conclusions or observations so long as the conclusion is accompanied by the factual finding observation. A recorded recollection under FRE 803 (5) is admissible if the document is a record concerning a matter which the witness once had knowledge but now cannot recall to be able to testify fully and the document was made or adopted by the witness when the subject matter was fresh in his memory and the document correctly reflects that knowledge.

A negative foundation is used to prove that a document is inadmissible. A negative foundation is proven by showing that the witness lacks familiarity with the document, that it was not the business' practice to keep such documents. If the documents are notes, you should prove that they were not made at a time when the subject matter was fresh in the witness's mind, or that the document is not a complete, true and accurate representation of the material.

## **VI. EXPERT DEPOSITIONS**

An expert is a trained witness and as such you should be aware that an expert will be difficult to impeach at a deposition. Instead of impeaching an expert, you should concentrate on walking the witness through everything he will testify to at trial and learn about his particular area of expertise. The goal of an expert deposition is to lock in all of his opinions and the underlying basis for the opinions. In addition to his opinions, you should examine the witness's education and employment background. These responses will give you the

background information that you may need for a *Daubert* motion. It also gives you information which you can use to find impeachment materials for the expert to use at trial. The topics you should discuss include memberships in professional societies, any materials or general articles authored by the expert, prior deposition testimony, other cases that the expert has worked on including the attorney's names, prior experience the expert has as an expert witness including the case name and court. To discover a possible bias, you should ask the expert how long he has been testifying on either a part or full time basis, how many cases the expert is involved in, how many times he has given deposition testimony and testified at trial, how many of the cases he has previously worked on have fact patterns similar to the present case, and has the expert previously testified on behalf of the same law firm or defendant. Throughout this line of questioning, look for any responses that may show a bias in a particular manner which you should further explore with more specific questions. Some questions to remember when deposing an expert about his opinions are:

- What is the expert's assignment in the present case. Look at the communications between the attorney and the expert to see whether the attorney is coaching the witness what to say.
- How much time has the expert spent working on the case and what has he done.
- Question the expert on his file, including deposition transcripts, photographs, calculations, medical records, and notes. What assistance has been provided to the expert and by who and finally, the expert's opinions and why he reached each opinion and the basis for each opinion.
- Ask the expert if he disagree with any other expert in the case and the basis for the disagreement.
- Finally, try to turn the expert into your witness. Always find those points upon which there is an agreement. Then you can focus on the areas of disagreement and why there is a disagreement. Do their experts make different factual assumptions or employ different methodology? Discover the root of the disagreement so you can have your expert show the logic behind "his" or "her" side of the analysis.

You should resist the temptation to argue with the expert or challenge the basis for his

opinion. You should give the expert free rein to answer your questions in a narrative and get as much information from him as possible. The more information you have from the expert in deposition, the easier it will be to impeach him at trial. You should also ask the expert if he has come across any material which is inconsistent with the opinions that he reached. Similarly, ask him what treatises or industry publications he has relied on in forming his opinions and if his opinions are consistent with those publications.

## VII. CONCLUSION

Depositions do not typically make or break a case, however, they are a valuable way to learn about the opposing party's case and teach the other side about your case. Throughout the deposition remember you can not ask "Why?" too many times. Over time and with experience, you will develop your own techniques which work best for you. You should learn from each deposition you take. The most effective way I have found to learn from prior depositions is by summarizing them. After you have had time to reflect on what you thought you asked and the answer you thought you received, you may be surprised by the transcript. By spending the time to summarize your own deposition, you will learn from your past mistakes and know what works best for you.

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1. 488 U.S. 153 (1988).