LITIGATION 101: TAKING YOUR FIRST DEPOSITION

by

Joseph Siprut[1]

Taking your first deposition can be one of the most exciting experiences in a young litigator's career. Although the fact of the matter is that depositions really aren't that glamorous or exciting -- there won't be many "Perry Mason moments" in a deposition -- it is exciting for a young associate to take a deposition for the first time and feel like a "real lawyer." Although countless books, articles, and speeches have been drafted on the subject, here are some general guidelines and pointers that will benefit any young litigator preparing to take his or her first deposition.

- First and foremost, review all pertinent procedural rules, including local court rules regarding depositions. This will provide a fundamental and necessary understanding of the deposition process in your jurisdiction.

- Understand the various purpose of deposition: (1) to learn the witness's version of events; (2) to freeze that testimony; (3) to see what kind of witness he will make; and (4) to gather ammunition for cross-examination.

- Know the fundamental topics to cover when taking a deposition: (1) documents you need explained; (2) admissions you are seeking; (3) facts you want to discover; and (4) developing the prima facie elements of your cause of action in the course of the deposition (list the elements in your outline and hit them all).

- Remember that it is just as important to establish what the witness doesn't know as it is to find out what he does know.

- Before the deposition begins, make small talk to loosen up the witness.

- Bring the opponent's (and the deponent's, if the deponent is a third-party or co-party) document production to the deposition, and ask about key documents.

- To begin, ask the court reporter to swear in the witness, but just say "swear him." Never say "for the record;" formality like this will tighten the witness's lips.

- Explain deposition procedure to the witness and explain that the answers must be stated out loud so that the court reporter may properly record them.

---

[1] Mr. Siprut is an attorney with Novack and Macey LLP in Chicago, Illinois, where he focuses his practice on commercial litigation. He is also a member of the American Bar Association Young Lawyers Division, including the Litigation Committee.

- Take care of any stipulations that you want part of the deposition record.

- If you are confident of your court reporter, see if the witness will waive signature so that you can eliminate the possibility that answers will be changed later. (But if you are defending a witness, never waive signature.)

- Let the witness talk -- don't interrupt.

- Generally, ask open-ended questions – especially if your goal is pure discovery. If you seek admissions or impeachment material, however, leading questions can and should be used as appropriate.

- Close all doors by asking "clean up" questions: Is there anything else you can possibly think of? You haven't left anything out, have you? Was anything said? Was anyone else there? Did you do anything else? Who? What? When? Where?

- If the witness can't remember something, always ask if anything will refresh his recollection.

- Avoid adjectives and adverbs.
  Don't ask: Did you consider this to be egregious?
  Do ask: Is this a violation of company rules?
  Don't ask: Was it a bad accident?
  Do ask: Was it an accident?

- Ask the question "how do you feel about that?" to unlock pent up emotion.

- Poke and prod the witness; confront him with his position in plain terms, and their bluster may vanish. For example, in a misrepresentation case, ask: "Are you calling my client a liar?" If they back off at all, they are undermining their own case.

- When opposing counsel makes an objection, the best response is generally no response.

- If you recognize the objection to be valid, however, rephrase your question in order to be certain that any answer you get may be utilized in the future. Control your pride.

- If the opposing attorney instructs the witness not to answer, certify the question. This establishes a foundation on the record for the relevance of the information, that the witness has been instructed not to answer, and the witness intends to follow the instruction.

- If the attorney-client privilege is asserted by opposing counsel, test the boundaries of the privilege: where the conversation was held; persons present for the conversation; whether the witness told anyone else about the conversation; whether the witness knows of anyone else who was told about the conversation; other actions taken to keep conversation confidential; what

position the person holds (to determine "control group" status); and other questions relevant to the applicability of the privilege.

- If the question is important enough and an instruction not to answer has been given, call the court for resolution. Judges do not generally like this procedure, however, so make certain it is an important matter.

- When using documents, have the materials marked by your court reporter as deposition exhibits.

- Establish the foundation for each exhibit -- e.g., "do you recognize this document?"

- Authenticate the document (Is this your signature? Did you prepare the document on or about the date it bears? Was the document sent?) If the witness is reluctant to authenticate documents, ask questions such as "Do you have any reason to believe this document was not sent?," etc.

- If inane or jocular remarks are to be made, tell the reporter you are going off the record before making them. If the matter is important and the other attorney has requested to go off the record, you may want to make certain that the conversation stays on the record. If it is your record and your court reporter, -- stay in control.

- Do not forget to identify things on the record: the record is not visual and descriptions are always needed. The same holds true for a witness who answers in vague generalities or descriptions. Rephrase his answer in a way that is understandable on the record and get the witness to confirm your reformulation. "When you say 'this document,' you are referring to the document marked as Exhibit 2 to this deposition, correct?"

- If a witness confers with his attorney before answering a question, describe that on the record. Another way to do so is to rephrase the question as: "Now that you have had an opportunity to confer with your counsel here . . . ."

- If a witness does not know an answer to a question -- particularly if it is a witness within an organization -- ask the witness who would know the information.

- If the witness gives a non-responsive answer to a question, move to strike that answer or specify the portion that is non-responsive. Then ask the question again until you receive a responsive answer.

- Do not allow other attorneys to question the witness while you are examining the witness; they will get their turn.

- Do not begin questions with "do you recall." It encourages a witness to say he does not recall. Begin questions with "did you," "did he," etc., and let the witness tell you if he does not recall.

- If the witness refers to relevant documents which have not been produced, ask opposing counsel on the record that they be produced and follow up with a letter or production request.

Although the foregoing pointers should serve as a helpful starting point when preparing to take your first deposition, experience, as always is the best teacher. Good luck!

#82778