Witnesses, statements and depositions

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I have been taking statements and depositions from people since 1975. First, it was in the context of working for a federal agency where sworn statements were used in enforcement proceedings before a federal administrative law judge. Many of these statements were in a foreign language. This made me listen to what was said. Later, when I became a lawyer, statements were taken for the purpose of investigating a case, and depositions were conducted formally for court proceedings. These experiences helped me decide whether or not what was said was material, accurate, and credible.

This training taught me to consider three things prior to taking statements or depositions. First, in order to appreciate a witness' story, you must know why you are doing it. In short, is it purposeful? Does it help you achieve the theory of your case? Next, what are you going to do with the statement or deposition? Is it evidentiary? Do you want to limit the story, learn facts and/or make a record? Third, how are you going to take the statement or deposition? This question has two components. Initially, will you "go after" the witness or will you use a style that puts the witness at ease? Finally, will you take the statement by oral question, ask the witness to write it out longhand, take your own notes, use a tape recorder, or use the formal discovery devices provided by our Supreme Court Rules? Hopefully, this article may provide some insights.

Deposition is a curious word. Literally, it means to take one from a position. It's one of the words, like *interrogatory*, that lay people do not understand. There is a little mystery to it. Your job is to remove the shroud of what a deposition may connote to your client. Strip it down. Make it the sworn statement it actually is.

Depositions are now a part of the discovery process of a lawsuit. They did not use to be. Historically, depositions were not routine exercises. Leave of court was required. This is still true for some medical professionals (735 ILCS 5/2-1003, S.Ct.R. 204(c)) and in ordinance and small claims cases (S.Ct.R. 201 (h), S.Ct.R. 287). In arbitration cases, depositions are basically limited to the parties and treating physicians (S.Ct.R.222). Liberal rules of discovery were promoted because judges and legislators felt that surprise by testifying witnesses was not resulting in the promotion of the truth-seeking process we aspire to as justice. Now depositions occur in almost every civil case. Lawyers make money doing them. Remember, there is no requirement that you take a deposition. Nonparty, lay witness statements can serve the same function. Also, they are less expensive and can be taken *ex parte* in certain circumstances.

The rules that pertain to depositions in the discovery process have been laid out by the Supreme Court (S.Ct.R. 201). The rules provide the purpose for which depositions may be taken in a pending action (S.Ct.R. 202), how to take

a deposition before a suit is filed (S.Ct.R. 217), to perpetuate testimony (735 ILCS 5/8-2301) and to compel the appearance of a deponent in this state, as well as other states (S.Ct.R. 204). The rules provide where the deposition may be taken (S.Ct.R. 203), who it may be taken in front of (S.Ct.R. 205), how it is to be conducted--orally (S.Ct.R.206) or in writing (S.Ct.R.210), what you do with the deposition once it is over (S.Ct.R. 207), and who pays for it (S.Ct.R. 208). Finally, the rules provide how you can object (S.Ct.R. 211), what you can use a deposition for (S.Ct.R. 212 and 191, 735 ILCS 2/1005), and what happens if you do not show up for a deposition (S.Ct.R. 209, 219).

So, you need to know the rules. If you are in state court, these maxims are different from those in federal tribunals. Also, they may be different for arbitrations and mediations. In federal court, a deposition transcript can be used with greater ease that in an Illinois trial court (Fed. R.Civ. P. 32(d); S.Ct.R. 212). In other words, a party cannot wait until trial to bring up objections which could have been addressed during the deposition. Illinois Supreme Court Rules, on the other hand, list the type of objections that may be made at deposition. Full disclosure is required. Objections as to the form of the question, privilege, and that the question will not lead to the discovery of evidence admissible at trial are the only reins on this philosophy. So, you need to read the rules. As to the federal rules, obtain a copy of David Malone's *Deposition Rules*. It is a small book with a lot of good information. Also, Tom Mauet's books, *Fundamentals of Trial Techniques* and *Pretrial* have good analyses of taking witness statements and depositions.[1]

Six questions are applicable to the taking of any statement or deposition. You learned them a long time ago. They are: what, where, why, when, who and how. That may sound simple. It is not. Those inquiries cover a lot of ground. If you keep these questions in mind throughout your examination of the witness, you will simplify things. The deposition transcript will be much more understandable.

When you talk to your client, put yourself in her position. Witnesses are anxious. They do not know what to expect. They think they have to know something because they are the focus of your interest. Witness preparation varies not only by the individual but also by the theory of recovery. A "stoic" and a "whiner" present different problems, as does the surviving spouse and a child in wrongful-death litigation. Five minutes before the deposition is not enough. Make house calls. See how people experience their lives. Doctors used to do it. Why? Because people know you are interested in them when you call them at their homes. That promotes trust.

Explain to your client how the deposition proceeds in terms of examination. Tell your client what to expect in terms of your opponent's examination. Make sure your witness understands the question and that she can request clarification of any question at any time. Instill in your client a wariness of questions that start with "Don't you agree with me?" or "Isn't it true?" that such and such happened. Explain what objections are at a deposition. Tell her why you make or don't make objections and what to do when you do make an objection. Remember, your client wants to know why you are instructing her

to not answer a question. Describe not only your theory of the case but also the burden of proof and its quantum. Discuss changing an answer, signing the deposition, and what happens to the transcript. Be sure your witness understands what use(s) can be made of her testimony. The importance of the impression that your client makes at the deposition cannot be overemphasized. Cast her in a favorable light. It is your job not just to turn that light bulb on but to illuminate your client as both likable and credible.[2]

Witness statements and depositions have two purposes. First, they are used to gather information. You need information to not only assess your opponent's theories, but also because the witness probably knows more about the facts of the case than you do. In this regard, taking a witness' deposition can provide links to other witness testimony you have not discovered which produces new proof, corroborates your client's theory, or discredits the opponent's defense. Most important, you need information to assess the viability of your own position.

Another purpose of the deposition is to seal the witness into a position which she cannot change materially. In short, you must make the witness "take a stand" with respect to her own testimony. Although much of a deposition contains open-ended questioning, there comes a time during the deposition that you need to push the witness into a corner from which she cannot emerge without contradiction. This is not merely an exercise in logistics. More important, it has do with credibility. A person can only say "I do not remember" so many times before she loses any persuasive force as to having knowledge on the topic about which she is being questioned. Similarly, if a witness takes an inconsistent or vague position on a topic of which he is supposedly knowledgeable, she is either feigning, not disclosing for a reason, or ill-informed. This happens often with opinion witnesses, such as physicians or appraisers, who always want to know the other side's theory of the case before disclosing their views. Be persistent. Make them take a specific position. You are fixing one's belief in a given array of facts. You will use that at trial to possibly show mistake, inconsistency, or impeachment. You set the stage now in clear, precise utterances from the witness. Some lawyers take depositions for long periods of time. This is understandable in some cases, but they are a singular minority. Most cases where depositions are taken are car wrecks and divorces. In Illinois, we have a rule that depositions must be completed within three hours unless you obtain permission from the court for a longer period of time. This is a good rule. Depositions should not rival root-canal dentistry. Generally, you do not need three hours to understand a witness' view of what happened as she approached the open intersection and a collision occurred. Focus your inquiry. If your opponent is using three hours to take such a deposition, be wary. Your opponent is probably beefing up his billable hours, trying to show how knowledgeable he is, or trying to tire your witness so she makes an admission she might not otherwise have made. Lawyers are great at covering ground they have plowed twice before. Do not permit this to happen. Instruct your witness about this before it happens. There is nothing wrong with your witness saying, "I already answered that." If the lawyer persists, which she can, then the witness can say she stands by her earlier answer and does not have anything to add since she thinks her original answer was accurate. This should suffice. Generally, I ask my opponent

before the deposition starts how long she thinks it will take. If you do not get a straight answer, then take a few minutes with your witness before the deposition starts to alert her.

Remember, during a deposition, there is nothing wrong with taking breaks. You should encourage your witness to do that. Don't talk to the witness during the break about her testimony. That's not permitted and is probably discoverable. Tell the witness to go for a five-minute walk and move around. Keep a clear head. Tell her not to agonize over her testimony and, for certain, do not evaluate her testimony during the deposition. This is not a time to be handing out report cards.

The above rules apply to all witnesses, but there are special rules that apply to opinion witnesses. There are a few points you need to remember. First, with an opinion witness, you must prepare, prepare, and then prepare some more. Next, appreciate that an opinion witness may be (and probably is) smarter than you are about the topic of her opinions. This not a sign of inefficacy on your part but, more importantly, respect. This type of witness truly believes she knows all. And she is making money doing it. It is your job to test the witness' view. The witness' opinion is only a part of a trial's mosaic. Yet, you are the artist who places or arranges the mosaic's tiles in an understandable, simple form. There are very few opinion witnesses who have the mettle to say their opinion is the only correct one. Reasonable persons, as well as reasonable opinion witnesses, can differ as to a given set of facts, regardless of their pedigree. Remember that. Use it to your advantage.

Opinion witnesses can be condescending. This is a trait you want an opposing opinion witness to flaunt. Let her puff, strut, or manifest her importance. People, like jurors, generally do not like this. Humility is a virtue with which most people identify. It is the utmost factor in establishing witness credibility. Imbue that notion in your own opinion witnesses and your trial tapestry will be more successful.

Try to elicit some of the following information from any opinion witness:

* What significance does the witness have to the elements of proof in the case? Is her testimony relevant and material? Is it accurate not only as to philosophical integrity but as people understand it as it applies to the facts of your case?

* Read the witness' resume. Determine where her expertise rests. Obtain her written materials. Has she given any speeches? Read them.

* Obtain the witness' prior depositions, trial testimony, and any reports introduced into evidence. Opinion witnesses often waffle on giving up past testimony. Don't let them.

* Is the witness a teacher? Look at the courses she teaches. Talking with her

students might be worthwhile.

* Determine what materials the opinion witness is relying upon and get her working papers and notes. Carefully craft Rule 213 interrogatories and use subpoenas.

* Get copies of all correspondence between the opposing party and any attorney with this particular witness.

* Determine the amount of independent analyses or testing performed by the witness. Are you in a *Daubert* or *Frye* jurisdiction?[3]

* Accentuate the fact that the witness has no first-hand contact with the topic or person about whom she is testifying.

* Ascertain the amount of income the witness obtains from being an opinion witness and whether she has been employed by your opponent or persons with similar interests as your opponent before.

* Limit her area of expertise. Make her concede that other knowledgeable experts in the field have different opinions and reinforce that with recognized professional literature.

* Read the transcript and determine whether or not the witness will hurt you based on her expertise, the reliability of her analysis, and her credibility.[4]

Finally, I think you will find the following 10 rules for witness preparation useful in taking statements or depositions.

1. Tell the truth. There is no substitute for this. But remember, truth is based on knowledge, not supposition or what the witness thinks she ought to know. Also, truth is not the platitude we learned in law school or Sunday School. Truth is based on one's perception, which is as different for your witness as it is for you. Perception centers on one's ability to distinguish fact from figment. Factors such as environment, mores, and personal and physical attributes color one's perception. Perceptions have varying accuracy, but they become "truth" based on one's belief in the "truth" of what is perceived. This is reinforced by rationality. Don't assume that "it had to be that way," or "that's the only way it makes sense." What is objectively reasonable may be persuasive but is not necessarily true. DNA testing has taught us this. Truth is seldom black and white; in fact, it is usually gray. No one likes that, but you must accept it and address it with your witness.

2. Don't be someone else. If you do otherwise, you will not be sincere; if you are not sincere, the examiner or jury will see through this. This will be held against you or your witness, or both. Speak your own language. If you try to

use words that you are not familiar with-- being someone else--you might as well be speaking Pashto. You will not create interest but thwart it because of misunderstanding. This is as true for a witness as it is for a lawyer. The witness becomes hollow and thus incredible. A witness' world view cannot be changed, but her attitude can be altered. Shaping behavior and recognizing the undesirable habits of your witness are critical.

Instruct but do not preach to your witness how she can change her persona. A witness' flaws must be addressed with candor, at the outset. Forgiveness is not given; it is earned. You accomplish this by displaying fault at the first opportunity.

3. Don't be presidential. Admit what you know; do not admit what you do not know. As Americans, we think we have to know the answer; otherwise, we have failed. Others will think we are uninformed or not intelligent. Failure, instead of being an opportunity to learn, often creates rebuke or reprimand. There is a lot of guilt in American society. It promotes cover-ups. That leads to deception. We learned this from Richard Nixon and Bill Clinton. Most guilt is learned behavior. Guilt, unlike true sorrow, has no place at a deposition. Nor should you permit blame to become arrogance in your witness or you. The latter is an unappealing attribute. It promotes evasiveness. Questions that are answerable by your witness should be done directly. Don't equivocate-- "is" means "is."

4. Recognize limitations. A witness who thinks she is more crucial or august with respect to an issue or person only deceives herself. Humility is a virtue, not a sign of weakness. The opposing examiner must be respected with a wary ear and eye, but this caution does not equate with incivility. This requires the ability to listen to the question asked, not only in its words, but its tone and manner. One human condition is aging. With it comes an affect on memory. Again, people's memories are shaped by not only what they want to remember or forget, but also what they think others think they should remember. The latter has no place in witness preparation. Memories fade. Using premarked documents and exhibits to assist your witness is the key.

5. Volunteering is anathema. Again, as Americans, we are quintessential volunteers. It is part of our American heritage. There are "One Thousand Points of Light" in the United States. At least, we believe that. The truth of that proposition is not significant. We want to help. We need to help. If we do not, it becomes a moral failure. You must instruct your witness against this attribute when testifying. The other prong of volunteering addresses knowledge. A witness thinks she has to have an answer. Let's face it, we think we know it all. These attitudes have no place at a deposition. Morality, other than telling the truth, has no place in witness preparation. Nor does helping or volunteering. This is the most difficult cultural trait to overcome in preparing a witness for a deposition. Witnesses do not like this. They fight it.

6. Teach listening. It is difficult for us to listen because we think we have to say something to have any impact. Also, because we think we have something to say, we are always formulating our answers while the person with whom we are conversing is talking. We used to call it "making a point." People think this is the way depositions proceed; she who can make her point, wins. This is wrong thinking. The purpose is to display facts. To make a word picture. To display a perspective. To make a favorable presentation. In other words, to expand, as well as limit, depending on whom you represent. You can do neither unless you listen. You must also be vigilant in your view of the

speaker's tone, body language, and when he does not speak. Silence can be telling. Observe it.

7. Do not advocate charity. Once the deposition commences, the rules apply. Adhere to them to the letter. A deposition or trial is a process for reaching a decision, not an exercise. You need to have a rhythm more than a flow. Don't let your opponent talk to the witness once the deposition starts. Don't let her make long-winded, oral objections. Discovery depositions are extremely wide-ranging under Illinois law. Do not let your witness speculate. If a document can be used as a prompt, make the opponent produce it. Documents should be reviewed during preparation but not necessarily given to the witness to review. Make the witness answer specific questions. Try to reinforce with the witness that guessing at questions only hurts. Do not let your witness get lazy with her answers.

8. Shifting gears. Don't be afraid to tell a witness to change her testimony if it needs to be corrected. Making a mistake is human. So is changing a wrong answer. We all did it in school and were encouraged to do so. Likewise, at a deposition, if the question is not understandable, it should be made so. During every deposition your witness can never comprehend every question. Make sure your witness requests clarification of questions. Many lawyers ask questions with words that are unintelligible and stilted. Your client must be reminded that these questions should be and will be changed at her request. Your witness needs to know that asking an examiner to rephrase a question is a *good* thing. It shows intelligence, not its antonym. It shows she is listening. If your client does not do this in her deposition, you should be disappointed. Remember, your witness knows more about the event on which she is being deposed than the examiner. Otherwise, the deposition would not be occurring.

9. Explain the players and their purpose. You need to tell the witness who the judge, the court reporter, and the other lawyers are. More importantly, you need to describe what their purposes and roles are. It is not enough to say what a transcript is and how it is prepared. What happens to it once it is prepared? Is this a discovery deposition or an evidence deposition? Who reads it? Why? Is it evidence? What is an objection's effect? What does the witness do when someone objects? Explain applicable privileges like attorney-client, work product and whether medical or psychiatric records will be produced *and* how that happens. As to your opponent's lawyer, who does he really represent? Does he get paid by the insurance company? Why is he taking your client's deposition, and what is his purpose? Explain the dichotomy of expected styles of the "nice-guy lawyer" or the "aggressive advocate." Make sure your witness understands that your opponent is not only prying but also appraising credibility. Ninety-five percent of all cases are settled. Your witness needs to know that before her deposition is taken. Spend time with your witness before the day of the deposition, not just 15 minutes beforehand. If you try the case, take your witness to the courthouse so she can understand the layout of the bench, bar, and jury box. This will help your witness talk to and make eye contact with the jury or the court instead of locking in on your opponent's examination.

10. Woodshedding. When I began practicing law, the concept of witness

preparation was foreign. It was not taught in law school. Suborning perjury is not on the bar exam. It should be. Many lawyers do not understand it. Woodshedding has two components: preparation of direct examination and anticipation of cross-examination. Although the latter is always highlighted, the former is usually more important. This is because it is your client's story. She has to tell it, not you. If it is not understandable, the impression she makes will be unfavorable. Simplicity and credibility must be the hallmarks of what is said. Everyday words that provide reasons to believe a proposition is more likely true than not must be used. The most important thing about cross-examination is cross-examining your own witness before the deposition and accentuating her weak points. By doing this, you can address these low points on direct. The witness can then get the idea. As to your own cross-examination, the point is realizing that sometimes you do not need to do it. My partner, Bill Murphy, taught me this 20 years ago. It took a while for me to understand this. Limit yourself. Learn to sit down. This requires the jury or examiner to focus not on you, but on what the witness says. Woodshedding is about providing leadership to your client without taking the lead role. The latter will only get you in trouble. You are the guide, not the witness. Don't carry the latter's baggage. Spend time with your witness not only before but after the deposition is over. Explain the theory of the case and the role of the witness in that theory. After a deposition your client will invariably ask, "How did I do?" This should be expected. Do not ignore the question. Be objective. Deal with the problems or warts in your case as well as its high points. Sugarcoating leads to unrealistic client expectations. When those are not met, you will be blamed. This only leads to trouble for you with the client. Every case has peaks and valleys. Recognize and explain that. You want to keep your case on the diagonal going up, not down; and that will not be vertical--no real case or witness ever is.

Conclusion

Preparing yourself and witnesses for statements and depositions requires forethought and recognition that, as Americans, we think we possess an incredible intellect, are very compassionate, and know more than most about the world and our neighbors. That is a troubling recipe. If you address its ingredients, recognizing its limitations, you will take a statement or deposition which is persuasive, believable, and purposeful.

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1. D. Malone, *Deposition Rules* (National Institute for Trial Advocacy 2001); T. Mauet, *Fundamentals of Trial Techniques* (6th Ed., Aspen 2002) and *Pretrial* (5th Ed., Aspen 2002).

2. Hegland, *Trial and Practice Skills* (West, 2002), pp. 80-93.

3. See *Daubert v. Merrill Dow Pharmaceuticals*, 509 US 579 (1993); *Frye v. United States*, 293 F. 1013 (1923). See also *Donaldson v. Central Illinois Public Service*, 199 Ill.2d 63, 82 (2002).

4. See Clancy, Michael W., "A Primer on Selection and Management of an Expert Witness." *Chicago Daily Law Bulletin,* March 28, 2003; J. Alexander Tanford, *The Trial Process: Law Tactics and Ethics* (3rd Ed. 2002), pp. 338-348; T. Mauet, *Fundamentals of Trial Techniques* (6th Ed.2002), pp. 309-316.