

**Resource Center**

FIVE TIPS FOR SUCCESS IN YOUR FIRST DEPOSITION

American Bar Association: Trial Evidence, Spring 2021, Vol. 28, Issue 4
05.28.2021

There is an old adage that law school teaches you to think like a lawyer but not how to practice law. There is significant truth to this statement, especially when it comes to taking depositions. While law schools provide some measure of litigation training through moot court and mock trial competitions, very few law school graduates emerge with much, if any, training on taking depositions. I can distinctly recall being assigned my first deposition as a first-year associate and feeling overwhelmed and undertrained. As it turned out, a few wise words from more experienced mentors provided the confidence to own the room and successfully navigate the process. With 13 years and dozens of depositions now under my belt, I have learned some lessons that might be helpful to new litigators as they embark on taking their first deposition.

1. Know Your Case

Knowing the facts and legal theories may seem obvious, but this simple advice may be more useful than it first appears. A key advantage a young litigator may have over a more seasoned attorney is time and tenacity. Young litigators are often tasked with legal research and document review from the outset of the case while more experienced partners manage the case along with several others. It is possible that you will enter the deposition with more understanding of the facts and legal theories than your opposing counsel. You should of course never underestimate an opposing counsel's knowledge based solely on age or experience, but the lesson here is to be prepared to exploit a knowledge gap if one becomes apparent during a deposition. For example, you may have researched a legal precedent concerning necessary elements to a claim or defense that your opposing counsel may not know. You may also be more familiar than your opposing counsel with a particular document or how seemingly unconnected documents fit a narrative from your hands-on review. If

ATTORNEYS

Daniel E. Gomez

PRACTICES

Litigation

Five Tips for Success in Your First Deposition

you can insert a line of questioning on these points without resistance or adduce testimony connecting dots others had not yet connected, you may have identified a knowledge gap from which you can establish certain facts that help to undermine your opponent's legal positions or support your own.

2. Engage in Active Listening

The biggest mistake I have observed during depositions from counsel of all ages (though more common among less experienced attorneys) is failing to listen or comprehend the witness's answers. In defending depositions, I can distinctly recall several instances where my witness answered a question in a way that made me uncomfortable. The questioning attorney completely missed the opportunity to follow up and instead moved to another subject. The questioning attorney was likely reading directly from a script and concentrating on the next question, instead of the response to the one already posed. By failing to listen and ask follow-up questions, the attorney missed a key opportunity.

Active listening is key to avoiding this mistake, and the key to active listening is to outline your lines of questioning, instead of employing a rigid script. A script of questions often leads to thinking ahead to the next question and missing opportunities to press certain points or to lock down your opponent's story if it deviates from the pleadings or prior discovery. It also hinders your ability to observe the witness's mannerisms, credibility, and appeal as a witness, which is the first thing your client is likely to ask about after the deposition. On the other hand, outlining your lines of questioning allows you more flexibility to adapt to the natural flow of testimony. Do not hesitate to ask follow-up or clarifying questions or to adjust the order of topics from your outline. A witness will often open the door to a line of questioning that you outlined for later in the conversation, and it might make more sense and result in a better transcript if you move to that topic as part of natural conversation. By outlining your questions as opposed to following a script, you are better able to make this adjustment on the fly.

3. Know the Rules

This seemingly obvious advice also includes some less obvious points. The rules start with the federal or state rules of civil procedure, but you should also be familiar with applicable local rules and your judge's practices. In fact, many nuances can be found in local rules that differ not only from state to state but sometimes between courts within the same state. An easy starting point is that Federal Rule of Civil Procedure 30(c)(2) provides:

An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(Emphases added.)

Five Tips for Success in Your First Deposition

Most state rules of civil procedure similarly require that objections be nonargumentative and that a deponent must answer any question that would not invade a privilege. Local rules can be even more specific. For example, the rules in my state court jurisdiction provide:

Objections to questions during an oral deposition are limited to “Objection, leading” and “Objection, form.” . . . These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the deposition to be later raised in court. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing court or other sanctions.

(Emphasis added.)

While the federal rules and most state rules preclude “argumentative” or “suggestive” objections (also known as “speaking objections”), local rules such as the one quoted above can impose severe sanctions for such conduct. The cited rule, for example, can result in waiver of an objection if one makes it argumentative or suggestive. Knowledge of that rule is critically important to counter difficult opposing counsel who may insist on speaking objections.

Rules additionally might include time limitations (which could inform how much time you spend on background materials and certain topics) and whether a lawyer may consult with the deponent mid-deposition. For example, the local rules discussed above also preclude “private, off-the-record conferences” between the witness and the witness’s counsel, except for limited purposes, but allow consultation during a regular break. Knowing these nuances in the rules is critical to ensuring proper conduct in the deposition room.

4. Beware of the “Usual Stipulations”

New litigators will often be surprised if opposing counsel proposes the “usual stipulations” at the outset of the deposition and will agree to avoid feeling embarrassed for not understanding the suggestion. The problem with the “usual stipulations” is that they are largely undefined, and agreeing to such stipulations could lead to unintended results. Legal commentary often describes the “usual stipulations” as limiting objections to “form” or “privilege” and requiring the witness to respond despite a “form” objection. But these are often provided by the rules of civil procedure or local rules as shown above. Do not be embarrassed to ask specifically what stipulations counsel is referring to and to place them on the record. If they comport with the applicable rules, then the stipulation is acceptable, though unnecessary. If the requested stipulation is not covered by rules, consider the stipulation carefully and feel free to reject such stipulation if you are unsure of the possible consequences.

5. Consider the Transcript

Always be aware that both your questions and the witness’s answers are being transcribed and likely videorecorded, and that the result will be a written transcript and video presentation that can serve several purposes in discovery, motion practice, and possibly even trial. Unclear questions and rambling answers are difficult to quote in a brief and can harm your ability to persuade. Avoid using double negatives in your

Five Tips for Success in Your First Deposition

questions and avoid distorting your questions with “ums” or “ahs.” Ask that the witness allow you to finish your question before responding to avoid talking over one another and provide the witness the same courtesy. Always be thinking about “sound bites” that can be used in briefs. If the witness provides a very long answer only part of which is relevant, consider asking a clear follow-up question so that the answer can be more easily quoted. If the question calls for a yes or no answer and the witness fails to comply, be sure to follow up and get the straight answer. Your follow-up may be advantageous even if the witness continues to resist giving a straight answer, in that stubborn refusal to answer a question directly can at times appear evasive and incredible.

Finally, pay close attention if opposing counsel questions his or her own witness on cross-examination. Often, the purpose will be to “rehabilitate” the witness if an answer unhelpful to that party’s case was made on the record during direct examination. If the answer initially given changes, be sure to explore the matter on redirect, and make a clear record that the answer was changed. If the answer changes only slightly, try to obtain your “sound bite” again to preclude any ambiguity. If your question receives a “form” objection, think about the question and feel free to re-ask it more concisely. You can use objections to your advantage to make for a clearer transcript and possibly avoid an intervening objection if the transcript is later quoted in a brief.

Conclusion

It is my sincere hope that this advice will relieve some stress and allow you to be successful in your first deposition. Remember that you will get better with each deposition you take. Starting out on the right foot will instill the confidence needed to launch a successful litigation career.