CHAPTER 2

Taking A Deposition

Once you have completed your litigation blueprint and determined your discovery strategy, you are ready to begin planning, preparing for, and taking depositions. In this chapter, we start with a discussion of deposition purposes, as the purpose for which you are taking a deposition will affect how you prepare for and how you approach the actual deposition. Following discussion of deposition purposes, we provide detail regarding how best to prepare for a deposition. Finally, we launch into information about the logistics of the deposition itself, along with much detail regarding questioning techniques.

A. Deposition Purposes and Styles

The purpose of your deposition will affect your style and approach. This is one of many reasons why you always need to determine in advance *why* you are taking any given deposition. Following are some of the common reasons for taking a deposition, along with a brief explanation regarding how your approach should vary in order to best meet your needs in any given situation. You also should be mindful that depositions may serve multiple purposes and that you may have to vary your style at different points in the deposition to best meet your goals.

1. Discover Information

The most common type of deposition is a discovery deposition. In a discovery deposition, the examining lawyer attempts to elicit as much information as possible from the deponent. The purpose primarily is investigatory. You want to discover everything the deponent knows that is related to your case. This information should include sources of proof, such as the identities of potential witnesses, documents, and physical evidence. The key thing to remember in a discovery deposition is that you are trying to obtain information of which you otherwise may be unaware.[5]

[5] The Federal Rules of Civil Procedure allow discovery regarding any nonprivileged matter "relevant to any party's claim or defense and proportional to the needs of the case." FED. R. CIV. P. 26(b)(1). The proportionality requirement invites consideration of "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* The proportionality concept originally appeared as part of Rule 26(b)(1) in 1983, but proportionality factors were subsequently moved to other rule subparts until 2015, when proportionality language was reinserted in 26(b)(1). The reinsertion of proportionality factors replaced language that broadly allowed the discovery of any information that was "reasonably calculated to lead to the discovery of admissible evidence." While the re-emergence of the proportionality language in Rule 26(b)(1) may impact the allowable scope of and objections to demands made through other discovery methods, it is unlikely to have much effect on a typical discovery deposition being conducted in good faith, particularly given that other rules already limit the number and length of depositions. *See* FED. R. CIV. P. 30(a)(2)(A)(i), (d)(1).

Typical Discovery Deposition Questions

- "Tell me about . . ."
- "What happened next?"
- "What did she say next?"
- "Describe the . . ."
- "Is there anything else?"
- "Was anyone else there?"
- "Does anyone else know anything about . . .?"

When your purpose is to elicit information, it is especially important to ask broad, open-ended questions. You want the deponent to talk and direct you to the paths you should pursue. Your questions should be short and open-ended; it is the deponent who should be talking in paragraphs. In the end, the transcript should be at least 90 percent the deponent and no more than 10 percent you. Be especially cautious about cutting off the deponent during a discovery deposition. If you are uncertain whether the deponent has completely finished answering, pause for a few seconds before posing your next question. Such a pause sometimes will cause the deponent to continue talking. If it does not, you may want to ask whether the witness has any more to add.

Your demeanor may be especially critical to the success of a discovery deposition. This type of deposition is most suited to a friendly, relaxed style. The saying, "you can catch more flies with honey than you can with vinegar," applies even to sophisticated deponents. You want the witness to like you and want to help you; at a minimum, you want the witness to trust you and let his or her guard down. To achieve this, smile and be pleasant when you introduce yourself. Chat

before the deposition starts, if possible, about the weather, the local sports team, or some noncontroversial issue unrelated to the case. Try to be patient and helpful during the deposition. If appropriate, be empathetic.[6]

Discovery Deposition Key

- Open-ended questions
- Let the deponent talk
- 90% deponent/10% lawyer
- Listen and follow through
- Maintain eye contact
- Maintain a pleasant demeanor

Listening, as always, is critical. So is maintaining eye contact. While the deponent is answering a question, jot down very brief notes (a word or two) regarding areas to pursue in more detail. Do not let note taking interfere with maintaining eye contact. Once you break eye contact the witness may stop talking. Similarly, maintaining eye contact without interruption may encourage the witness to continue providing information.

Once you are certain there is nothing else to elicit on a given question, then it is time for follow-up. It generally is least confusing and most effective to exhaust all follow-through questions in one area before going on to the next. Each follow-up question on a particular subject should get progressively narrower.

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[6] One commentator who ascribes to this view of taking depositions advises that you, as the deposing attorney, treat the witness as you would a guest in your home, that you develop a genuine interest in the witness, that you be self-effacing to let the witness see you as a "regular" person, that you periodically compliment the witness, and that you ask the witness for help in understanding the events at issue. Edward G. Connette, *How to Take Better Depositions and Perhaps Improve Your Marriage*, LITIG., Spring 2005, at 3, 7-8.

What you should end up with is an answer tree. For example, one answer, like the trunk of a tree, may lead to four different large branches to follow. It is best to follow through completely to the end of one major branch, including all the twigs sprouting along the way, before you return to the trunk and proceed down another major branch. What you will end up with is a transcript that will be packed full of information that will be useful to you, but it will not be a narrative that you would want to read to a jury.

2. Pin the Deponent Down

Frequently, you not only will want to discover information from the deponent, but you also will want to pin the deponent down and to commit the deponent unequivocally to a particular position, theory, or version of the facts. Sometimes you already will have the information you need and your sole purpose may be to commit the deponent. One reason to do this is for use in a dispositive motion. Another reason is to commit a witness or party to their testimony before they hear or become aware of testimony, information, or theories you intend to propound through other witnesses and other sources.

When you want to pin down your deponent, your questioning style must change. Rather than broad, brief, open-ended questions, you will want to ask narrow and more directed questions. The idea is to commit the deponent and to foreclose any possibility of the deponent testifying at a later date to something new or different without obviously contradicting the earlier deposition testimony.

Key to Pinning Down the Deponent

- Use progressively narrower questions
- Foreclose all possible escape routes
- Use leading questions before concluding
- Be serious and more assertive

The style best suited to pinning down a deponent generally is a serious, formal, and more assertive style, similar to the style you might use during cross-examination. Maintain a serious tone and demeanor, be especially vigilant about maintaining steady eye contact, even to the extent that you do not look at your pad to write notes, and consider picking up the pace of your questions. You do not necessarily need to be hostile or unpleasant; generally, it is best not to start out that way. If the witness is hostile or remains nonresponsive, then you may transition to a more aggressive and less patient style.[7] It is difficult, however, to move convincingly from an aggressive style to the pleasant kind of style that is more suited to general information gathering. The witness is unlikely to see you as warm and friendly after you have been stern and confrontational. Therefore, especially if you also are using your deposition for broad discovery purposes, consider deferring these cross-examination type questions until later in the deposition.

3. Get Admissions for Dispositive Motions

One productive use of a deposition is to get admissions for a dispositive motion. It frequently is easier and more effective to use a deposition for this purpose than it is to use interrogatories or requests for admissions. In a deposition, you get the witness's own words rather than brief responses crafted by a lawyer. In a deposition, you also can immediately follow through, clarify, and pin down the witness through a progressive series of questions tailored to the witness's responses.

[7] Sometimes, your best laid plans to invoke this style may backfire. One lawyer, in an effort to exhibit stern body language while deposing a hostile witness, leaned forward on his elbows with his hands clasped in front of his face. Unfortunately, the peanut butter on his suit sleeve from his son's breakfast ruined the effect.

Key to Getting Useful Admissions

- Research elements of claims/defenses
- Checklist admissions you need
- Design questions to elicit necessary facts/admissions
- Use precise, clear questions
- Lead, if necessary
- Do not linger once admission is obtained
- Consider timing admissions questions to catch witness off guard

To use a deposition in this way, there are a few things to keep in mind. First, you should research the legal bases for your claims or defenses in advance so you know before the deposition begins precisely what you will need from the deposition in order to support a dispositive motion. In contrast to a discovery deposition, you should know exactly where you want to take the witness, and your questions should be designed to do so in much the same way you would design them to prove points during a trial. Make a list of the precise points you need the deponent to make or confirm. Again, in contrast to a discovery deposition, you do not want to linger; once the witness makes the desired statement clearly on the record, move on to something else. The longer you linger, the more likely it is that the clarity of your record will be spoiled.

You will want to use a demeanor similar to that recommended for pinning down the deponent, including using cross-examination type questions. Frequently, it is useful to disguise some of the questions seeking admissions by asking them at

unexpected times during the deposition. By varying your approach, you may avoid more guarded and qualified responses from the deponent as well as an avalanche of objections from opposing counsel.

4. Preserve Trial Testimony

There are several circumstances under which you may need to take a deposition to preserve trial testimony. These situations include when you have a witness who is expected to be unavailable for trial, a witness who is beyond the reach of a trial subpoena, or a witness who is ill and may become unavailable.

Key to Preserving Trial Testimony

- Phrase questions as if at trial
- Order questions as if at trial
- Object as if at trial

When taking a deposition to preserve trial testimony, you must craft your questions as you would for trial, and you should maintain a trial-like style. Remember that if you ask an objectionable question and fail to rephrase it upon receiving an objection, the testimony that you elicit may be excluded at trial and you will have no opportunity at that point to correct your error. Similarly, if you are defending such a deposition, you must be especially vigilant about objections during the deposition in order to preserve your right to object at trial.

5. Assess the Witness

Although assessing the witness rarely is the exclusive purpose of a deposition, it always should be one of your goals. What is the witness's general demeanor? Nervous, calm, arrogant, confident, suspicious, aggressive, meek,

emotional, dispassionate, phony, genuine? How does the witness react to and answer questions? Is the witness direct? Is the witness evasive? Does the witness try to obfuscate the truth? Does the witness ramble? Does the witness need to be drawn out? Does the witness answer your question?

This opportunity to assess witnesses can be invaluable. It will give you a sense of how a jury or judge may react to a witness. It will give you a sense in advance of how you may need to alter your style at trial for a particular witness. It will help inform your assessment of your case and where the appropriate settlement line lies.

Assess the Witness

- Observe general demeanor
- Observe how the witness answers questions
- Observe reaction to specific questions
- Use observations to prepare for trial
- Use observations for settlement assessments

In addition to assessing a witness's general reaction to questions, it is important to observe reactions to individual questions during the course of the deposition. Does a particular question have a different effect on a witness? Does the witness's body language change? Is a chatty witness suddenly giving short or abrupt answers? Is the witness evasive? These reactions provide important indications of areas that may need additional follow-through.

It is equally important to assess your own witness when you are defending a deposition. You can use this information for the same purposes described above, but additionally to help prepare the witness for trial. An important witness's

demeanor can have an enormous effect on the outcome of a trial, and it can have an especially material effect if the witness is a party or related to a party (for example, an officer of a corporate defendant). Even when the facts are with you, the unlikeable demeanor of an important witness can affect not only the measure of damages, but also the question of liability itself. Keep in mind that some people appear to have a completely different personality when answering questions posed by an opposing attorney. Defending a deposition may be your only opportunity to observe how your own witnesses react to such questioning.

6. Show of Strength

An important but occasionally overlooked purpose of a deposition is as a show of strength. Through carefully selected questions or exhibits and strong, favorable witnesses, you can demonstrate to opposing counsel and the opposing party the strength of your position or the weakness of their own. You can then use this as leverage in your settlement discussions. Given the costs associated with a trial and the inherent risks that a trial brings, it may be best to preview certain strengths of your case through a deposition in the hope of encouraging an earlier and more favorable conclusion to the litigation. If the deposition is particularly effective, you may consider following it with an offer of judgment.[8] Such a strategy has the advantage of requiring a quick response, while the memory of your devastating deposition is still fresh.

Show of Strength

- Use questions to show your strength
- Use questions to show the witness's weaknesses
- Use exhibits to reveal favorable evidence
- Consider following the deposition with an offer of judgment

[8] *See* FED. R. CIV. P. 68.

B. Preparation

Lawyers preparing to take a deposition should review the case file and formulate an outline.[9]

1. File Review

Review your file, including your overall litigation blueprint. What is each party's case theory? What are the elements of the claims and defenses? What is each party's story? What proof is already in hand? What will this witness add or subtract?

2. Question Outline

Once you have reviewed your file and blueprint, you should prepare a fairly detailed outline of questions for the particular witness. This outline may take a number of different forms. Some lawyers write out specific questions. This is particularly desirable in two instances. The first involves hypotheticals directed to expert witnesses. The second involves questions that will set up dispositive motions. In both cases, you want to ensure that the questions do not omit key facts that later give the other side room to disavow deposition answers.

Other lawyers simply prepare lists of topics to cover. They fear the loss of spontaneity and the risk of inadequate follow through that comes from having questions fully written out. Deposition outlines are not television scripts.

Either approach can be made to work most of the time. Pick the one that suits your comfort level. Generally, we prefer the outline approach, *except* when setting up an expert or a claim or defense for a dispositive motion, because it tends to better enable the questioning lawyer to listen carefully to the deponent and re-order questions or depart temporarily from the prepared outline entirely. Some attorneys use a separate page or set of notecards for each topic of their outline. This can be a useful technique to reorder the topics during the deposition. If, for example, the witness gets into another topic the questioning attorney was not intending to address until later, the attorney can consider turning directly and

[9] There is a helpful four-page summary of what lawyers should do in preparing to take a deposition in James W. McElhaney, *The Deposition Notebook*, LITIG., Summer 2001, at 55.

immediately to the separate part of the attorney's outline dealing with that topic rather than circling back to the witness's response and that topic later in the deposition.

To free yourself to listen and follow through, you need to have a way of recording answers. One device is to leave space in your outline underneath each question or topic to record an answer in shorthand. Another device is to write each question or topic on the left half of a page, and then leave space on the right half for the associated response. Yet another device is to count on a colleague to sit through the deposition and keep careful notes to help ensure that you have adequately exhausted each line of inquiry.

Again, any of these approaches can work. You just need to ensure that, if you have predetermined that you need to get five key pieces of testimony from the particular deponent, you have a way to check that you have actually obtained those five pieces before you adjourn the deposition.

3. Notices and Subpoenas

Your deposition will not take place unless you issue proper notice to obtain the attendance of the witness and to alert opposing counsel. The notice rules are described in Federal Rule of Civil Procedure 30(b) and in Chapter 9 of this book. Make sure you follow them. A notice goes to every party in the litigation.[10]

If the deponent is not a party to the lawsuit, make sure you *also* subpoena the witness. The rules for subpoenas are described in Federal Rules of Civil Procedure 45(a) and (b) and in Chapter 9. If you issue a subpoena that calls for production of documents from the witness, be sure to attach a copy of the document production description to the notice that you have served on the parties, under Federal Rule of Civil Procedure 30(b).

[10] Throughout this handbook, we will be referring to the Federal Rules of Civil Procedure. Be aware that not all states use the same rules, and even states that use the federal rules as a model may adopt their own unique variations of the federal rules. Moreover, even federal courts have various local rules and practices. Find out what they are or risk serious consequences.

4. Miscellaneous Logistics

There are a number of logistical details you need to arrange when you take a deposition:

- Arrange for the court reporter. The deposition cannot proceed if you neglect to arrange for the attendance of a court reporter.[11]

- Reserve the conference room. You need a distraction-free space in which to take the deposition. The space needs to be big enough to accommodate all of the people who will be attending. In some cases, that will be you, one opposing lawyer, the witness, and the court reporter. In others, it will be you, an army of other lawyers, the witness, the witness's boss, party representatives, and the court reporter. In still others, it will be you, one opposing lawyer, the witness, the court reporter, and a videographer whose equipment takes up more room than the people do. Be especially cautious about reserving an appropriately sized and configured room if the deposition is taking place out of town and consequently out of your office.

- Arrange for the videographer. If you are going to videotape the deposition, you need to reserve a videographer. This person may be employed by an entirely different company than the court reporter, and requires his or her own separate reservation.

- Arrange for sufficient copies of deposition exhibits. Select in advance a universe of documents that you may show the witness as possible exhibits. You need copies for the court reporter to mark as the official exhibits. You need duplicate clean copies for the other lawyers (at least one set for each party). You need annotated copies for yourself to use in questioning the witness. Organize these copies so they are readily at hand.

- Arrange for refreshments. It is customary and helpful to have at least water, coffee, and soft drinks at depositions. Mouths get dry. Energy levels fail.

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[11] *See* FED. R. CIV. P. 28(a), 30(b)(3).

- Arrange for lunches. Time tables may be tight. You and the other attendees may want to have lunch brought in to the deposition, take a short break, and resume. Think about that in advance.

- Arrange for travel. If a deposition is out of town, this may mean air tickets, hotel reservations, and rental cars. It also may mean advance shipment to the deposition site of all of those duplicate copies of exhibits that you otherwise will be hauling on the airplane. Think about all of this in advance. Double check everything to make sure people and documents arrive in the right place at the right time.

- Arrange for supplies: legal pads, pens, highlighters, stickers to tab documents or notes.

These are all obvious, you say. Yes and no. In calm, quiet moments they are obvious. In the press of day-to-day legal practice, they can be easy to forget. Here is a checklist. Use it for each deposition.

Deposition Logistics Checklist

Item	Arranged	Details
1. Court Reporter	___	_____
2. Conference Room	___	_____
3. Videographer	___	_____
4. Exhibits	___	_____
5. Refreshments	___	_____
6. Lunch	___	_____
7. Travel		
Air tickets	___	_____
Hotel	___	_____
Rental Car	___	_____
8. Supplies	___	_____

C. The Deposition

1. Introductory Remarks and Instructions

When you start a deposition, you should do at least the following:

First, have the court reporter swear in the witness. This will typically occur off the record, and then the court reporter will type at the start of the transcript that the witness has been duly sworn.

Example: *Ms. Court Reporter, would you please swear in the witness?*

Second, introduce who you are, and tell the deponent the name of the party you represent.

Example: *Good morning, Ms. Jones. We are here today to take your deposition in the Pardon v. ABC Railroad case. I am John McGreedy, the lawyer for Sam Pardon, who is the person bringing the suit.*

Third, ask if the witness has been deposed before. This helps you evaluate how much the deponent knows about the ground rules. If the witness has been deposed many times, then ask for the number. You may be dealing with a professional testifier, which is something you would want to know.

Example: *Q: Have you ever been deposed, Ms. Jones?*
A: Once. [If the witness identifies multiple depositions then ask who, what, where, when, why questions to find out details.]

Fourth, give the deponent some basic instructions.

Example: *[1] I am going to be asking you questions today about some of the matters involved in the case. The*

court reporter will take down everything we say and prepare a complete transcript of the deposition.

[2] The transcript may be used at trial. So although there is no judge or jury sitting here today, you should testify with the same seriousness as if they were. You understand that you are under oath? [Get a "yes" from the deponent, so the witness has a difficult time later claiming a lack of appreciation for the solemnity of the deposition.]

[3] Because the court reporter is trying to take everything down, it will help if we each speak one at a time. I would appreciate it if you would let me finish each question before you start answering, and I will try not to talk over your answers. Okay? [Get a "yes" from the deponent.]

[4] Also, because the court reporter is trying to take everything down, it will help if you try to answer each question out loud with a oral response. It is hard for the court reporter to record nods of the head, and uh-huhs and uh-hums may be ambiguous. Okay? [Get a "yes" out loud from the deponent. It is not unusual for a witness to nod his or her head in response to your question, which presents you with a good opportunity to point out what you mean.]

[5] If you do not understand a question, please let me know that, and I will try to rephrase it. Will you do that? [Get a "yes" from the deponent.] If you do not ask me to rephrase a question, I will assume that you understand it. Okay? [Get a "yes" from the deponent, so the witness has a hard time later claiming confusion as to any particular question.]

[6] If you need to take a break at any time, please let me know. I may ask you to finish answering a particular question or series of questions before we break, but we can certainly pause from time to time. [This humanizes the process a bit, but add the admonition about finishing answers. You do not want the witness to take a break while a question is pending, and then cite your own opening invitation as a basis for doing so.]

[7] Are you taking any medications that might affect your ability to recall events or to testify? [Not all lawyers use this question, because it is extremely personal and can negatively affect your rapport with the witness from the outset. On the other hand, if you expect no rapport with the witness anyway, or you have specific reason to wonder about witness competency, then go ahead and ask. The question is legitimate.]

[8] Lawyers may state objections to questions at a deposition under the relevant court rules. Unless your lawyer expressly instructs you not to answer one of my questions, you must still answer it. A court will later decide whether the objection was well-taken.[12]

2. General Questioning Techniques

a. Type of Witness

Now you are ready to move on to substantive questioning. When you do, think back to your case blueprint and witness charts. What kind of witness are you

[12] Reasonable lawyers may omit one or more of these introductory steps (except swearing in the witness) from time to time and instead launch immediately into substantive questions to catch the witness cold. Even then, these lawyers may go through this list with the witness a little later in the deposition.

facing? Is this a friendly witness – one who generally is aligned with your client's position in the case? Is this a neutral witness – for example, a bystander who happened to witness some event? Or is this a hostile witness – one who generally is aligned with your adversary's position in the case?

Deposition Question Categories

- Competency/Foundation
- Credibility/Bias
- Substance

The type of witness you are facing affects your technique and approach to the deposition. Do you want the witness on a long leash or a short one? Do you want a conversation or a cross-examination? Will your own demeanor be relaxed or confrontational? Will you be content with general answers, or will you want to explore details extensively? Are you taking this deposition primarily to discover all kinds of facts, both good and bad, or primarily to preserve good facts in admissible form for trial?

In all likelihood, you will need to use some combination of techniques. For example, even though the deposition may be for fact exploration, you may want to use techniques that give you greater control over where the deponent's answers are heading in the case of a hostile witness than in the case of a friendly one. The point is: make a conscious decision about techniques. Go in with a plan.

b. What to Ask

Basically, every question you ask a witness falls into one or more of three categories. The first category is *competency/foundation.* Does the witness know anything relevant to the lawsuit, and can the witness recall and recount that information? The second category is *credibility/bias.* Can the witness be trusted

when the witness claims to know something and to recall/recount that information? Finally, what is the *substance* of what the witness knows?

All of the questions below, and any other questions you may develop, fit one of the above categories. So a helpful cross-check in creating a witness outline is to ask yourself periodically: Does the outline cover each of these categories? If not, have you left out a category by accident or by design?

i. Background

When you start a deposition, find out who the witness is. If the witness is friendly, you may want to personalize the witness to strengthen credibility. Yet there may be situations in which you do not want to seem particularly friendly, even if the witness is Will Rogers. If the witness is hostile, you still want to know the kind of person with whom you are dealing. If you find something in common, it may help create some rapport that reduces the hostility. The background examination need not be long, but find out some basics.

Example:

Q: Ms. Jones, would you tell us your full name please?
A: Amanda Sarah Jones.
Q: Where do you live?
A: 123 Main St., Capital City, State of Moot.
Q: How long have you lived there?
A: 16 years.
Q: How many years of schooling do you have?
A: I graduated from college, and have a master's degree in counseling.
Q: What kind of work do you do?
A: I am a high school counselor.
Q: Where?
A: Central City High School.
Q: Oh, I went there, graduated in 1970. How long have you been there?
A: I have been a counselor there since getting my master's degree in 1985.
Q: When did you get your undergraduate degree?

A: *1983.*
Q: *From what school?*
A: *Moot State University.*
Q: *Where did you get your master's?*
A: *Moot State University.*

Even from this short exchange, you have a definite impression of this witness. She has a stable background, does not move around a lot, is well-educated, and presumably likes analyzing problems and working with teenagers.

In some situations, background information can turn out to be especially important. Do not simply ask background questions by rote. Consider how a deponent's background relates to the case. For example, if a case involves financial records, ask about the deponent's college business and accounting courses. If a case involves advertising practices, ask about the deponent's marketing training. If a case involves a real estate sale, ask about the deponent's own experience in buying and selling homes. You might find out important substantive information or you might identify a bias.

ii. Inquiries about subpoenaed documents

If your subpoena included a request for documents, that should be an early area of inquiry. Some lawyers will handle this in advance of the actual deposition by agreeing with the deponent or the deponent's lawyer, if the witness is represented by counsel, that the witness's documents will be produced for inspection a day or two before the deposition starts. Advance production of the documents will make the whole deposition more efficient, which is to everyone's advantage. (It clearly is to your advantage as the lawyer taking the deposition. It also, frankly, is to the advantage of the defending lawyer. Although the defending attorney might think that the less efficient the deposition is the less the questioning attorney will accomplish, the defender also must take into account the value of the witness's time. The vice president of the defending lawyer's client will not take kindly to hearing from the questioning lawyer that the seven hour deposition could have taken only three if the defending lawyer had simply produced subpoenaed files in advance of the deposition, as requested.)

If advance production of documents cannot be arranged, an alternative is to bring a second lawyer or a legal assistant familiar with the lawsuit to the

deposition to inspect the witness's document production and to cull out possible deposition exhibits, while the lead questioner proceeds on matters to which the documents do not necessarily relate. If attendance of a second lawyer or a legal assistant is not feasible, yet another alternative is to inspect the documents over a break or lunch.

In any event, always question the deponent near the outset of the deposition about the scope of the witness's search for documents:

Example:

Q: *Ms. Jones, you are testifying today in response to a subpoena?*
A: *Yes.*
Q: *Is Exhibit 1 a copy of the subpoena?*
A: *Yes.*
Q: *The subpoena asked you to bring with you to the deposition all of your telephone bills for the year 1999?*
A: *Yes.*
Q: *Did you do that?*
A: *Yes.*
Q: *Are these all of the bills?*
A: *Yes.*
Q: *Are any missing?*
A: *No.*
Q: *How do you know that?*
A: *I did a search of my accounts payable file, and found the invoice for each month in 1999.*
Q: *Is each page a separate bill?*
A: *Yes.*
Q: *There are twelve pages in total?*
A: *Yes.*
Q: *Let's mark these pages collectively as Exhibit 2. [The court reporter affixes an Exhibit 2 sticker to the stapled document.] Showing you Exhibit 2, do you recognize it?*
A: *Yes.*
Q: *What is it?*

A: *It's a collection of my telephone bills for 1999.*
[Note: If the deponent gives you a troubling no or yes answer in the sequence, then pause and explore that answer.]

iii. Inquiries about deposition preparation

It is advisable to ask a deponent what he or she did to prepare for the deposition. In general, the one area of preparation that is off-limits is the substance of conversations between the deponent and his or her counsel. A line of questioning might proceed as follows:

Example:

Q: *Ms. Grandma, did you do anything to prepare for your deposition?*
A: *Yes.*
Q: *What did you do?*
A: *I searched for documents in response to your subpoena.*
Q: *Did you find some?*
A: *Yes.*
Q: *And those are the documents we marked as Exhibit 2?*
A: *Yes.*
Q: *Did you do anything else?*
A: *I told Little Red Riding Hood I was coming here today.*
Q: *What did you say?*
A: *I said I was being deposed, and asked her if she had any advice.*
Q: *What did she say?*
A: *She said I should just tell you everything that happened.*
Q: *Anything else?*
A: *No.*
Q: *Did you talk to anyone else?*
A: *Yes.*

Q: *Who?*
A: *My lawyer.*
Q: *Is that Ms. Anderson, who is here with you today?*
A: *Yes.*
Q: *What did you say to Ms. Anderson?*
A: *[By Ms. Anderson:] Objection, privileged and work product. I instruct the witness not to answer.*
Q: *Did you talk to anyone else?*
A: *No.*
Q: *Did you review any documents in preparation for the deposition?*
A: *No.*

This last question raises a potential legal issue. Suppose the deponent had said yes, and you had then asked to see the documents. Is such a request similar to a request for the substance of conversations between a deponent and her counsel, and thus an invasion of attorney-client privilege or work product protections? Alternatively, is the request perfectly fair because presumably the documents refreshed the witness's recollection of prior events? The answer requires attention to both Federal Rule of Civil Procedure 26(b)(3) and Federal Rule of Evidence 612.

Under Federal Rule of Civil Procedure 26(b)(3), a party may obtain documents prepared in anticipation of litigation only upon a showing of substantial need. Many attorneys would argue that an attorney's selection of documents to show a witness in preparation for a deposition implicitly reveals what the attorney thinks about the lawsuit or the approach the attorney plans to take. Rule 26, the argument goes, protects against the required disclosure of particular documents used by the defending lawyer to prepare the deponent for the deposition. An attorney propounding this view will instruct a witness not to answer any questions identifying which documents the attorney showed to the witness in preparation for the deposition.[13]

[13] Note, however, there is a threshold question as whether Federal Rule of Civil Procedure 26(b)(3) even applies. Unless the documents reviewed by the witness were themselves prepared in anticipation of the litigation, the questioning lawyer might argue that Rule 26(b)(3) is not applicable.

Rule 26 logic, however, should be balanced against Federal Rule of Evidence 612. This rule of evidence provides that an adverse party is entitled to inspect any "writing" that a witness uses to "refresh memory for the purpose of testifying" in a civil case. Many attorneys would say that Rule 612 trumps Rule 26 if a witness concedes that a document reviewed for a deposition helped refresh the witness's memory about a particular event.[14]

One way for you as the questioning attorney to improve your chances of seeing the documents is to use the following series of questions:

Example:

Q: *Ms. Grandma, did you review any documents in preparation for this deposition?*

A: *Yes.*

Q: *Have those documents refreshed your memory about subjects we are discussing?*

A: *Yes.*

Q: *Have you used those documents to help you testify?*

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[14] *See e.g.*, Sporck v. Peil, 759 F.2d 312, 318 (3d Cir. 1985) (detailing discussion on this debate and ultimately holding that counsel's selection of documents in preparation for a deposition is protected by the work-product doctrine in a case where "deposing counsel failed to lay a proper foundation under Rule 612 for production of the documents selected by counsel"); *cf.* F.D.I.C. v. Wachovia Ins. Servs., Inc., 241 F.R.D. 104, 107 (D. Conn. 2007) (interpreting the "*Sporck* exception" narrowly). Some courts have been openly critical of *Sporck* and have declined to apply it or have distinguished it. *See, e.g.*, In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1018 (1st Cir. 1988); In re Pradaxa Prods. Liab. Litig., MDL No. 2385, 2013 WL 1776433, at *1 (S.D. Ill. Apr. 25, 2013) (attorney entitled to know which documents a witness reviewed prior to a deposition, but not entitled to know which of those documents were selected by counsel; counsel may not, however, "manufacture a zone of privacy by gratuitously disclosing" that all documents have been selected by counsel); *but see* Stevens v. Corelogic, Inc., No. 14cv1158, 2016 WL 397936, at *9-10 (S.D. Cal. Feb. 1, 2016) (declining to follow *In re Pradaxa*; attorney selection of documents in preparation for deposition is protected work product, although a witness's independent selection of documents is not protected). For a helpful and fairly comprehensive discussion of the intersection of the work-product doctrine and Federal Rule of Evidence 612, see In re Xarelto Prods. Liab. Litig., 314 F.R.D. 397 (E.D. La. 2016) (ultimately holding in a case involving over three million documents that "a list of documents reviewed by a witness in preparation for a deposition is discoverable under Rule 26(b), because the list is relevant, proportional to the needs of the case, and not privileged").

A: *Yes.*
Q: *May I see them, please?*

The two middle questions that set up memory refreshment for the purpose of testifying should help you trump an attorney work product objection. If the witness will not give you yes answers to the middle questions as to all the documents, then just ask about document review in connection with each deposition subject as you get to it. You might get the necessary concessions as to some documents, even if you cannot get the concessions as to the entire document preparation universe.

iv. Pleadings, discovery responses, affidavits

If the deponent is a party to the lawsuit, he or she has authorized pleadings and discovery responses and may have signed them. Even a deponent who is not a party may have participated in preparing the company's documents, or may have signed an affidavit or statement. It is appropriate to ask a deponent about information presented in documents in which the deponent has participated. "What did you mean by . . . ?" is a very useful question.

v. Who, what, where, when, why and how

In virtually all depositions, you will want to ask the journalist's classic five "w" questions: who, what, where, when, and why? We add: how? These six words will be useful in many different settings.

Example:
Q: *All right, Mr. Wolf. Where did you go on the morning of the fifth?*
A: *To Grandma's house.*
Q: *When did you go there?*
A: *About 10:00 in the morning.*
Q: *How did you get there?*
A: *I walked.*
Q: *What route did you take?*
A: *The high road through the woods.*
Q: *What were you planning to do when you arrived?*

A: *Eat someone.*
Q: *Who?*
A: *Little Red Riding Hood.*
Q: *Why?*
A: *Because I am a wolf, and that's what wolves do.*

The series of six "w/h" questions should be a fixture in your repertoire. Every time you encounter a document, a meeting, a conversation, or an event, you should ask these questions automatically, unless you have a special reason not to do so.

Examples:

Q: *Ms. Jones, let me show you Exhibit 2. What is it?*
A: *A letter.*
Q: *Who wrote it?*
A: *I did.*
Q: *When?*
A: *July 12, 2004.*
Q: *To whom?*
A: *My boss.*
Q: *Where were you when you wrote it?*
A: *My office.*
Q: *Why did you write it?*
A: *I wanted the boss to know the facts in the middle paragraph.*

* * *

Q: *Ms. Jones, you say you had a conversation with Mr. Williams.*
A: *Yes.*
Q: *Who is Mr. Williams?*
A: *My boss.*
Q: *When did you have the conversation?*
A: *July 12, 2004.*
Q: *Where did you have the conversation?*
A: *His office.*

Q: *Was anyone else present?*
A: *No.*
Q: *How long was the conversation?*
A: *5 minutes.*
Q: *What did you say?*
A: *I said the harassment had to stop.*
Q: *What did he say?*
A: *He said, "You are fired."*

* * *

Q: *Ms. Jones, you say you were fired after a series of meetings with Mr. Williams?*
A: *Yes.*
Q: *How many meetings were there?*
A: *Three.*
Q: *Let's take each one. When did you have the first?*
A: *July 12, 2004.*
Q: *Where was it?*
A: *My office.*
Q: *Who was there?*
A: *Mr. Williams and I.*
Q: *How long was the meeting?*
A: *Five minutes.*
Q: *Did either of you take notes?*
A: *No.*
Q: *Who called the meeting?*
A: *He did.*
Q: *What did Mr. Williams say at this meeting?*
A: *He said I needed to do better work.*
Q: *What did you say?*
A: *I said my last review said I was doing great work.*
Q: *What else did he say?*
A: *I don't remember.*
Q: *What else did you say?*
A: *Nothing.*

[Repeat as to second and third meeting.]

The who, what, where, when, why, and how questions accomplish at least three purposes. First, remember that you ultimately will be telling a story. Good story tellers always weave in some details; in the end, the details make the story more interesting and colorful for the audience. Second, the six questions help test the deponent's credibility. Do the details of the story hang together? Third, the questions help establish an evidentiary foundation for the admissibility (in the case of helpful facts) or the inadmissibility (in the case of unhelpful facts) of the witness's testimony.

Examples:

Q: *Tell me about the meeting, Ms. Jones. Who participated?*
A: *All the conspirators.*
Q: *Who are they?*
A: *Mr. Smith, Ms. Crawler, and me.*
Q: *Where did the meeting take place?*
A: *In a smoke-filled room in my house.*
Q: *When?*
A: *The night of April 6.*
Q: *What time?*
A: *1:00 a.m.*
Q: *What did you say at the meeting?*
A: *I said, "Let's rob the bank."*
Q: *Did Ms. Crawler say anything in response?*
A: *Yes.*
Q: *What did Ms. Crawler say?*
A: *She said, "Good idea."*
Q: *Did Mr. Smith say anything?*
A: *Yes.*
Q: *What did he say?*
A: *He said, "I agree."*
Q: *Why did you want to rob the bank?*
A: *I just lost a lot of money in technology stocks.*

* * *

Q: *Now, Ms. Jones, you say you had a conversation about robbing a bank?*
A: *Yes.*
Q: *Let's explore that in more detail. Who participated?*
A: *I don't know their names.*
Q: *Where was it?*
A: *Some hotel.*
Q: *Do you know the name?*
A: *No.*
Q: *When was the meeting?*
A: *I don't remember.*
Q: *What did you say at it?*
A: *I don't recall.*
Q: *Did any of these nameless people say anything?*
A: *They must have, but I can't think what that was.*
Q: *Why did you meet these people?*
A: *No particular reason.*[15]

vi. The good, the bad, and sometimes even the ugly

Should you limit yourself to questions that are likely to elicit only helpful answers? Or should you ask questions that may elicit good *or* bad information?

The answer depends on the purpose for your deposition. Sometimes you are deposing a friendly witness to preserve favorable testimony for use at summary judgment or trial, when you know that the witness likely will be unavailable later. In that event, you are concerned with eliciting favorable facts. If the witness also has bad things to say, let the other side ask the questions to get those bad facts in cross-examination, unless you are engaged in inoculating the

[15] Even if you are getting "I don't know answers," do not abort the "who, what, where, when, why, and how" sequence. The sequence might spark a memory. If not, you have effectively disqualified a witness from testifying later about the same subject.

judge and jury against the damaging information by bringing some of it out yourself with the best possible spin.

More often, you are deposing a witness who is likely to testify for the adversary. Your main purpose in the deposition is to avoid unpleasant later surprises. You want to know everything the witness is likely to say, so that you can defuse the testimony, either on the spot through immediate impeachment or cross-examination, or later through other witnesses and evidence. In this type of deposition, do not refrain from asking a question solely because you believe you will not like the answer. Just make sure to ask abundant "who, what, where, when, why, and how" questions, to test credibility and to set up possible impeachment on the spot or later.

vii. Sources of proof

You typically will want to know whether the deponent knows of other sources of proof for a particular fact. Are there other potential witnesses who know something about the same facts? Are there records, pictures, tape recordings, telephone logs, diaries, and like items that bear on a subject? Where can you find those? Make sure you ask for potential leads.

viii. Sources of answers

Another typical area of inquiry concerns the sources of proof for the deponent's answers (e.g., eye witness observation, statements of others, documents, presumptions based on habit). What are those sources of proof? What is the extent of the witness's reliance on them? Why does the witness rely on them? In what way does the witness rely on them? These questions all relate to the foundation and credibility of the deponent's version of the facts. Who is really testifying – the deponent or some other source?

ix. Feelings and attitudes

Deponents are people too. They have feelings and attitudes, just as do other people. These attitudes and feelings can affect their perceptions and motives, and thus their testimony.

Example:

Q: *Mr. Deponent, you just gave us an unusually detailed description of the car accident scene for a bystander. You must have been concentrating hard?*

A: *Yes, I made a point of that.*

Q. *Why did you do that?*

A: *I wanted to make sure Ms. Smith sued Mr. Anderson for everything he had.*

Q: *Why?*

A: *I was in a car accident two years ago, and never got a dime out of it.*

Q: *How do you feel about that?*

A: *Really angry.*

Feelings and attitudes may not always be relevant, and you may not always want to explore them for fear of looking like you are unfairly prying into the deponent's personal life. But think beyond the objective facts of the lawsuit in deciding what to ask each deponent. Bias caused by feelings and attitudes could reduce a deponent's credibility. And you want to know how strong those feelings and attitudes are, to gauge how the witness will appear to the judge and jury, and to determine whether you will be able to establish bias at trial.

Probing into feelings and attitudes also may help you establish inconsistencies when the witness talks about conduct. For example, assume that a deponent testifies that a defendant's conduct left the department an emotional wreck. Yet, when you ask the deponent later about events that occurred on the day in question, the deponent talks about partying all night with friends. The story does not fit together.

x. Hearsay, speculation and opinions

It is absolutely permissible to ask deponents for hearsay, speculation, and opinions.[16] Hearsay will not be admissible at trial, unless an evidentiary exception exists. Speculation will not be admissible. Some forms of opinion will not be

[16] The standard, remember, is that: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. . . . *Information . . . need not be admissible in evidence to be discoverable.*" FED. R. CIV. P. 26(b)(1) (emphasis added).

admissible either. But that does not mean you have to avoid asking for these kinds of information at the deposition. If challenged, simply explain that the information you seek need not be admissible to be discoverable, and may in fact lead to admissible evidence later. The deponent, for example, may testify that she knows some information because Mr. X told her this. You may then want to talk to or depose Mr. X regarding the source of his knowledge.

This, by the way, is why it is flatly impermissible for lawyers to instruct witnesses during pre-deposition preparation to say, "I don't know," in response to questions merely because they call for hearsay.

Example:

Q: *Ms. Grandma, why did Mr. Wolf come to your home on the morning of the 5th?*

A: *I don't know. [So far, this could be a truthful and permissible answer; Ms. Grandma is not Mr. Wolf, and does not know what he was truly thinking.]*

Q: *Did Mr. Wolf ever tell you why he came to your home that morning?*

A: *Yes.*

Q: *When did he tell you?*

A: *That morning.*

Q: *Where were you at the time?*

A: *In my living room at my house.*

Q: *Was the conversation face-to-face?*

A: *Yes.*

Q: *Was anyone else present besides you and Mr. Wolf?*

A: *No.*

Q: *Who started the conversation?*

A: *I did.*

Q: *What did you say?*

A: *I asked Mr. Wolf why he had come to my home.*

Q: *What did Mr. Wolf say to you?*

A: *Objection, calls for hearsay. [This is a theoretically permissible, but unnecessary substantive objection by Mr. Wolf's lawyer.*

Hearsay objections are typically preserved until trial. Moreover, the objection will eventually be overruled on the merits as Mr. Wolf is a party to the case.]

Q: *You may answer the question.*

A: *He said that he had come to eat Little Red Riding Hood.*

In the above sequence, if the lawyer for Ms. Grandma had instructed Ms. Grandma not to answer the question about what Mr. Wolf had told her, the instruction would have been inappropriate.[17] Furthermore, if Ms. Grandma, acting on instructions from her lawyer to testify only to what she knows firsthand and not to speculate, had answered all questions with "I don't know," she would have been committing perjury. The question, "why did he come?", which may call for speculation, is not the same thing as the question, "were you told?", which calls for a fact.

xi. Exhaustion/closure questions

Especially in the case of a deposition of a neutral or hostile witness whom you are deposing for discovery purposes, you need to make sure you have exhausted the witness's knowledge on any given topic. Do not assume that a witness has told you everything; a properly prepared witness will not volunteer knowledge.

There is no magic formula for closure on each subject. Different lawyers use different forms. But they all resemble the following:

Examples:

Q: *Did anything else happen?*

Q: *Did he say anything else?*

Q: *Did you observe anything else?*[18]

Q: *Have you told me everything you remember about . . .?*

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[17] FED. R. CIV. P. 30(c)(2).

[18] The first three of these examples appear in M. Melvin Shralow, *Cross and redirect examination,* 4 TRIAL DIPL. J. 36, 37 (Summer 1981).

Q: Anything else?
Q: Is that everything?

Keep asking the same exhaustion or closure question until you get a firm "no" to the "anything else" inquiry or a firm "yes" to the "everything" inquiry. Do not stop until that occurs. Ask similar closure questions after each break and at the end of the deposition.

Example: *Ms. Grandma, did you have a chance during the break to think about your testimony from this morning? [Yes.] Is there any answer you would like to supplement or change now that you have had a chance to think about it?*

These closure and exhaustion questions will show that you gave the deponent every opportunity to be as accurate as possible, thereby making it doubly difficult for the witness to modify or contradict answers later.

c. Organization of Questions

i. Logical/chronological

There are two basic styles of deposition question organization. The first is to put questions in a sequence that flows in a predictable manner, such as by logical subjects or by chronology.

Examples: *Q: Good morning, Ms. Jones. Today, we are going to be talking about the accident, the nature of your injuries, and your medical expenses. Let's start with the accident. [Discussion of accident.] Now let's talk about your injuries. [Etc.]*

Q: Good morning, Dr. Smith. Today, we are going to talk about your operating procedures. What is the first thing you do when you walk into the operating room?

[Discussion of first thing.] Then what do you do? [Discussion of second thing.] What next? [Etc.]

These kinds of approaches help an examination proceed in a way that is easy for a judge or jury to follow. Moreover, these approaches help the deponent stay on track with a coherent story. They are especially helpful when you are deposing a friendly or neutral witness through whom you are developing easily understood explanations of events. This approach to questioning also is advisable if you are taking the deposition to preserve testimony for trial.

ii. Unpredictable

There is a downside to the logical/chronological approach, of course. Precisely because the deponent can predict where you are going next, the deponent is less easily trapped with inconsistencies in a story. For that reason, lawyers may prefer a more unpredictable approach with hostile witnesses. With this approach, the questioning lawyer jumps around among subjects, and comes back to a given subject multiple times.

Example:

Q: *Please state your name for the record.*
A: *Wilbur H. Wolf.*
Q: *What is your address?*
A: *225 Carnivore Lane, Capital City.*
Q: *Mr. Wolf, on the morning of the fifth, you tried to eat Little Red Riding Hood, didn't you?*
A: *No.*
Q: *You were planning to eat her, true?*
A: *No.*
Q: *What did you do when you first awoke on the 5th, Mr. Wolf? [Discussion of early morning tasks]*
Q: *Mr. Wolf, let me show you Exhibit 6. It's an email you wrote to Mrs. Wolf on the morning of the 4th?*
A: *Yes.*

Q: *It says you are going to eat Little Red Riding Hood, doesn't it? [Etc.]*

The point of the unpredictable approach is to keep the witness off balance. Be careful, however, that the approach does not also keep you off balance and cause you to lose track of the proceedings and forget to cover key points. Being unpredictable does not mean being disorganized yourself.

Some attorneys like to save the "critical," tough questions for witnesses until near the end and late in the day when witnesses are more likely to be fatigued and just want to get the deposition completed. Witnesses are often less guarded and alert at this time and their answers are often shorter and cleaner.

d. Probing for Details/Listening to the Deponent

Always plan on asking follow up questions. You want details. If the witness is friendly, you want details because it helps the deponent tell a persuasive story. If the witness is hostile, you want details (often, but not necessarily always) to test credibility and to avoid later surprise. Think of your "who, what, where, when, why, and how" sequence.

Part of probing for details, however, is not just remembering to ask questions like "who, what, where, when, why, and how." In addition, it is developing the habit of actually listening to the witness. This is harder than it sounds. If you are prepared properly, you have gone into the deposition with a plan for what you want out of it. You have specific points you want to prove and to disprove. But you cannot always predict all of the points that may come up with a given witness, especially one who is not in your control. So a witness may tender a promising line of testimony you did not anticipate. If you are not listening to the witness, but instead concentrating solely on your own planned questions, you may miss the opportunity to probe for important detail. To ask most effectively for details or to pick up on a promising line of questioning, you have to be paying attention to the actual previous answers in a sequence.

Example:

Q: *Mr. Wolf, what is your age?*

A: *Now, or at the time I tried to eat Little Red Riding Hood?*

Q: *Now.*

A: *26.*
Q: *How much education do you have?*

Another part of probing for details is developing the habit of watching a deponent's demeanor. Witnesses send clues about their testimony through facial expressions, posture, pauses, vocal volume, and the like. These signals are important. Watch for them.

e. Pace of Questioning

Vary your pace to fit your purpose. Try to develop a rhythm. If you are trying to pin the witness down and the questioning is going well, use short, quick questions, and try to entice the witness to keep up with you through short, quick answers. Then perhaps turn to a longer question for a mini-summary of the favorable testimony before proceeding to the next topic.

Example:

Q: *On the night of the first, Ms. Jones, was it dark?*
A: *Yes.*
Q: *Was it raining?*
A: *Yes.*
Q: *Were there clouds?*
A: *Yes.*
Q: *Was the moon out?*
A: *No.*
Q: *Were you wearing your glasses?*
A: *No.*
Q: *Do you usually?*
A: *Yes.*
Q: *So it was a dark, rainy, cloudy, moonless, glass-less night when you were driving 40 miles per hour in a 30 mile per hour zone?*

On the other hand, if the testimony is not going well, there is no benefit to you in letting the witness go on a roll of harmful answers. Slow the questions down. Take the witness out of rhythm.

Your pace and rhythm will be different if you are trying to draw a witness out and discover all aspects of the witness's story or sources of information. In this case, you will proceed more slowly and pause between the witness's answer and your next question. The slower pace and the pauses are more likely to create an atmosphere that will cause the witness to be more talkative and provide longer answers.

Example:

Q: *Ms. Witness, you say you didn't agree with your performance appraisal?*
A: *That's right.*
Q: *Can you please explain why?*
A: *[Some explanation provided.]*
Q: *[pause]*
A: *[Additional explanation provided.]*
Q: *Is there any other reason why you didn't agree with your performance appraisal?*
A: *Not that I can think of.*
Q: *[pause] Did you make any notes anywhere about your disagreement with the appraisal?*
A: . . .
Q: *Did you talk to your supervisor about your disagreement?*
A: . . .
Q: *Did you talk to anyone else at XYZ Co. about your disagreement?*
A: . . .
Q: *Did you talk to anyone outside XYZ Co. about your disagreement?*
A: . . .
Q: *Are you confident now that you have explained fully all bases for your disagreement with the performance appraisal?*
A: *Yes.*

f. Leading Questions

Direct exams of friendly and neutral witnesses must generally proceed through non-leading questions – an essentially important point if the depositions are to preserve testimony for use at trial. This restriction does not apply to hostile witnesses, who can be examined in a deposition just as they would be cross-examined at trial.[19]

Keep this firmly in mind. One of the authors was once in a series of depositions opposite a lawyer who seemed incapable of asking a non-leading question, even of friendly witnesses. After a while, lawyers on the opposite side began objecting to virtually every question as impermissible. The questioning lawyer refused to rephrase any of the questions. If the case had gone to trial, there would have been all-out warfare over whether large portions of the transcripts were usable.

g. Prefatory Phrases

When framing your questions, be vigilant about avoiding prefatory phrases. Common prefatory phrases include: "Do you remember whether . . . ?", "Do you recall whether . . . ?", and "Do you know whether . . . ?" Prefatory phrases confuse the record and may render the answers useless. A simple "yes" or "no" response may pertain either to the prefatory phrase or to the subsequent substantive part of the question.

h. Summarizing Testimony

One useful technique for questioners at the end of a sequence is to summarize the witness's testimony, and ask him or her to agree to the summary. Then the summary and answer are introduced into evidence for summary judgment or at trial.

Example: *So Mr. Smith, your testimony is that on the night of the accident you attended a party at which you had*

[19] "The examination and cross-examination of a deponent proceed [at a deposition] as they would at trial under the provisions of the Federal Rules of Evidence, except Rules 103 and 615." FED. R. CIV. P. 30(c).

six beers and three vodka martinis in the space of three hours, and ate no food, is that right?

If the witness agrees your summary is correct, then move on to the next line of questions. If the witness disagrees, then ask the witness, "Which part of my summary is not accurate?" You may use further questions to probe the alleged inaccuracy.

There are times, however, when this technique may be counterproductive. For example, if you have a potentially hostile witness whose guard is down and who consequently is giving you good information without fully realizing the impact of what he is doing, you may be better off taking the answers as they come and leaving it at that. If you restate or summarize the testimony, that may cause the witness to try to qualify those previous responses and to become more cautious and less expansive. Use your judgment.

i. Reacting to the Witness

One difficult tactical issue is whether to react to a deponent's testimony. The important consideration is whether you likely will derive any benefit from the reaction. That depends upon the circumstances. In some cases, you will not want to react in any way to a witness's testimony; for example, you would not want to send a message that the testimony has hurt your side of the case. In other circumstances, you will want to react, to encourage or to discourage further testimony of the type you are hearing. Reasonable lawyers may differ over appropriate approaches, and each witness has to be taken one by one.

If the witness is utterly hostile, the best approach is probably a non-reactive one. You are unlikely to effect a positive change in the witness's testimony through any reaction. You should push hard. You should probe sensitive areas to see if the witness reacts. But ask what you need to ask, and get out.

If a witness is friendly or neutral, react normally, as you would in conversation with someone. A smile, an approving nod, or a warm tone of voice will put the witness at ease and will encourage the witness to continue in the same vein in which the witness has been testifying. A frown, a wrinkled brow, or a

puzzled tone will cause a friendly witness to pause to consider whether the testimony is confusing, incomplete, or contradictory.

A simple pause, and silence, also may affect a deponent, friendly or not. There are some witnesses who cannot bear quiet. They will finish an answer. But if you pause, and look at them as if you expect more, they will keep talking! If you want them talking, try it. This works especially well if you have developed a rhythm with the witness. If the witness answers a question and you do not ask another question immediately, the witness may resume talking.

Suppose a witness is relatively neutral, or is unfriendly but semi-controllable. Then, rather than remain stoic in the face of unfavorable testimony, you might choose to react. One approach is to use a friendly conversational style until the witness gives the first unfavorable response, at which point you may alter your style to express confusion or disapproval. If the witness retreats, then shift back to the more friendly, conversational style. The witness gets the message over time that hostile testimony provokes negative reaction. Such an inference will not and should not cause the witness to refrain from telling the truth, but it does encourage the witness not to stretch for negative spins in the witness's answers to your questions just to please the other side. Your typical lay witness (setting aside experts for the moment) does not like to be attacked.

j. Challenging/Impeaching the Witness

Reasonable lawyers may take a variety of approaches to the tactical question of whether and when to challenge a witness through overt, aggressive cross-examination or impeachment. Some would argue that it is better not to engage in extensive cross-examination or impeachment because doing so tips the questioner's hand for trial. As long as you know all of the bad things the witness will say, save your best attacks for surprise when the witness is live on the stand in front of the judge or jury.

Other lawyers would argue that waiting until trial often is a mistake. The vast majority of civil cases never go to trial. The case is won or lost at the summary judgment stage. If there is no dismissal at that time, the case likely settles. So, if you have good cross-examination or impeachment material, you may want to use it at the deposition. Depositions are the places where the case actually gets won, lost, or positioned for settlement.

We think the correct answer to the tactical question is: it depends. First, the standard for getting summary judgment is that there are no genuine issues of material fact, and a party is entitled to win the case as a matter of law.[20] So, if your cross-examination or impeachment of a deponent will definitively remove or establish a material fact, go for it!

Suppose instead that the cross-examination or the impeachment will have a lesser effect. Then the tactical question is trickier. The questioning lawyer has to balance the potential desirability of surprising the witness on the stand later at trial against the desirability of testing the witness a bit at the deposition. In that balance, the authors distinguish between impeachment and cross-examination. Cross-examination can lead to the discovery of additional information. In that regard, the questioning fits the purposes of a deposition even when the questioning does not definitively remove or establish a material fact. On the other hand, impeachment is not likely to get you new facts. It just impacts the credibility of the witness. Seldom is the impeachment so devastating that it helps much at summary judgment, when credibility determinations are inappropriate. So, except when impeachment of the particular party or witness is likely to encourage settlement, we recommend that you save true impeachment material for later use.

k. Rephrasing Questions

There will be times during the deposition when one of the other lawyers in the room will object to a question you ask. Let's say the objection is that your question is ambiguous. You are now put to a choice: do you reframe the question or insist on an answer to the one you asked?

There is no one correct approach to this choice. If it is obvious to you upon quick reflection that your original question to the witness is seriously ambiguous, then reframe it. Otherwise, we advise in most circumstances that you insist on an answer to your question as asked. *After* you get an answer to your original question, you may want to rephrase and restate it to make sure the record is clear. The logic behind this approach is that you do not want to encourage the other lawyers in the room to believe they can dictate the content of your questions

[20] FED. R. CIV. P. 56.

merely by routinely objecting to form and causing you automatically to withdraw your initial inquiry.

On the other hand, do not be so proud as to refuse ever to reframe a question, and then watch a valuable answer be excluded from evidence because an objection to the question is sustained. This leads to an important exception to our general advice: if the primary purpose of the deposition is to preserve testimony, you need to be cautious about objections. In the deposition, you can require the witness to answer your question as framed; at trial, that answer may be excluded if the objection was well-founded.

Occasionally, it will be the *witness* who challenges your question: "What do you mean by . . . ?" If you sense that the witness truly is confused, rephrase the question. If, on the other hand, the witness seems to be attempting to assert some control over the deposition, you may try responding with a couple of different approaches. One is: "What do you not understand?" The other is: "What did you mean by [X] when you said it yourself ten minutes ago?"

3. Handling Exhibits

Handling an exhibit during a deposition is much like handling an exhibit at trial. Here are the basic steps:

- First, pre-mark the document, by handing it to the court reporter for identification. The court reporter will affix the proper number sticker to the document. If you know in advance of the deposition that you will be running through a series of exhibits, give the whole batch to the court reporter to mark before the deposition starts.[21]

[21] The authors are proponents of marking any one unique document only once as an exhibit. Then the document carries that single marking all the way through every deposition in the case and the trial. Re-marking a single document with new numbers every time it is used in new depositions is confusing and unnecessary. (E.g., Jones Exh. 2 = Smith Exh. 64 = Anderson Exh. 26 = Pl. Tr. Exh. 200 = Def. Tr. Exh. 82.) Just mark the document once the first time it appears as an exhibit, and forever after refer to the document by that number, no matter when it is used and no matter who uses it. If local rules of practice in your court normally require a different approach, then seek permission from the court to use a single number method.

Example: *Ms. Court Reporter, would you please mark this as Exhibit 36? [Court reporter marks exhibit with correct number and hands the document back to questioning counsel.]*

- Second, show the document to the witness, and hand a copy to counsel.

Example: *Ms. Jones, I am handing you a two-page document, dated April 16, 2000, marked as Exhibit 36. [Questioning lawyer gives the marked document to the witness and hands a copy to the witness's lawyer and to opposing counsel.]*

- Third, find out whether the witness recognizes the document. If the answer is yes, ask the witness to identify the document in sufficient detail to establish a foundation for the witness's substantive testimony about the exhibit. Alternatively, describe the document and then ask the witness to agree with your description.

Example:
Q: Please take a moment to review Exhibit 36, and tell me if you recognize it.
A: Yes.
Q: What is it?
A: It's a letter I wrote on April 16, 2000, to my boss.
Q: Is that your signature at the bottom of page 2?
A: Yes.[22]

- Fourth, ask the witness applicable substantive questions.[23]

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[22] At this point in a trial, you would offer the exhibit into evidence. That is unnecessary during a deposition. You will wait to make the offer at trial.

[23] One commentator suggests that you may want to consider having the witness highlight on a clean copy of the exhibit those key sections that are important, then have the witness explain the importance of each. Lisa C. Wood, *Better Discovery Through Discovery Management*, 31 LITIG., Summer 2005, at 4, 43, 46.

Examples: *What did you mean at the bottom of page one of Exhibit 36, when you said . . .?*

Did you read Exhibit 36 when you received it?

How does your company use reports like Exhibit 36?

Is it important that reports like Exhibit 36 be accurate?

How long does your company retain reports like Exhibit 36?

- Fifth, when you have finished discussing the document with the witness, make sure the original marked exhibit goes back to the court reporter to include with the official transcript of the deposition.

Example: *At the end of the discussion, the questioning lawyer hands the marked version of Exhibit 36 back to the court reporter for safekeeping.*

4. Demonstrations, Reenactments and Diagrams

There may be occasions in which you want the deponent not only to provide oral responses to your questions but also to perform some physical act. For example, you may want the deponent to demonstrate some action (e.g., the range of motion in the deponent's injured shoulder) or to reenact some incident at issue in the suit (e.g., how the deponent was using a product at the time of the accident). Alternatively, you may want the deponent to draw a diagram (e.g., an accident scene) or to provide a handwriting sample (e.g., to try to determine if the deponent was the source of some marginalia on a document). As a threshold matter, there is the issue of whether you can compel the deponent to do any of these things. The courts that have considered this issue are divided. Some courts hold that a deponent is required only to provide oral responses to questions and

that the deponent cannot be required to perform some action in the deposition.[24] Other courts disagree and hold that a deponent can be compelled to perform the types of acts described above.[25] These courts reason in part that a demonstration or reenactment may provide a more direct and accurate account of an event than a verbal description.

Assuming that the courts in your jurisdiction allow you to compel a deponent to perform nonverbal acts in a deposition, or that the deponent agrees to perform such acts, you need to consider the mechanics of recording these actions for the record. Obviously, if you videotape the deposition, you will have a visual record. Even if you videotape the deposition, however, you also may want to make a verbal record of what the deponent does so that you have a written record of the deponent's action. You may find it considerably easier to attach such a written record to a motion or to impeach the witness at trial with the written transcript.

You certainly need to make such a verbal record of any actions if the deposition is not videotaped. Otherwise, your written transcript will look something like this:

Example:

Q: *Can you point to the area of your back and neck where you still have pain?*
A: *It starts right about here and goes all along here to this area.*
Q: *Where does it hurt the most?*
A: *[Witness pointing.]*
Q: *How high can you lift your left arm?*
A: *Usually only about this high. On a good day, I can sometimes raise it this much higher.*

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[24] *See, e.g.*, Greenidge v. Ruffin, 927 F.2d 789, 793 (4th Cir. 1991) (finding no abuse in discretion for refusing to allow a videotaped deposition of a murder reenactment); Howard v. Michalek, 249 F.R.D. 288, 290 (N.D. Ill. 2008); *see also* Jones v. Covington, No. 1:15-cv-396, 2015 WL 7721835, at *2 (N.D. Ga. Nov. 30, 2015) (plaintiff may question doctor about his previous examination of a pathology slide, but may not compel doctor to re-read the slide as that would compel the creation of new facts). Keep in mind, however, that a deponent may agree to perform some act in a deposition even if the deponent cannot be compelled to do so.

[25] *See, e.g.*, Kiraly v. Berkel, Inc., 122 F.R.D. 186, 187 (E.D. Pa. 1988); Emerson Elec. Co. v. Superior Court, 946 P.2d 841, 842, 68 Cal. Rptr. 2d 883, 884 (Cal. 1997).

There are different ways to make a verbal record of the deponent's acts. You can observe and orally describe the deponent's action, and then ask the deponent to confirm the accuracy of your description. While opposing counsel can object to your description, you can ask the deponent to correct any inaccuracies.

Example:

Q: *You are pointing to an area about the size of a baseball directly under your left shoulder blade, is that correct?*

A: *Yes. It also sometimes hurts down here too.*

Q: *Now you are pointing to a smaller area just to the left of your spine and right above your belt line, is that right?*

A: *That's right.*

Alternatively, you can instruct the deponent to describe and perform the physical act simultaneously. This may not work very well if the deponent cannot accurately and clearly verbalize his or her actions. In that case, you should supplement the witness's description with your own, and then get the witness to agree with your description.

If you ask the deponent to draw a diagram or to mark on a photograph or other document, you can use multi-colored pens to help create a clear record of what the deponent did.

Example:

Q: *I'm handing you a blank sheet of paper marked Exhibit 1. Please take this red pen and draw on Exhibit 1 the intersection where the accident occurred. . . . You have drawn two intersecting streets, Elm and Cedar. Is that correct?*

A: *Yes.*

Q: *Please now take this blue pen and indicate the point of rest of your car after the accident. . . . Have you done that?*

A: *Yes.*

Q: *Please take this green pen and draw the point of rest of the defendant's truck after*

the accident. . . . You have drawn the point of rest of the defendant's truck in the northbound lane of Cedar Street, is that correct?

A: *Yes.*

If you are defending the deposition of a witness asked to perform some physical reenactment, you may consider objecting to the request on the grounds that the requested reenactment is too difficult or dangerous, or that it is misleading and assumes facts not in evidence because the setting and/or circumstances in the deposition room are not the same as those at the time of the original incident.

Example: Too dangerous: *Let the record reflect that we have moved to the stairwell of my office building. Mr. Smith, I'd like you to show us how you somersaulted down two flights of stairs at my client's apartment building.*

Too misleading or difficult: *Dr. Jones, would you please take this Milton-Bradley game of "Operation" and show us how you performed a heart transplant on my client.*

You might alternatively object to the reenactment but allow it to occur, and then object to the introduction of a videotape of the reenactment at trial. As courts have noted, it does not automatically follow that a videotaped reenactment "taken for discovery purposes [is] admissible into evidence at trial."[26]

5. Dealing with Confidential Material

It is not unusual in commercial cases, for example, for parties to be dealing with trade secrets, business strategies, employment records, and the like. It is similarly standard in personal injury cases to be dealing with medical records. These and other items may be confidential.

[26] *See, e.g.*, Roberts v. Homelite Div. of Textron, Inc., 109 F.R.D. 664, 668 (N.D. Ind. 1986).

Generally, counsel will have entered into a confidentiality stipulation, approved by the court, at the outset of the case. This stipulation and order will spell out the procedures for treating disclosure of sensitive information. Follow the instructions in that order.

The most likely scenario in which confidentiality will become an issue at a deposition is when the witness says that some particular subject of testimony is especially sensitive. A standard approach to handling this scenario is to excuse all persons from the deposition room except the lawyers, the witness, and the court reporter. The questions and answers proceed. At the end of the topic, the court reporter is told to transcribe the sequence into a separate "confidential" volume, which is then available only to the witness and the lawyers in the case. (Other persons may be eligible to see the confidential volume as permitted by the operative stipulation/protective order.) Later, the court will determine the degree of confidentiality, if any, to ascribe at trial to the sensitive testimony. If any exhibits are especially sensitive, handle them in the same way.

6. Taking Notes During the Deposition

The most important thing to do when taking a deposition is to *listen*. You will miss critical follow through unless you pay careful attention to all aspects of each of the deponent's answers. Paying such careful attention to each word the deponent utters can be hard to do if you simultaneously are trying to take copious notes. One way to solve this problem is to ask a legal assistant or another lawyer to attend the deposition for the purpose of note-taking. This approach, however, increases the cost to the client.

An alternative is to go into the deposition with an outline of question topics on the left half of a page, leaving room on the right half, opposite the questions, for recording key notes about answers. This device will help you know that you have covered particular points, and will help you refresh your recollection of the deponent's prior testimony if you have to return to a topic during a deposition. It also will provide a device for jotting a quick word or two about areas to follow through on.

Example:

The April 16, 2000 letter:	*Deponent's answers:*
Who wrote it? [Deponent?]	
Where were you at the time?	
When did you write it?	
Why did you write it?	
What did you mean at the bottom of page one?	

7. Concluding Procedures

There are three things to remember about concluding a deposition. The first is instructing the witness, or inviting the witness's lawyer to instruct the witness, about the right to read and sign the transcript. Under the Federal Rules, a deponent has 30 days within which to review and correct a transcript once it is prepared.[27] If the witness waives the right, or asserts the right but then makes no changes, the transcript is deemed correct as reported. Have the witness state on the record whether the witness intends to exercise the right to review the transcript.

Second, if the witness declares that he or she wants to review the transcript, you should make sure following the deposition that the witness receives notice of the preparation of the transcript and receives a copy to review. Then, you need to make sure that the official transcript includes any corrections. Always review any corrections to determine if the witness has suddenly reversed

[27] FED. R. CIV. P. 30(e).

course on an important answer. If the witness has, you may need to notice a supplemental deposition to explore the change.

Third, in many jurisdictions, court reporters send the original of the deposition transcript to the lawyer who noticed the deposition for storage. Courts do not ordinarily store transcripts, and court reporters do not like using their own file space for this purpose. So it becomes your job.

If you get original transcripts to hold, make sure you set aside a secure space for them. You do not want to misplace the originals of depositions and exhibits that might wind up being used in court.