Deposition Do’s and Don’ts

David Letterman had a top ten list. God has his top ten list of things you shouldn’t do. Although not a pithy as God … or David Letterman, we have comprised our list of ten things you absolutely must do in deposition practice, and ten things you probably should avoid if you are opposed to the whole malpractice thing.

This list is a work in progress. At every seminar, we ask the audience to give us their top deposition tip. So if you have a tip that belongs on this list, please send it to info@comedianoflaw.com.

#1 – Do be prepared; Don’t wing it.

Deposition time is not Rambo time. Depositions take time and preparation. Document reviews. Thorough analysis of the legal issues. A clear understanding of what will be needed to win a summary judgment motion. The ability to lock in witness testimony for cross examination at trial. With so much at stake, it is amazing that so many attorneys just simply take the opportunity to “fish” and just wing it. Just say no! The rule of thumb is “3 hours prep for every hour of dep.” Often, this requires two pre-deposition conferences with the client to have the client feel comfortable with the deposition.

In preparing a client for his deposition, a lawyer has an ethical duty to not improperly influence the testimony. Geders v. United States, 425 U.S. 80, 90 n. 3 (1976); Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

One tip prior to taking the deposition is to prepare the summary judgment outline. By writing the summary judgment motion, or at a minimum, the outline for the summary judgment motion, you will know the critical facts in the case.

If defending a deposition, draft an outline as if you were taking the deposition and then grill the witness with difficult questions.

#2 – Do own the deposition; Don’t be bullied

It is important to have a metal attitude that you own the deposition. To do this, arrive early. Don’t be late to your deposition. This will put you mentally behind the eight ball. Arrive early, place people where you want them, organize your documents.

Don’t be bullied. Some attorneys, unethically I might add, try to bully the other attorney though coaching depositions, witness conferencing, speaking objections and generally bullish behavior. Don’t fall for it. Do not be afraid to call the court. Don’t get mad. A lawyer should be even keeled during the deposition. Don’t argue. Don’t quarrel. If you get combative with a deponent, the deponent will likely clam up and become defensive. In addition, an angry lawyer is an out-of-control lawyer, meaning the witness now has control of the deposition.
End the deposition when you are ready to end the deposition. Don’t let the other attorney bully you into being done before you are ready.

#3 – Do use your documents; Don’t go sheet-less

Depositions are the time to get control of the documents in the case. You need to make sure you obtain all the documents from the other side prior to depositions. Know which ones you will need for trial. Take care of any potential objections concerning the documents.

Bring three copies of each document to the deposition, and have them organized by document. This will allow you to effectively go from document to document during the deposition.

Don’t be afraid to write notes/questions on your copy of the document. Many attorneys use sticky notes on documents so they will be able to quickly identify the relevant questions concerning a document.

Make sure to do the document dance. Have the witness identify the document and authenticate the document before testifying about the document. This will make trial a lot smoother as you will have the record to handle potential objections to the document.

#4 – Do use an outline; Don’t use a script

When asking questions during a deposition, use an outline, do not use a script. Scripts tend to shut down the attorney’s “read and react” mechanisms. Conversely, an outline allows for better fishing by the attorney. This does not mean an attorney can never ask scripted questions. You can still script the killer questions that you absolutely need an answer to in a specific form. But the better practice is just to follow an outline.

Make sure to come back to outline at the end of the deposition to make sure every item has been covered.

#5 – Do ask open-ended questions; Don’t ask double negatives about the smell of color

Because you will want to be able to use the question at trial if the witness changes his testimony, make sure the questions are clear and not confusing. A general rule of thumb is that if the witness will be unavailable as a witness at trial, then you will want to ask leading questions during the deposition. But if the witness will be available at trial, then you will want to ask open-ended questions.
Generally, depositions are fishing expeditions. So, if you are trying to get information, ask open-ended questions. If you are trying to pin a witness down, ask leading questions. Make sure to:

• Keep questions short, but speak in complete sentences.
• Keep questions self-contained (minimize use of pronouns).
• Ask clear questions.
• Don’t talk over the witness.
• Repeat the question rather than have court reporter re-read it.
• Don’t joke on the record.

Examples of bad questions
Q: You didn’t have to ask Susy for permission, did you not?

Q: You didn’t have to ask Don for permission, correct?
A: No
Q: Is that correct, you did not have to ask Don for permission?”
A: Yes

Q: You have no personal knowledge regarding who was at fault for the accident? Correct?
A: No.
Q: Correct?
A: Correct.
Q: So, then the answer is yes?
A: Correct. No.

General questions you should almost always ask:
Q: Are you represented by an attorney today?
Q: Have you ever had your deposition taken before?
Q: You understand you are under oath?
Q: And that means sworn to tell the truth?
Q: And even though we are in an informal setting here in this office, your answers have the same force and effect as if we were in a courtroom with a judge and a jury?
Q: Are you prepared to answer my questions today?
Q: There’s nothing that will prevent you from giving me your full attention?
Q: You aren’t taking any medications or suffering from any illness that will prevent you from understanding my questions or answering them fully?
Q: If you don’t understand one of my questions, will you let me know?
Q: If you need to take a break at any time, tell me, and we’ll take a break. Is that okay?

Discovery related questions
Q: Did you receive a litigation hold notice?
Q: Did you get a request to produce documents?
Q: Did you search your files, shared drives, personal computer, personal and mobile devices, etc.?

Q: Do you keep relevant documents at home? Personal computer?

#6 – Do exhaust, and then drill down; Don’t fail to get an answer

A typical deposition strategy is to exhaust the list of possibilities about an event, and then drill down. So, if you want to enquire about what happened at a certain meeting, you would first exhaust who was at the meeting, and then ask for each person there, what was said. For example:

Q: Who was at the meeting on December 25?
A: Jim, Freddy and Sue.

Q: Was anyone else at the meeting on December 25?
A: No.

Q: What did Jimmy say at the meeting ..

#7 – Do get impeachment nuggets; Don’t disbelieve great admissions

One of the main objectives of a deposition is to lock down the person’s testimony. To do this, you need to first know the critical issues in the case. (See #1 above!) By locking down the person’s testimony on the important issues, you now have locked them into this testimony for trial.

But when you get an admission, don’t disbelieve it and ask for it to be repeated. This will likely tip off the deponent that he just hurt his case and cause him to waffle on the answer. Once you get the admission, note it in your outline, and the move on.

#8 – Do object as to form; Don’t make coaching objections

Deposition objections should be the same in quality as court room objections. Fed R. Civ. P. 30(c)(2) provides that “an objection must be stated concisely in a nonargumentative and nonsuggestive manner ....” Would an attorney, in the middle of trial, ever loudly clear throat and say, “if you know”, “don’t speculate”? No. So, those coaching objections should be allowed during a deposition.

Typically, an attorney can only object as to the form of the question. Typical form objections include:

• “Compound.” The question is two questions.

• “Argumentative.” Though it might be a question grammatically, the questioner is asking it not to get an answer, but to communicate some other message to the witness. “When you arrived at the deposition this morning, had you already decided not to give me your full attention?”

• “Asked and answered.” The questioning lawyer is covering the same ground a second time, asking a question to which he has already received an answer.
• “Assumes facts not in evidence.” The question contains a factual statement that has not yet been established.
• “Misstates the evidence” or “misstates the witness's testimony.”
• “Leading.” The lawyer is asking a leading question to a witness to which he is not permitted to ask leading questions.
• “Lacks a question.”
• “Lacks foundation.” The questioning lawyer is asking the witness concerning a fact or topic about which the witness lacks personal knowledge.
• “Vague.” The question is unclear. The question might be too long, some of the key words in the question might have more than one meaning, or the period to which the questioner is referring might be unclear.

Improper objections include:
• Relevance
• “If you know”
• Speaking objections
• Too many objections

#9 – Do take breaks when needed; Don’t engage in a witness conference

A lawyer cannot stop the deposition in the middle of a question to advise the deponent how to answer the question.

A lawyer can instruct a client to assert a privilege. But be careful. If the facts indicate that the lawyer has coached the witness how to answer, the lawyer and the client will be in trouble, and such activity is sanctionable.

A coaching session during the middle of a deposition is fair game for questions from the other side.

#10 – Do read and sign; Don’t agree to the usual stipulations

Always agree to read and sign the transcript after the deposition. But do not agree to the usual stipulations. While certain stipulations might be usual for you, you do not know what is “usual” to the other attorney. The best practice is to get the stipulations on the record.

Witness Tip Sheet Checklist
  1. Dress comfortably
  2. Make sure you hear the question
  3. Do not guess or speculate!
  4. Make sure you understand the question
  5. Think about what is the truthful answer
  6. Only answer the question that is asked
  7. Do not get upset or otherwise react to the questions. Body language can be very revealing.
8. Do not look at your lawyer for help.
9. Don’t be afraid to say “I don’t know.”
10. Do not speculate or guess!
11. Ask to take a break if you need one. Be careful of what you discuss during the break; it is probably discoverable once the deposition resumes.
12. Do not guess or speculate!

**Applicable ABA Model Rules**
- **1.2(d)** - A lawyer cannot counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
- **3.3(a)(3)** - A lawyer cannot offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- **3.4(b)** - A lawyer cannot falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.
- **8.4(c)** – A lawyer cannot engage in fraud, deceit, dishonesty or misrepresentation.
- **1.1 (comment 5)** - Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.
- **3.4 (comment 1)** – can’t coach a witness - The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, **improperly influencing witnesses, obstructive tactics in discovery procedure**, and the like.