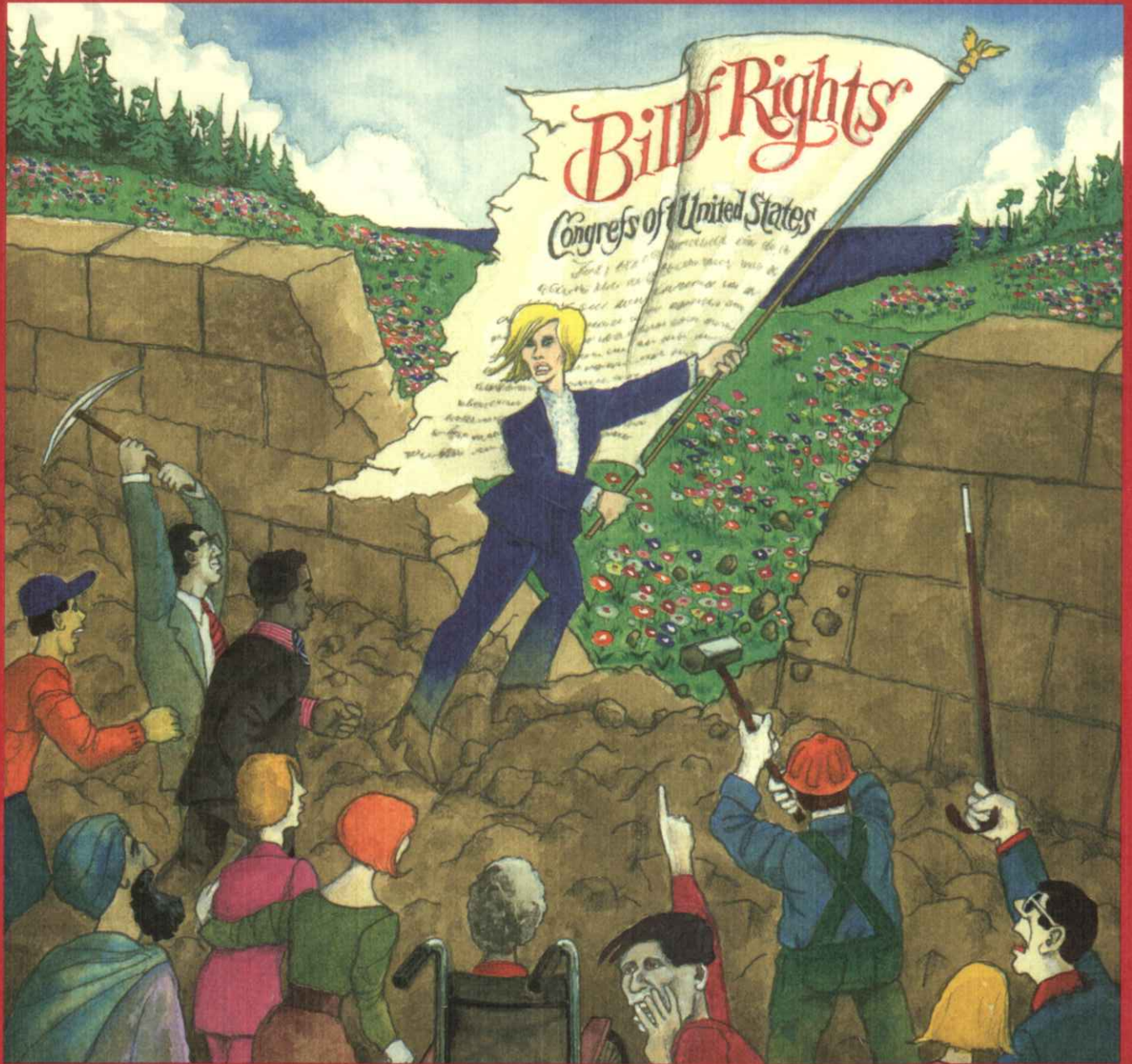


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## Rights



## How to Take a Deposition— Preparation

by **Kenneth P. Nolan**  
Senior Editor

It's not your fault. It really isn't. As usual, we're to blame. After all since birth we've scripted your lives with play dates, dance and tennis lessons, lacrosse and debate camps. If you didn't know how to do something, we'd hire someone to teach you. If you're no good at basketball or baseball, try hockey, soccer, golf, what about swimming—games where suburban kids can excel. Failure was anathema. An 80 in bio? Hire a tutor, change classes, schools.

In P.S. 102 where my wife teaches, there's an Award Day at the end of the year. Great fun. Except now every student must receive an award. And teachers are not permitted to correct homework or tests with a red pen. Red ink must be really bad, as George Carlin would say.

*I'm not pickin' you. You stink!* Joe Kelly would scream as he looked some poor mug in the eye when we chose up for a stickball game. The only reason we're letting you play is because it's your ball. You throw like a girl, you run like a retard, you can't catch. In the Brooklyn of my youth, you were told your faults, and to your face. Jackie Fats, Chubby Hopkins, Chin Grewshaw. And those were the nice nicknames. *Hey Mrs. Nolan, could you lend me ten bucks*, the local harmless ne'er-do-well asked my mother. *Cut your hair Georgie and get a job*, was her immediate and loud response.

When the Knicks of Reed, Frazier, DeBusschere won their championships

in '69 and '71, the only coach was Red Holzman. Now every team has six. Tom Seaver had 231 complete games, my partner Frank Granito announced with amazement. Today if a starter goes eight innings, it's champagne in the dugout.

The same with our work. Used to be, hey kid, go pick a jury next Monday on this piece o' crap. Learn something. Now we have jury consultants, eight associates organizing the file on the computer into neat categories, "with 27 eight-by-ten color glossy photographs with circles and arrows and a paragraph on the back of each one," sang Arlo Guthrie. All to impress the heck out of the client and even the mediator who settles the case.

So we've become six-inning starters, yanked after 100 pitches, never setting foot in the courtroom. Sure, cases are tried, but only those that bark, or where the rich guy's facing 20 and can't get the prosecutor who needs no makeup to offer less than a sawbuck. So we litigate our little fannies off, serving 'roggs, document requests, writing four-page indignant letters stuffed with the meanest, ugliest, nastiest language which then ends "With warmest regards." We

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make motions, have interminable phone conferences, and meet and confer until you just want to toss your arrogant adversary and his bright yellow tie out the skyscraper window.

Around and around until you jump off the merry-go-round and settle. That way no one ever loses. So we've coddled you, protected you from the big bad world. You lost the game? That's OK, you had fun, right? Your room's a pigsty. Well, she's artistic and you know how the creative mind works. You don't like chicken? Since when? OK, call Gino's and order a pizza. A bit different from my "you're not leaving this table until you finish your potatoes."

Even after law school, firms take years to teach, responsibility rationed like slivers of white truffle on pasta. All firms, it seems, have adopted the Cravath System, where lawyers are made not born—taken to shallow water and carefully taught strokes. Years pass before you're allowed any autonomy.

Arguing motions is easy. You have your notes, citations. You've practiced in front of the mirror and before other brilliant young attorneys in your office, in the dive bar after three PBRs. Not a problem. Public speaking since pre-K, you've rewritten your argument five times, memorized the cases, put on your navy blue dress and simple gold chain. And anyway the judge's mind is on the 20-foot double breaker he made on 14 or the leftover homemade meatballs, Faicco's sausage smothered in gravy. A

glass of Barolo will be perfect, probably two after listening to these morons and their infantile discovery disputes.

But after 18 months of e-mailing hundreds of documents, depositions have finally been ordered. Five years after you passed that useless exercise call the bar exam, it's finally your turn. You're the lead. No more hiding, no more protective bubble. Just you. Others will be watching. Not 20 lawyers in the room, but four, and you'll have to think and speak and decide—all at the same time. And if you screw up, word will slither out and you'll be embarrassed, hurt, humiliated, all the things we've desperately tried to prevent from happening in some insane, perverted belief that failure is horrible, to be avoided. *You lost, get over it. It's a tough world out there* was the mantra on Sherman Street where I was raised.

And with the dearth of trials, depositions have become more central, crucial in some cases. When I first started, the roar was, *Wait till I get this phony SOB on the stand, I'll moirder the bum*. Today it's, *Wait until you see my awesome motion for summary judgment, dude*. With my pasty white skin, it's easy for me to wear a tee shirt that says "Pale is the new tan." With the change in trial work, I'm thinking of having one made that reads "Depositions are the new trials."

So here are my thoughts on how to prepare for a dep. My next column will deal with execution, how to ask questions and all. But no matter how facile or smooth, if you don't know your subject, the facts, you're immediately identified as a charlatan. And your adversary will slightly nod, turn toward the witness with a "don't worry, he can't hurt you" look. So you must do your homework, sit for hours at your desk studying boring documents, learning the terminology of cardiac surgery, what causes an SUV to roll over, how the subprime market doesn't work. And without that knowledge, effort, you will fail.

**Purpose.** I'm sick of hearing lawyers screech how they're gonna destroy the witness, chop 'em up. Perhaps too many dreams of cappicola sandwiches, espresso at Satriale's. Those who howl loudest have least to say. They strut like a peacock, feathers abloom, and brag about how much they know, how proficient, how they've taken this dep a million times.

"But what do you want from this guy?" I ask and they look perplexed, and for the first time, there's a touch of doubt. "Well . . ." is the eventual response. And then they just blather on. They have no clue, never thought of it. And purpose is the first consideration, since this may be the only time you question this witness. Let's face it, trial ain't gonna happen that often.

Why are you taking this deposition? And what are you trying to achieve? Sure, I mostly belong to the school of let's depose everyone and learn as much as possible. But before you send out 40 notices, consider whether the individual will enhance your strategy, help prove your case—or will she just bolster your adversary's position? You haven't helped your cause if the defendant can brag to the mediator or judge that you deposed ten employees and each emphatically stated that the guy never forwarded an off-color e-mail, never mind sexually harassed anyone.

Analyze your goal before you notice the dep, before you sit down to write your outline. Is this your one shot? Is he within the subpoena power of the court? Will he change jobs, move, retire? If he says this or that, do you then ask these questions? How does he help me? How can he hurt me? Treat almost every deposition as your only chance at the witness. Even if your adversary swears that he'll produce him at trial, nail it down on the record as tightly as possible. And it still doesn't mean much. People die, move, and fade into oblivion. And trial is a stretch anyway. Question the witness as if it is your only time. If you know he's going to devastate your case, maybe you should avoid that line of questioning. Tough call, but that's why you make five times what a teacher earns.

Have an objective for each dep. Plan and work to achieve that goal, whether it is to gather facts or learn the corporation's internal training mechanism. Have contingencies so that if the witness veers into areas that you didn't want to cover, you'll have a strategy to explore that area or limit testimony. The "let's take everyone and his mother" school is not always the best. You have a brain, use it. You have colleagues, ask for input, advice.

**Who.** Usually, I depose all fact witnesses. You remember *Dragnet* and Joe Friday: *Just the facts, ma'am*. What did you see, hear, say, write? You were at

the corner of Maple and Main when the cars collided. Did you see them collide? Oh, you turned when you heard the bang. How far away, did you speak to the drivers, cops, passengers, other witnesses? Overhear anything, take photos, see the damage?—and on and on until you wring every bit of information, delineating between what the witness saw and what she believed happened.

The objective witness (make sure they're objective—Ask do you know anyone, ever meet them, speak to them, see them? Know their relatives, friends, acquaintances? Your relatives, friends know Mr. Smith, Mrs. Smith, anyone in the Smith family, know any friend or acquaintance of the Smith family . . . ?)? Ask hundreds of questions to find out what they know, how they know it. Facts and what people believe are facts are often different. Learn everything from a witness; you don't want to be shocked at trial or mediation when the testimony is, *Yeah, I heard the plaintiff mutter that she shouldn't have had that third dirty martini*.

With knowledge you can challenge your client's version—they don't always tell the truth, you know. Years ago after I put the small settlement on the record in court, my client, who claimed his damaged arm rendered him essentially useless, turned and excitedly asked, "Does this mean I can go bowling tonight?"

So I depose every witness, every nurse or doctor who treated the plaintiff. Most of the time, there are no surprises, but you might as well be sure. When I was young, I tried a bunch of, as my kids would say, *sketchy* cases. My guy was hit crossing the street in front of Jimmy's bar. I thought I was doing fine until one of the passengers in the car, a nice young woman, testified that my client was loaded and walked into the side of the car. I hadn't deposed her, and she was the primary reason that the jury was back in a half hour with a defense verdict. A juror said to me later, with a chuckle, "I wanted to help you, really. But he wasn't coming from church, you know."

Some fact witnesses kill you. Depose them so you learn your weaknesses to minimize damage, or even acknowledge them before your adversary announces them with trumpets blaring. Knowledge helps not only in valuation of your case but in preparation of your witnesses as well. Mrs. Newby testified that you

were busted for drugs, have brought five other lawsuits against the city, are behind in your child support payments. Are all true or just one or two? Confront your client, witnesses. After all, no one's perfect, at least no one who practices law.

Other witnesses, those who are in the corporate chain, those who trained the negligent pilot, might be treated differently. If your goal is to stick the corporation with punitive damages, you may wish to limit the deposition to the inadequate training, lax oversight of the company, instead of focusing on the errors of the crew. You may also have to probe the skills of the pilot who was negligent in takeoff, but if you hear that the supervisor had a terrific opinion of the pilot, don't make a record about what a great guy, husband, father, T-ball coach he was. Get what you need and let your adversary question or bring this guy back in two years to proclaim the pilot's goodness.

It's a fine line and sometimes you'll take your lumps as the well-prepared witness testifies with authority that the corporation's commitment to safety was the best in the industry. And you may even have to explore this response: How do you know it's the best? Have you studied other safety procedures? How many? When? And on and on until you expose the hyperbole and have him admit that he really didn't study the entire industry. So you really don't know whether Corporation X's safety practices were better than Corporation Y's?

During the early stages of the case, discuss not only who to depose but why. What you can achieve. Consider the potential damage. And don't believe the hype of the grey hair who brags that he can control the witness. A bright witness properly prepared will always slip in devastating testimony. "Motion to strike as nonresponsive" always makes me chuckle. You opened the door, you moron. You got what you asked for.

Take into account age, where they live, even pension info to determine if the witness will be around at time of trial. Most are aching to sit in the sun and do nothing. Even if they're like me—live, work, and probably die within 10 miles of where they were born—the transcript will be used in mediation, settlement discussions.

**Know your stuff.** Axiomatic that you must comprehend the facts, the subject, and the corporate rules, procedures. Do

the research, study the operating manual, search the Web. Let's face it; we have to learn in a short time what the witness has been doing all his life. Think of *My Cousin Vinny* and Mona Lisa Vito (Marisa Tomei) on the stand as an expert. She was able to blow away the prosecutor since she knew ten times what he did about cars. Like me, however, she knew nothing about grits.

Buy the medical texts, hire an expert tutor who can teach you the terminology, how the product was designed, how the company's accounting practices were carried out. Ask the dumb questions, the ones that make you look like an idiot. Go to the scene of the accident—photos are not enough, drive the same route, buy a cup of coffee, and speak to the locals. Hang out in the corporate lunchroom, have soup with the support staff. Learn everything until you're confident and prepared.

Know the law, the burden of proof, and the jury instructions. Except for a few mom-and-pop shops, every corporation does business in many states and nations. So knowing the law is no longer that simple. Eventually the judge will determine which law, but until then, study all possibilities and prepare your questions accordingly.

Keep copies of the potential jury instructions and law on burden of proof in the file. Before every deposition, read them so you can tailor your strategy to what the judge will tell the jury. It's not

that you'll try the case, but that you'll focus on what's important legally.

If there are many different states or countries involved, do a choice-of-law analysis. Research the judge's previous decisions for insight into how she will rule. Involve your partners, tell them your thoughts and learn how you're all wrong, no way, what are you, nuts? Ask for help. You'll need it.

Nearly every case is met with a motion for summary judgment. Know the threshold and gather sufficient admissions and documentation through questioning to raise issues of fact. Any deposition has multiple purposes and uses. Take the time to plan even simple factual ones. Not easy to explain to your partners and client that the case was dismissed because you failed to establish a fact or ask a question. "We're gonna appeal that horrible decision" are not the words that will bring you fame and fortune.

**Outline.** Of course you need one, and if you're really inexperienced, do what I did and write every question: What is your name? What is your home address? Sure they'll ridicule, but you're young, you'll get over it. Eventually you'll graduate to an outline of topics that you'll explore and then check off as you complete them.

But for many years, I kept the written questions handy and always reviewed them at breaks and just before I completed my questioning. Depositions are free flowing. You never know where an



answer to a simple question will lead. And you have to follow along closely. Doctor, has your license to practice medicine ever been suspended or revoked, was a standard question until one day, the cardiologist answered yes. An hour later, I looked down at my outline and was back on track.

No one's memory is that good. Without written words, you will forget (yes, even you), omit topics, areas of importance. And some savvy and ruthless adversaries will deliberately start fights, interrupt your questions, make improper objections in an effort to disrupt your thinking, your line of questioning. And you will be flustered or angry or amused, causing your mind to wander. Words on paper make you return to your theme, strategy.

Despite rules, orders, admonitions, the experienced continue to voice objections in a blatant effort to frustrate, delay, drive you freakin' nuts. Maintain composure, focus. Refer to your notes, outline. One particularly noxious opponent would often voice multiple objections. Some kept track of his home runs—vague, argumentative, improper predicate, outside the scope. At the end of the dep, he had more home runs than Barry Bonds. And he was the same loveable character.

**Exhibits.** Make a bunch of copies, enough for each attorney. Put them in separate folders, neatly labeled. Nothing worse than to disrupt the flow by having someone run to the copy machine or pass the document among all the lawyers because you only brought the original and a copy.

Be organized. Mark your copy so that you can easily and quickly focus on the portion you want the witness to read. I show you exhibit 12 and refer you to page 3, paragraph 2, the sentence beginning with the words . . . . When you establish a rhythm in the deposition, the witness will answer more readily and sometimes more honestly. If you constantly have to break for copies or to fumble around in your file for an exhibit, the witness has time to think and prepare an answer. Plus, when you walk into a deposition with your outline and exhibits properly organized, others will respect you, even fear you.

You may never be a Clarence Darrow or even a smooth-talking John Edwards type. But with diligence, preparation, and organization, you will win. And in litigation, style points don't count—winning does. ☐

## Literary Trials

*(Continued from page 72)*

five, Mr. Gresham; then I go out and dine in Fleet Street, and back to work till nine.'

'Dear me! That's very hard.'

'Well, yes it is hard work. My boys don't like it; but I manage it somehow. I get down to my little place in the country on Saturday. I shall be most happy to see you there next Saturday.'

Frank, thinking it would be outrageous on his part to take up much of the time of a gentleman who was constrained to work so unreasonably hard, began again to talk about his mortgages, and, in so doing, had to mention the name of Mr. Yates Umbleby.

'Ah, poor Umbleby!' said Mr. Bideawhile; 'what is he doing now? I am quite sure your father was right, or he wouldn't have done it; but I used to think

keep the wolf from the door.

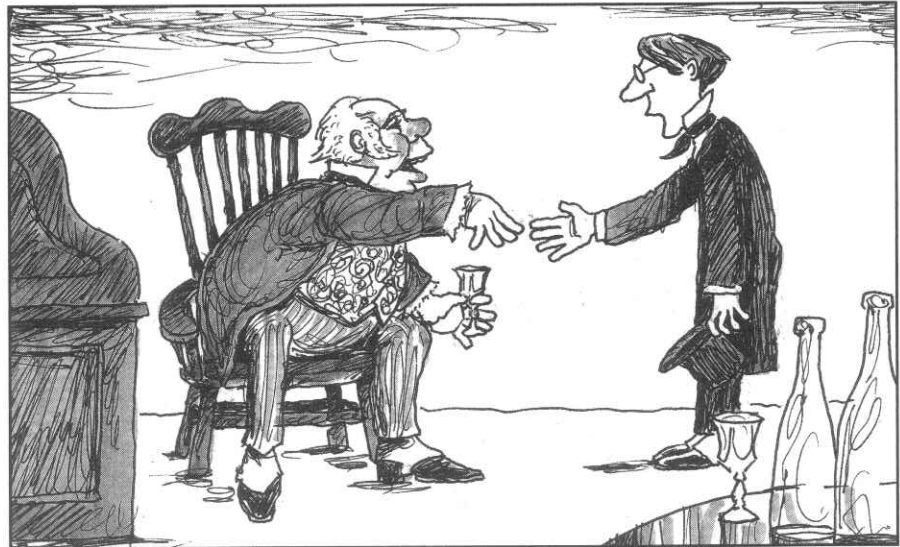
'So you have got Gazebee down there now? Gumption, Gazebee, & Gazebee; very good people, I'm sure; only, perhaps, they have a little too much on hand to do your father justice.'

'But about Sir Louis, Mr. Bideawhile.'

'Well, about Sir Louis; a very bad sort of fellow, isn't he? Drinks—eh? I knew his father a little. He was a rough diamond, too. I was once down in Northamptonshire, about some railway business; let me see; I almost forget whether I was with him, or against him. But I know he made sixty thousand pounds by one hour's work; sixty thousand pounds! And then he got so mad with drinking that we all thought—'

And so Mr. Bideawhile went on for two hours, and Frank found no opportunity of saying one word about the business which had brought him to town. What wonder that such a man as that should be obliged to stay at his office every night till nine o'clock?

During these two hours, a clerk had come in three or four times, whispering



that Umbleby was a decent sort of man enough. Not so grand, you know, as your Gazebees and Gumptions—eh?, Mr. Gresham? They do say young Gazebee is thinking of getting into Parliament. Let me see: Umbleby married—who was it he married? That was the way your father got hold of him; not your father, but your grandfather. I used to know all about it. Well, I was sorry for Umblebey. He has got something, I suppose—eh?'

Frank said that he believed Mr. Yates Umbleby had something wherewith to

something to the lawyer, who, on the last of such occasions, turned to Frank, saying, 'Well, perhaps that will do for today. If you'll manage to call tomorrow, say about two, I will have the whole thing looked up; or perhaps Wednesday or Thursday would suit you better.' Frank, declaring that the morrow would suit him very well, took his departure, wondering much at the manner in which business was done at the house of Messrs. Slow and Bideawhile. ☐