

The Journal of the Section of Litigation

American Bar Association

# Litigation

Vol. 34 No. 2 Winter 2008



## Second Chances



## How to Take a Deposition— Execution

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Don't try to impress me. It won't work. Sure you're brilliant and know all about the Federal Rules and the really important cases, probably even their cites. Whoopiedamndo. So you're smarter than me and better looking, too. Join the club. Ain't that hard.

But this is a deposition. Just take it and shut up. If you're looking to impress, drag an unconscious kid from a burning building or join the Marines and kill terrorists. But if you're looking to build street cred, a dep is not the place.

A deposition is the accumulation of information, slowly, akin to a boxing match—jab, jab, jab, your left to his right eye. After a dep or two, a few land, most miss. Another dep and there's redness, slight swelling. Finally, after a few more, a small cut appears and eventually blood begins to trickle. He's weakened, can't see that well, tries to protect. You depose a few more witnesses, then the blood flows and you know you have him.

I've never seen a knockout at a dep. Not even a TKO. Not even when Larry Goldhirsch asked the dentist who, in one sitting, yanked out 12 teeth of some poor woman:

"Doctor, are you a good dentist?"

"I'm the best dentist in the world," was the reply from a guy whose patient lapsed into a diabetic coma immediately after treatment.

Your job is to ask short, simple questions, force the witness to tell you everything she knows. Compel her to reveal

and reference documents. Obtain an admission or two. Do these and you've done your job. And I don't care if you're eloquent, if you fumble and stumble with your questions. If you gather the appropriate information, then I'll be impressed. How suavely you question, I don't care. Save the Clarence Darrow stuff for the courtroom. Learn the facts.

**There's no such thing as a stupid question.** If you don't know the answer, ask. Even if you do, ask. You may look like a moron, but so what. You should be used to it by now anyway. And if you don't ask, you'll never know the answer. Too many are worried about appearances rather than results. Ask away, look foolish, but insist on an answer. Don't assume you know the answer. Let the witness testify.

"Doctor, has your license to practice medicine in the State of New York ever been suspended?" I've asked this a million times and only once did the defendant answer, "Yes." I nearly fell off my chair.

It's the same when I'm defending a deposition and I object to a question because I'm unsure what is meant or what's the purpose of the question. And

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I object even if it makes me look like an idiot. Often the colloquy is: "It doesn't matter if you understand it, Mr. Nolan. It matters if your client understands it. And you understand the question, don't you, Ms. Rodriguez?" If my wiseass Brooklyn side appears, the response is, "Well, as you know, I'm not that smart, I'm pretty dumb, actually. I couldn't get into NYU where you went, Ms. Smith. I went to law school at night. So you'll have to be patient and explain these simple questions to me. So why don't you rephrase and use very small words so my pea brain can understand. Then Ms. Rodriguez will be happy to answer."

**Make the witness define all terms, phrases, words.** Even simple ones.

"You testified that your company performed an internal investigation. What do you mean by *internal investigation*?"

Or even better, "When you use the words *internal investigation*, what do you mean by *internal*?" And then, "What do you mean by *investigation*?" And, "Please define *internal investigation*."

Note that in my initial question I used the term *internal investigation* twice. Many lawyers ask as follows: "You said that your company performed an internal investigation. What do you mean by that?" Sure, everyone probably understands that refers to *internal investigation*. But as was said in the movie *Casino*, why take the chance? Precision is best.

Always repeat names, terms. I hate when lawyers ask:

"You spoke with Mrs. Sasso?"

"Yes."

"What did she say?"

Better is, "What did Mrs. Sasso say?"

Forget pronouns. Toss them in the dump. You young kids never even studied grammar, never mind diagrammed a sentence, so don't pretend you know the parts of speech. Repeat the exact words. If you have to read the deposition at trial, the jury will never be confused as to who you meant when you used *she, him, that*. And the witness can never claim, "Well, when you said *he*, I thought you were talking about Mr. Abel. I guess I was confused."

"Exhibit 24 mentions the phrase *flight training*. Do you see that phrase?"

"Yes."

"What does *flight training* mean?"

"Objection. He didn't write that document. The document speaks for itself." I never know if that objection is legit, but I always then ask, "What is your understanding of the phrase *flight training* as contained in Exhibit 24?"

Every term of art must be defined by the witness. Almost all the time, the answer will be pro forma. But occasionally you'll be pleasantly surprised. And asking the witness to define a bunch of words or phrases will add some pressure, unease to the exercise. Some witnesses begin to crack a bit and talk more, trying to please. The more the witness talks, the more you learn.

**Ask one question at a time.** "Can you tell me what you have done, if anything, to prepare for this deposition? Have you read any materials to prepare for this deposition?"

Two questions. If the answer is yes, you have no idea which the deponent is answering. Go slowly, take your time. One by one. Simple and short are always best. Not always possible, but try.

"Can you tell me what you have done, if anything, to prepare for this deposition?"

Even this is terrible. If the deponent answers yes, then the follow-up is, "What have you done, if anything, to prepare for this deposition?"

"Nothing."

Stop using "Can you tell me," "Do you recall," "Do you know."

"What have you done, if anything, to prepare for this deposition?" You will finally have an answer. And I never know whether "if anything" adds anything, but I'm a lawyer and have developed terrible habits. (I am proud

that I have finally kicked the "hereinafter/heretofore" addiction.)

"Do you recall if you had a conversation with Mr. Tobin?"

"Yes."

"What did you discuss?"

"I didn't speak with him."

And then it takes ten minutes to straighten out the mess. The first question asks only if he "recalls" whether he had a conversation. Yes, I recall if I had a conversation. My recollection is that I did not. Instead ask:

"Did you have a conversation with Mr. Tobin?"

"No."

"Do you recall" and "do you know" are superfluous and sloppy. Just ask the darn question without the preamble. The witness can answer only if she knows. If she doesn't know, make her say so.

"Do you know the time of the collision?"

"Yes"

This really isn't answering what you are asking. You want to know the time of the collision. So ask, "What was the time of the collision?" See, that's not difficult.

For some reason lawyers have diarrhea of the mouth and it leads to imprecise questions with ambiguous answers.

"I believe yesterday you testified that Manufacturer B cooperated with the NTSB in doing a comparison of some data on various aircraft. Do you recall that testimony?"

"No."

Now the questioner has to figure out if the no means the witness doesn't recall the testimony or that he did not testify as summarized. This leads to confusion and a mangled transcript.

And stop with the "I believe . . ." If you didn't believe it, you wouldn't ask it.

"Yesterday, you testified that Manufacturer B cooperated with the NTSB in a comparison of some data on various aircraft, true?" Keep it clear, concise.

Compound questions are always wrong. "What was the time and date of the accident?" That's a lazy question. Sure, you might get a decent answer, but most times the deponent will answer, "about 7 PM" or "December 11," and you have to ask again individually anyway.

"What was the date of the accident?"

"May 25, 2007."

"What day of the week was May 25, 2007?"

"Friday."

"At what time did the accident occur

on Friday, May 25, 2007?"

And don't be afraid to lead if you know the facts. You can establish a rhythm and bind the witness to the scene.

"On May 25, 2007, you were driving your car?"

"Yes."

"On Main Street?"

"Yes."

"Between Oak and Elm?"

"Yes."

"You were alone in the car?"

"Yes."

"You owned the car?"

"Yes."

"It was daytime?"

"Yes."

"The weather was dry?"

"Yes."

"It wasn't raining, was it?"

"No."

"You were traveling south on Main?"

"Yes."

"Your car was in good working order that day?"

"Yes."

"There was a collision with another vehicle?"

"Yes."

"What time did the collision occur?"

"About a little after 1."

"1 PM?"

"Yeah."

"Tell me what happened."

Of course the more traditional way is to ask, "Did you have an accident on May 25?"

"Yes."

"Were you driving a car at the time of the accident?"

"Yes."

"What was the make and model?"

"On what street?"

"Was anyone else in the car?"

"What was the weather at the time of the accident?"

"In whose car were you driving?"

"In what direction were you traveling?"

It doesn't matter which way you do it as long as you feel comfortable asking the questions. You can either lead or ask open-ended questions, whichever you prefer. The idea is to bind the witness to a story. A dep is to learn what the witness will testify at trial. It's also to learn what the witness knows so you can ask others the same questions to determine if there are discrepancies.

If the answers are the usual crap—"I'm not sure who was present. I really

don't remember what was discussed"—you can give the witness a taste of cross-examination after you obtain all the info.

"There was a meeting on Feb. 24, 2006, correct?"

"In the conference room on the 18th floor?"

"The meeting lasted two hours?"

"You were present?"

"For the entire time?"

"And others were present?"

"You testified there were about four other people present?"

"Ms. Baird was one, right?"

"There were another two men and a female, right?"

"Did you introduce yourself to these individuals?"

"Did they introduce themselves to you?"

"But you don't remember their names?"

"So you were at this meeting for two hours with four other people, and you don't remember three of the four names?"

"Did you have a business card?"

"Did you give your card to anyone at the meeting?"

"Did you receive any business cards?"

"Ask for business cards?"

"Was there paper in the room?"

"Were there pens or pencils?"

"Did you write down anyone's name?"

"And you're a vice president of this corporation?"

"Big job?"

"You supervise 23 people?"

"Just so I'm clear, Mr. Smith, you were in a meeting with four people for two hours and you introduced yourselves all around with pads and pencils and you can't remember their names?"

"You never wrote their names down?"

"Never asked for their business cards?"

And on and on.

You can do this on one aspect of the meeting or on every aspect that the witness has sworn he doesn't remember. I usually do it on only one aspect. It's the Don Fanucci "wet my beak" cross. Just enough to let the witness and counsel realize how unbelievable the testimony is. Of course, if the witness may not be around for trial, then you may wish to cross-examine as if at trial.

**Ask open-ended questions.** Sure, cross-examination is fun, but you only do that if there's no dispute as to facts or after you've obtained the information.

"Tell us what you do as vice president of operations."

"Tell us what was discussed at the meeting on January 7."

"Tell us what you did next."

"What did you do after you took Ms. Neubauer's blood pressure?"

"Then what happened?"

The idea is to get the witness to be a blabbermouth. The more the witness talks, the more you learn.

"So, you were driving on Main on Thursday, December 13, 2007, at about 1 PM—then what happened?"

"Tell us about your job as flight instructor."

"Did you have a procedure where an employee can give notification to management if that employee thought that safety considerations were not being followed?"

"Yes."

"Tell us about this procedure."

**Be precise.** We live in a world where oral and written communications have many meanings.

"Did you ever speak to Mr. Good about the project?"

"No."

This tells you little. "Did you ever communicate with Mr. Good in any fashion about the project?" Then ask individual questions about e-mail, text messaging, fax, phone conversations, voice mail, memos, and all the other ways we communicate in this age of

technology. And then follow up with:

"Did Mr. Good ever speak to you about the project?"

"Did Mr. Good ever communicate with you in any fashion about the project?"

When defending the deposition, pay attention. Sometimes the questioner will ask a question such as:

"On what date did you attend the staff meeting regarding X?"

"I'm not sure, either January 28 or 29."

Then the questioner will ask a dozen other questions about the meeting and eventually will slip in, "Well, at this staff meeting on January 28, was Ms. Murphy present?"

"Objection, he didn't say the meeting was on the 28th, he testified it was either January 28 or 29." Don't fall asleep when defending a dep.

Pin down what is assumption and what is fact. "Was Mr. Smith at the meeting on April 8, 2007?"

"I think he was."

"Do you know?"

"No, but he usually goes."

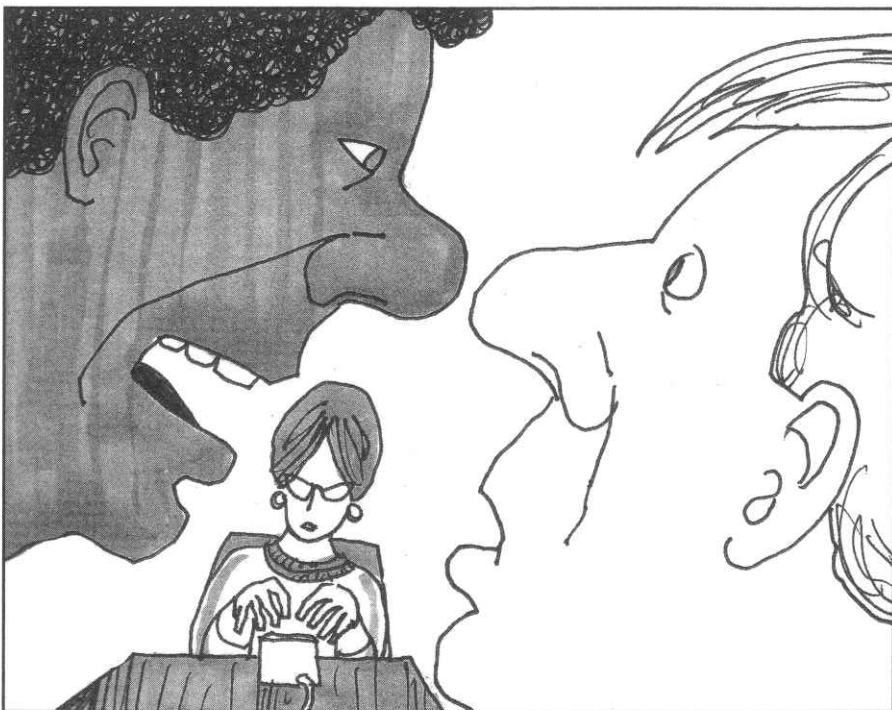
Force the witness to answer the question.

"And you don't know what a Certification Flight Test program is?"

"I don't have precise knowledge of it."

"Well, then, tell us what your knowledge is."

Or: "Have you ever seen a subpoena issued by the Southern District of New York in this case?"



"No."

Follow up. "Have you ever seen a copy of the subpoena . . .?"

"A subpoena was received by your company, you know that, correct?"

"Yes."

"Do you know who received the subpoena in your company?"

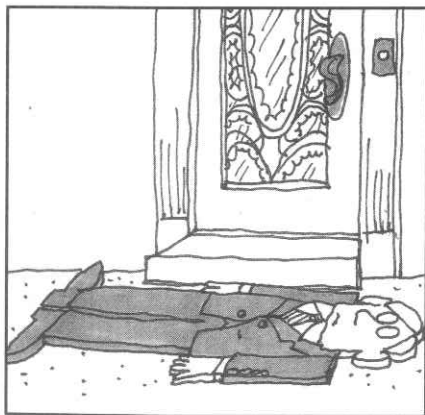
"I believe I already testified that I thought it came into the legal department."

"So you don't know who received it?"

"No, I don't know."

And you can go further: "Did you ever ask who received the subpoena?" "What is the basis of your statement that you thought the subpoena came into the legal department?"

**Don't be a doormat.** Objections and disputes are designed by experienced counsel to disrupt your thinking and your questioning. That's why an outline is a necessity. You can battle your adversary and then return to your line of questioning by just glancing at your outline. It's difficult to maintain your composure when you have an adversary who during a dispute will state, "You don't have to raise your voice, Mr. Nolan, please calm down"—knowing that I didn't shout but wanting it to appear in the record that I went berserk. If the deposition is not videotaped, it would appear from that



statement that I'm out of control. Very effective at times. Remain calm, refute the allegation, and then return to questioning. Don't fall for the bait. Remember, the best revenge is victory. Or an ice pick in the base of the skull.

Not only attorneys are adept at playing games. One judge made it an art. Counsel would object to a question during trial and the judge would slowly turn, look at the attorney with a face of disgust, and then ask contemptuously, "Mr. Vilardo, you want to object to this question?" "Yes, Your Honor." The judge

would turn to the jury and spit, "Denied," making clear his preference for the plaintiff, although the transcript would reveal none of his feelings.

These games can't be played if the deposition is videotaped. And you must maintain your demeanor during a videotaped deposition because it records sarcasm or anger as a printed transcript does not.

**When you change topics, tell the witness.** "Now let's discuss the meeting in your office on July 7 2006." Set the stage with short questions. "You were at the meeting?" "It started about 9:30 AM on July 7, 2006?" "It occurred in your office at 250 East 78 Street, New York City on the 14th floor?" "Now tell us who else was physically present." "Anyone else attend via conference call?" "Other means?"

**Depose everyone.** Even today I am mocked because I depose every potential witness, anyone involved. Defense counsel snicker and laugh. Even the younger attorneys in our office blame me. "Ken wants me to take every nurse who wrote in the record. So if you have a problem, speak to him." Be thorough. Occasionally it pays off. Jeanne O'Grady from our office deposed the final nurse in a med mal case who was so eager to teach and explain that he essentially admitted an error on the doctor's part that directly contradicted the defendant's testimony.

**Be courteous.** Hard to do when our profession is littered with conniving fools. You still pick up the *New York Law Journal* and read about a judge sanctioning an attorney for boorish behavior—calling a woman "Hon," or worse. Unproductive and bad manners. Your mother taught you better.

Always better to make a statement on the record and return to questioning than to spend 20 minutes arguing over an objection or documents not produced. The next day, of course, you have to make the motion or contact the judge so your adversary learns to respect you. Sometimes it's very frustrating because judges don't want to take the time to stop the shenanigans, but my depositions are less contentious than they were years ago, so we are making incremental progress.

Most importantly, be yourself, not only during depositions but throughout your practice. There's really no right or wrong way. A dep is to learn facts. Don't forget it. □

## From the Bench

(Continued from page 4)

have and cannot get legal assistance. A nation committed to disposition of legal grievances through lawful means cannot blindly turn away from this situation." LSC Report at 19.

As Andrew Scherer, executive director of legal services for New York City, put it: "We deny access to justice to far too many people without means. We let them confront critical and complicated legal issues involving the most basic of needs like housing, health care, economic support, without benefit of counsel." Press Release, Legal Aid Society of Northeastern New York, Jan. 26, 2007.

The inability to provide legal assistance to those who seek it can be traced to the lack of resources devoted to providing that assistance. New York State, despite the prosperity of its lawyers, spends \$2.54 per poor person, according to the state's Equal Justice Commission. *Id.* Nationwide, the average starting salary for entry-level civil legal services jobs is \$36,000, compared with the median starting-level salary in private law firms of \$105,000 noted above. Sandhya Bathija, "Loans Not Filling Public Service Gap, More Law Schools Offering Repayment," *Nat'l L.J.*, Nov. 13, 2006. This salary is low in comparison with the private sector and particularly low in view of the fact that the size of law school loans has increased along with the costs of legal education.

Why should lawyers care about these unmet needs?

First, as citizens, we have an obligation to ensure that our system of justice operates fairly and effectively for all those involved in the process. As Samuel Johnson said: "[A] decent provision for the poor is the true test of civilization." James Boswell, *Life of Samuel Johnson*, 446 (1953). But lawyers have a particular responsibility, beyond that of nonlawyers, to ensure that the system of justice operates fairly, and fairness is best ensured when lawyers are able to provide effective assistance to those who require it. This is true because lawyers have a vested