Avoiding Deposition Pitfalls

by Jonathan W. Wolfe and Michael A. Mosberg

Lawyers love to tell war stories (or watch videos online) about depositions going wrong. This article addresses *why* depositions go wrong, which more often than not is the result of practitioners neglecting (or forgetting) some of the basic fundamentals for effectively preparing, taking and defending depositions.

THE FAILURE TO PROPERLY CONSIDER WHETHER TO TAKE THE DEPOSITION

Perhaps the single biggest contributor to a deposition going wrong is the failure to adequately consider whether to take the deposition in the first.[1]

Whether you are a practitioner who frequently takes or defends depositions or one who is only occasionally in that position, there is a natural tendency to be drawn into the conflict and to proceed with a deposition without asking yourself fundamental questions, the answers to which will quickly reveal whether you should go forward or not. These questions include:

- What is the purpose of this deposition?
- Why do I want to take it?
- What do I hope to accomplish?
- What are my objectives?

If you do not have good answers to those questions, you should not proceed with the deposition.

If your purpose in conducting the deposition is to 'beat' the witness, you should think about how you may be helping the other side. While the deposition may have some *in terrorem* value, you are coaching the deponent to be a better trial witness. This same witness who you embarrassed during the deposition, because of his or her lack of knowledge or lack of preparation, will most certainly be better prepared when you meet him or her again at trial. Is it really your objective to create a more formidable witness for trial?

TIMING OF THE DEPOSITION

Not enough time is devoted to the strategic timing of the deposition. There is a tendency to serve a deposition notice as a knee jerk reaction. To do so, without fully considering the ramifications of that decision, may lead to various unintended consequences that adversely impact your case. While many attorneys seek to resist having their client deposed first, there can be some potential benefits to starting first with your client:

- By allowing your client to be deposed first, you get the chance to see your opponent's hand before showing yours.
- You want the other side to 'discover' what a bad case they have or what a good case you have. If you have a solid case and a capable client, you may want to allow the deposition of your client to proceed first.
- You simply do not have enough information to take a thorough or meaningful deposition.

While there are often some benefits in taking the first deposition, you must analyze the risk/reward ratio. Do the advantages of probing your opponent first outweigh such advantages as learning the opponent's theory of the case before you must formulate your theory? In litigation, as in chess, the early moves are the most critical.

UNDERUTILIZATION OF DISCOVERY DEVICES

The failure to properly consider the strategic timing of the deposition goes hand in hand with the underutilization of other discovery devices. It has been the authors' experience that practitioners do not fully and effectively utilize *tailored* discovery demands,[2] interrogatories,[3] third-party subpoenas,[4] and demands for admission.[5] Each of these devices allows the practitioner to clear away the underbrush in advance of the deposition, as well as tie up loose ends after the deposition concludes.

These devices are to be used not in isolation, but rather in tandem with the deposition itself. Interrogatories, for example, are not only helpful in getting some preliminary answers to questions to aid in the preparation for a deposition, but also to close loopholes after the deposition has concluded.

Simply employing these devices is not enough. If you are going to use a discovery device, you must use it properly. First, the discovery device must be tailored to its objective. If you are going to serve a blunderbuss demand you will surely get one in response. If you serve a tailored demand (with follow up demands as necessary), it diminishes the likelihood you will get an overly broad retaliatory demand (and if you do, it becomes much easier to demonstrate the reasonableness of your demand when moving to compel and for a protective order). Moreover, by serving properly tailored demands you are far more likely to obtain the actual information you really need for your client's case.

Second, you must be prepared to follow through if you do not get

compliance.[6] If you are serving discovery demands just to serve them, do not bother. You must be resolute in the need for the information that you are seeking and the steps you are willing to take to obtain that information.

UNDERESTIMATING THE IMPORTANCE OF EXPERT HELP

Practitioners often overlook the use of experts and underestimate the impact (positive and negative) they can have on litigation.

Use of Experts for Deposition Preparation

It is critical for the practitioner to understand that experts are not just for trial testimony, but rather can serve as an invaluable tool during the discovery process as an educator. Employing an appropriate expert in preparing for your depositions (both defending and taking) can make the difference between bolstering and weakening your case. Also, keep in mind that while you may be compelled to disclose the identity of your non-testifying experts, additional discovery from non-testifying experts is largely protected by the Court Rules.[7]

Your Client's "Experts"

Be wary of your client's 'experts' or 'professional advisors' (*e.g.,* the business accountant, the house or family counsel). While this person may be great in the boardroom, he or she may not have experience with the case at hand, or experience with testifying in court.

CRAMMED/LIMITED PREPARATION

That the practitioner must be prepared is stating the obvious. However, on too many occasions the author's have heard lawyers explain: "I can spend a half day on the financial statement alone," or if defending, "all I have to do is stay awake." This type of approach does a disservice to both the practitioner and the case. The old adage that "failure to plan is planning to fail" comes to mind.

There are three fundamental components to deposition preparation: 1) starting your preparation the day you meet your client; 2) developing your theme; and 3) talking to your client.

Preparation Starts the Day You Meet Your Client

The first meeting with your client is the best time to assess both demeanor and credibility. At later meetings, his or her recollection is likely to be selective and or embellished. What you see is what you get. Is your client too tan? Wearing too much jewelry? Dressed inappropriately? Now is the time to begin rehabilitating those aspects of your client that warrant rehabilitation. If the client is long winded in your office, he or she will be long winded at a deposition and trial, absent proper preparation. If the client comes into your office dressed unsuitably, that is how he or she will show up to the deposition and trial.

Litigation is about white hats and black hats—the white hat signifying the 'good guy' and the black hat signifying the 'bad guy.' It is the practitioner's job to ensure the client understands how crucial it is for him or her to be viewed by the court as the party wearing the white hat.

Developing Your Theme

Nothing is more important to your case than your theme. Your theme is what the case is all about. It is the framework within which you make strategic decisions about the manner in which the case should proceed, the positions you take and how you prepare your client for deposition and trial. The theme of the case should be simple. It should be the sound bite that captures what your case is all about.

Depositions serve as the testing grounds for your themes. It is there that you will learn what works and what does not work. Most importantly, before trial you and your client and your experts should be on the same page, and each should able to finish this line: "The theme of this case is ___"

Talking to Your Client

Lack of client communication is a problem that too often permeates representation. As the lawyer, you are responsible for striking the balance in communication with both the micromanaging client and the disassociated client, because that communication is critical to the success of the representation.

Preparing Your Client for Deposition

Remember former President Bill Clinton's grand jury testimony?

Question: If Monica Lewinsky says that while you were in the Oval Office you touched her breasts would she be lying?

Answer: That is not my recollection. My recollection is that I did not have sexual relations with Ms. Lewinsky.[8]

The lesson here is: Do not assume because your client was a board leader, a debate champ, a lecturer, a public speaker or even the president of the United States, that he or she will be a good witness.

Start your client's deposition preparation early and bring familiarity to the unfamiliar. In addition to reviewing and practicing with your client the proper way to respond to deposition questions, your client needs to understand his or her limited role in the deposition, remembering that the testimony can only be used *against him or her* at trial. Your client must further be taught to use and find comfort and guidance from the theme of the case. The more in command your client is of the theme or themes of the case, the more prepared he or she will be for the deposition, regardless of the ultimate questions posed.

CONDUCTING THE DEPOSITION—THE X FACTORS

With respect to conducting the deposition, various other factors may contribute to a deposition going awry.

First and foremost, should your client attend? If your client can be controlled, the answer is yes. If you have a client who is going to

interrupt you or interrupt the orderly flow of the deposition, leave him or her home.

Next, plan your conduct. A deposition is not a social gathering. It is imperative that you set the tone from the outset. There should be no preamble or instructions. There should be no exchange of pleasantries with the deponent. You are not the deponent's friend. Your job is get at the truth, period.

Just as it is important to set the right tone, it is critical that you have the appropriate demeanor. You have to moderate your emotion and modulate your voice to maintain your own effectiveness and credibility as the interrogator. This way, when you get angry at the witness the witness assumes he or she is doing something wrong (as opposed to always being angry, in which case the anger loses its impact).

Find out what the witness was shown and told in preparation for the deposition. You never know what you may discover. You may learn that a third person wholly unrelated to the litigation was present, in which case privilege may have been waived.

Write down tricky or technical questions. This is not to suggest that you should be writing out a Q and A. An outline of the areas of inquiry is the best manner in which to proceed. However, if there are specific questions that need to be asked, or technical questions that you want to make sure are set out in the record correctly, write them out to avoid error.

Listening is critical. Do not sit there taking notes and writing down the answers. Look at and engage the witness. Make sure the witness answers the questions about his or her opinions, as they may lead to the discovery of admissible evidence. You may not be able to get the answers in at trial, but they may lead to other evidence. So ask questions such as: How do you know that? Why do you think that happened? And what did X tell you?

Ask why if it is important. (Of course you will almost never ask it at trial.) Why? At trial, you do not want to suddenly learn something negative about your case; during a deposition, you do. That way, you can prepare for it. It is best to get everything out on the table. But whatever happens, do not act surprised when you hear bad news. ("Of course we knew that you had a photograph of our client raiding the safe.")

Be cognizant of the transcript as a record. If the transcript is used at trial, remember that you only have frozen words. To make a good record, you must squeeze all life out of the dialogue; the words must be coherent standing alone. You should also keep in mind the limited rights your adversary has to object during your testimony,[9] and quickly put an end to improper speaking objections.

Establish what the witness does not know. Remember, non-responsive answers may be the best answers you get. "I don't know" or "I don't remember" may be music to your ears. Lock the witness into his or her testimony and move on! Do not belabor the point and give the witness the opportunity to figure out he or she should have the knowledge he or she claims not to have and fix the testimony.

Finally, leave something in your briefcase. Do not try your case at the deposition. The purpose of a deposition is to get information, not give it. So if you use the information in your briefcase, it should be used sparingly, if at all. Just because you can impeach a witness at a deposition with something you know or have does not mean you should. Save some valuable evidence for trial. ■

ENDNOTES

1. *See* R. 5:5-1 (discovery in civil family actions); 4:14-1 (rules for party and non-party depositions); R. 4:14-9 (authorizing videotaped depositions).
2. R. 4:18-1.
3. R. 4:17.
4. R. 1:9-2.
5. R. 4:22-1.
6. *See* R. 4:23-1 (motion for order compelling discovery); R. 4:23-5 (application for sanctions for failure to make discovery R. 4:17, R. 4:18-1 and R. 4:19).
7. *See* R. 4:10-2(d)(3) (prohibiting discovery except upon a showing of "exceptional circumstances.").
8. Grand Jury Testimony of William Jefferson Clinton, Aug. 17, 1998. (www.npr.org/news/national/clintontape/index.html).
9. *See* R. 4:14-3.

Jonathan W. Wolfe *practices family law at Skoloff & Wolfe, P.C., in Livingston.* ***Michael A. Mosberg*** *practices family law at Aronson Mayefsky & Sloan, LLP, in New York.*