



Multnomah Bar Association | Young Lawyers Section

Depositions

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What is a deposition?

Not a trick question!

Why depositions?

Info gathering, perpetuation, settlement

Advantages & Disadvantages

▶ Advantages:

- ▶ Unfiltered
- ▶ Opinions, Mental Impressions, Etc.
- ▶ Ability to Follow Up
- ▶ Spontaneous Answers
- ▶ Quick to Schedule
- ▶ Assess Credibility
- ▶ Information from Adverse Witnesses

▶ Disadvantages:

- ▶ Failure of Memory
 - ▶ “Can you think of anything that would help refresh your recollection?”
- ▶ Party witness practice session
- ▶ Helps opponent prepare case
- ▶ Expensive
- ▶ Reveals Theories
- ▶ Cannot Obtain Opposing Theories

Timing

▶ Within the Litigation Process:

- ▶ Discovery
 - ▶ Document discovery first?
- ▶ Settlement
 - ▶ Needed, or an impediment?
 - ▶ Cost v. Value
 - ▶ Evaluation of witness, counsel
 - ▶ Presenting information
- ▶ Trial
 - ▶ How far before trial?
 - ▶ Dispositive motions?

▶ Deposition Scheduling:

- ▶ Party depositions
 - ▶ When do you want to test your theories?
 - ▶ How many parties? Who goes first?
 - ▶ Do you want to educate the other party first?
- ▶ Fact witnesses
 - ▶ What do you think they know?
- ▶ Organizational Depositions
 - ▶ Do you know enough to craft deposition topics?

Taking Depositions

- ▶ Information Gathering
- ▶ Creating Outlines & Generating Questions
- ▶ Asking the Questions
- ▶ Using Documents Effectively
- ▶ Deposition Style
- ▶ What if They Don't Show Up?
- ▶ Dealing with Objections
- ▶ Dealing with opposing counsel
- ▶ Dealing with bad testimony

Information Gathering

- ▶ Facts and Events
- ▶ Witness Knowledge
- ▶ Witness Demeanor and Credibility
- ▶ Strengths & Weaknesses
- ▶ Confirmation and Testing Theories
- ▶ Other Witnesses

Creating Outlines & Generating Questions

▶ General Topics

- ▶ Claims, Defenses, and Allegations
- ▶ Background
- ▶ RFAs, RFPs
- ▶ Other Witnesses

▶ Witness Specific

- ▶ What should they know?
- ▶ What should I confirm they don't?
- ▶ Client questions?

▶ Generating Questions

- ▶ Who? What? When? Where? Why?
- ▶ (Exhaust)
- ▶ Documents
- ▶ Other depositions

Asking the Questions

- ▶ Open ended questions
 - ▶ Who? What? When? Where? Why? How?
- ▶ Follow up
- ▶ Fill in Gaps
- ▶ Recap (sound bites)
- ▶ Suggesting facts
- ▶ Short, one fact
- ▶ Using silence (carefully)
- ▶ Eye contact

Using Documents Effectively

- ▶ What is said
- ▶ What is not said
- ▶ Authentication / Admissibility
- ▶ Use and/or Meaning of
- ▶ Beginning, Middle, or End?
 - ▶ Usually prefer saving documents for the end
- ▶ Impeachment and Testing Candor
 - ▶ Ask questions based on documents before showing the documents
- ▶ Forcing Admissions

Deposition Style

- ▶ One Size Does Not Fit All
- ▶ Student-Teacher
 - ▶ Non-combative
- ▶ Adversarial
 - ▶ Commitments
- ▶ Organized vs. Skipping
- ▶ Background vs. “First Strike”
- ▶ 4:00 pm slump?
- ▶ Length of Deposition

They didn't show up. Now what?

▶ Represented?

- ▶ Confer with counsel
- ▶ Reschedule
- ▶ Introduce Notice/Subpoena
- ▶ Record the no-show
- ▶ Move to compel
 - ▶ Move for sanctions?

▶ Unrepresented?

- ▶ Make your record and seek involvement of court

Dealing with Objections

To rephrase or not to rephrase

The other side is obstructing my deposition—Now what?

▶ Do:

- ▶ Keep your goal in focus
- ▶ Ask good questions
- ▶ Make your record
- ▶ Cut out opposing counsel
 - ▶ You understand me, right?
- ▶ Seek assistance of court as needed

▶ Don't:

- ▶ Don't get distracted
- ▶ Don't take it out on the deponent
- ▶ Don't sabotage yourself
- ▶ Don't waste time

What did you say?

Dealing with Bad Testimony

- ▶ Probe further?
 - ▶ Usually preferable
 - ▶ Bad testimony doesn't go away
 - ▶ One chance at a deposition
 - ▶ Better to know now
 - ▶ Educate your client
- ▶ Ignorance is bliss?
 - ▶ Is it as bad as you thought?
 - ▶ Is it that bad and you don't want to develop it further?
 - ▶ Settle?

Be Curious, Not Judgmental



Defending Depositions

- ▶ Client Prep
- ▶ Defending your Client
- ▶ Raising Objections

Client Prep

- ▶ Who is there, why
- ▶ Q&A Session
 - ▶ You tell your story later
- ▶ Not a memory exam
- ▶ Objections and Whether to Answer
 - ▶ “Unless I instruct you otherwise”
- ▶ Be empowered
 - ▶ Listen, think, clarify, answer
- ▶ Important documents
- ▶ Tricks
- ▶ Attire
- ▶ Notes
- ▶ Breaks
- ▶ Sample Questions
- ▶ Organizational:
 - ▶ Review topics
 - ▶ Collect information

Defending Your Client

- ▶ Objections
 - ▶ Non-speaking / non-argumentative
 - ▶ This is witness coaching
 - ▶ Preservation vs. obstruction
- ▶ Tiredness / Breaks
 - ▶ The Client and You
- ▶ Follow up Questions
 - ▶ When? Why?
- ▶ Request Read & Sign

“I Object!”

- ▶ “Mandatory” objections:
 - ▶ Notice / Subpoena
 - ▶ Privilege
 - ▶ Attorney-Client
 - ▶ Self-Incrimination
 - ▶ Spousal
 - ▶ See OEC 503-510
 - ▶ Outside of topics (corporate rep)
 - ▶ Harassing
- ▶ “Optional” objections (waived if not made):
 - ▶ Vague
 - ▶ Compound
 - ▶ Misstates Prior Testimony
 - ▶ Assumes Facts Not in Evidence
 - ▶ Calls for Speculation
 - ▶ Asked and Answered
 - ▶ Calls for Legal Conclusion
 - ▶ Hearsay



Questions?

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