LAWYER TO LAWYER MENTORING PROGRAM
WORKSHEET JJ
INTRODUCTION TO DEPOSITIONS

Worksheet JJ is intended to facilitate a discussion about tips for preparation for and proper behavior during depositions.

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- Review with the new lawyer the Commission on Professionalism's *Professionalism Dos and Don'ts: Depositions*. Share with the new lawyer examples of ways *not* to behave in depositions. Discuss the potential consequences for improper behavior. To the extent that you have experienced a lawyer acting improperly in depositions, share those experiences with the new lawyer.

- Discuss how to properly advise and prepare your client or witness for a deposition. What constitutes improper advice and/or preparation?

- Discuss professional ways to handle a situation where opposing counsel is acting improperly or unprofessionally during a deposition.

- Discuss the types of disputes that would warrant calling a judge for resolution during a deposition.

- Review and discuss the attached articles from the ABA Young Lawyer Division e-Library.
  Amanda G. Main, *Depositions 101: Deposition Dos and Don'ts,*
  http://www.abanet.org/yld/elibrary/fall05/13DepositionDosandDonts.pdf;
  John A. West, *Deposition Practice: A Personal Perspective,*
  http://www.abanet.org/yld/elibrary/fall05/14DepositionPractice.pdf;
  Scott Palmer Mason, *Litigation 101: An Overview for Preparing to Take Your First Deposition,*
  http://meetings.abanet.org/webupload/commupload/YL406000/relatedresources/OverviewForTakingYourFirstDeposition.pdf;
  Joseph Siprut, *Litigation 101: Defending Your First Deposition*,
  http://meetings.abanet.org/webupload/commupload/YL406000/relatedresources/DefendingYourFirstDeposition.pdf .

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American Bar Association
Young Lawyers Division

Depositions 101

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DEPOSITIONS DOS AND DON'TS

DEFENDING A DEPOSITION:

1. Prepare your client a few days in advance of the deposition.
2. Give your client a checklist of basic instructions for the deposition (see attachment).
3. Practice the deposition by asking your client some likely questions and critique their response.
4. Use a deposition preparation video.
5. Know your case and review your file, concentrating on the elements of all claims and defenses and key documents.
6. Be careful about giving the deponent work product materials during deposition preparation. They may be discoverable
7. One the day of the deposition, meet with your client 30 minutes in advance of the deposition to answer any last minute questions.
8. Do not let you client take any documents into the deposition. That means no notes, no calendar, no files, not even blank paper and a pen. Your client should not take any notes during the deposition.
9. If more than one attorney attends the deposition from your opponent, only permit one attorney to ask questions. Do not allow the opposing side to "tag team" your witness.
10. Be familiar with objections made during a deposition. Objections to form must be made or they are waived. This allows the questioner to ask a proper question.
11. Be familiar with when you can instruct your witness not to answer a question. You can only instruction the witness not to answer a question "to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [under Fed. R. Civ. Proc. 30(d)(3) to cease the deposition or to obtain a protective order]." Fed. R. Civ. Proc. 30(d).
12. If a dispute arises and the judge is called, stay on the record.
13. Take frequent breaks. During these breaks, avoid giving your client assistance with their testimony. Do tell your client that he or she is doing fine and to keep telling the truth.
14. If opposing counsel asks for documents on the record, ask that they follow it up with a written request. This will allow you to make and preserve any necessary objections for the record.
15. Have your client read and sign the deposition.
16. At the end of the day, no matter how the deposition went, tell your client they did a good job.

TAKING A DEPOSITION:

1. Know your case and review your file, concentrating on the elements of all claims and defenses. Search the witness's name from other depositions, documents, public records, etc.
2. Determine what information you need to obtain from the witness.
3. Prepare a deposition outline. Include in your outline, background information (i.e., education, work history, does he or she know plaintiff, defendant, or key witnesses and if so, how), corporate structure, industry information, documents).

4. Ask your client about possible areas of inquiry for the deponent.
5. Have plenty of copies of documents that you intend on using with the deponent (one copy for court reporter, one for you marked with your notes, one copy for deponent, one copy for all counsel, one for your client).
6. Determine whether the deposition should be videotaped. Is the witness on "death's door"? Is the deposition testimony going to serve as trial testimony? Is the witness likely to become unavailable for purposes of trial?
7. At the deposition, introduce yourself to deponent, have witness sworn, and go over ground rules (see attachment).
8. If the witness brought documents into the deposition, ask to see them.
9. Ask the witness what they did to prepare for the deposition? Did he or she meet with anyone? If so, whom? Who was present? How long did the meeting last? Where was the meeting held? Did he or she review any documents in preparation for the deposition? If so, what?
10. Don't permit the deponent's attorney to make speaking objections or otherwise coach the witness as to how to answer a question. If you know in advance that this might be a problem, consider having the deposition videotaped.
11. If the witness is instructed by counsel not to answer a question, confirm that fact on the record. Then ask the witness if he or she intends to follow counsel's instruction. Have opposing counsel state on the record the basis for the objection and assertion of privilege. State on the record why you think the objection and instruction are improper and why the privilege does not apply. Resume questioning. You can later determine whether you need to raise the issue with the court through a motion to compel.
12. If problems arise, call the court as a last resort.
13. Before concluding the deposition, take a short break to review your notes and confer with your client. Generally, this will be your only opportunity to depose this individual, so make sure you ask everything you need to. (Fed. R. Civ. Proc. 30(a)(2)(B) requires a party to obtain leave of court to re-depose an individual.)
14. Remember, Fed. R. Civ. Proc. 30(a)(2)(A) requires you obtain leave of court if you intend on taking more than 10 depositions.

WITNESS GUIDELINES

1. Tell the truth.
2. Listen carefully to the question and answer the question asked and only the question asked.
3. Don't volunteer information. Put opposing counsel through their paces and make them do their job.
4. If you don't understand a question, ask that it be repeated or rephrased. You are entitled to an intelligible question.
5. Before you answer a question, pause. This will give you an opportunity to process the question and it will give your attorney an opportunity to object.
6. Be concise. Answer yes or no to yes or no questions. If you don't know the answer, then say you don't know. Don't speculate.
7. Listen to my objections. If I object to a question because of its form, you will still be required to answer, assuming you understood the question. However, if I object to a question and instruct you not to answer, then do not answer the question.
8. Do not reveal the substance of any conversations that you had with your attorney.
9. If you need a break, then ask for one. However, if a question is pending you will need to answer it first.
10. Don't bring anything with you to the deposition and do not take any notes during the deposition.

DEPOSITION GROUND RULES

1. It is important that only one of us speak at a time so that the court reporter can take down everything that we say. Therefore, if you let me finish my questions, I will let you finish your answers.
2. The court reporter can only record words, so I need you to answer questions verbally – that means, no nodding your head and no "uh-huhs or "un-uhns."
3. If you don't hear or understand a question, ask me to repeat it or rephrase it. Otherwise, if I ask a question and you answer it, I will assume you understood it.
4. If you need a break, just ask for one. However, if there is a question pending, you will have to answer it first, okay?
5. Are you taking any medication that effects your memory or impair your ability to truthfully answer my questions?

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DEPOSITION PRACTICE - - A PERSONAL PERSPECTIVE

I. SOME RULES TO KEEP IN MIND IN PREPARING FOR AND TAKING A DEPOSITION - - A PERSONAL PERSPECTIVE

A. FIRST RULE – TAKING A DEPOSITION INVOLVES A COMMUNICATION PROCESS.

1. Always remember that those things which are a part of effective communication in other settings apply equally in depositions. *Think of a deposition as having a conversation with the witness – on your terms.*

2. For example:

   a. Speak in language the witness understands; make sure the witness understands the question.

   b. Establish eye contact!

   c. Listen!

   d. Make sure the witness answers your question.

   e. Maintain demeanor which is consistent with the situation – pleasant if the witness is disinterested; firm and professional if the witness is adverse.

   f. Be fair with the witness.

   g. Know what your objectives are. Here are some common objectives in a deposition:

      (1) You want to find out as much as possible what the witness knows;

      (2) You want to obtain concessions which will help your case;

      (3) You want to pin down the witness's story or lack of knowledge in a particular area;

      (4) You want to make a record that the facts are not in dispute so you can file a summary judgment motion.

B. SECOND RULE – YOU CONTROL THE CONDUCT OF THE DEPOSITION.

1. Taking a deposition is an exercise in control to achieve your purposes.

2. For example:

   a. Control the setting, i.e., the deposition room, by arranging the witness, the court reporter, opposing counsel, etc, to suit your purposes.

      - For example, if deponent is an adverse witness, have witness sit directly across the table from you; if a disinterested witness, arrange room in a less confrontational way, if possible.

   b. Make sure that you stick with the basic format of a deposition which is that you ask the questions which the witness must answer; do not let witness or opposing counsel disrupt your control of the conduct of the deposition by making objections, by asking you questions, or by requiring you to define terms.

   c. Assume a confident and professional manner with the witness and opposing counsel; begin the deposition simply by asking one witness to state his name and address; demonstrate your preparedness!

   d. Never lose your temper when you lose your temper you lose control, not only of yourself but of the deposition.

   e. Pin the witness down on whether he is testifying from memory.

   f. You control the court reporter to accept instructions from you on off-the-record statements, etc.

C. THIRD RULE – YOU MUST THINK YOUR WAY THROUGH A DEPOSITION.

1. Critical listening skills cannot be over-emphasized.

2. Take time to think.

3. On outlines and notes:

   a. Don't get overcommitted to notes; detailed outlines get in the way of communicating with witness; you need to be flexible in your interrogation; sometimes it is a good technique to jump around in your interrogation; never

(well, almost never) write out your questions; if you have a key question which has to be worded just right, write it out in your notes.

b. Better approach – list subject matter areas you want to cover and your goals in taking the deposition; also might outline deposition chronologically.

D. FOURTH RULE – BE PREPARED!

1. The obvious: Have a good understanding of the factual background of the case, how the witness fits into the picture and the documents you will use as exhibits; in a document case involving correspondence between the parties and internal memoranda, a good understanding of the documents is absolutely essential.

2. The not-so-obvious: Have a theory or a theme of the case; you bring to the deposition room all your experience in dealing with people; knowing what you do about the way people act in certain situations, what you think happened in this case; you are going to test your theory on the witness and get him to agree with it if possible; this is where the art of advocacy comes into play. Remember, some of your best thinking about a deposition or trial will be in the shower, on a long walk, etc.

II. SOME OTHER THOUGHTS

A. Dealing with objections:

1. The shorthand way of explaining the status of objections during a deposition is: All objections to relevancy, admissibility, etc., are preserved. The only objections which need to be made at the deposition are objections as to the form of the question, i.e., leading, compound question, unintelligible, or questions that implicate privileges, etc.

2. Don't let opposing counsel's objections throw you off track; explain to the witness that counsel is objecting for the record, that the judge will rule on the objection later and that the witness must answer the question subject to the objection.

3. When is it proper for opposing counsel to instruct his witness not to answer?

a. Rule 30(c) of the Federal Rules of Civil Procedure provides: "All objections made at the time of the deposition . . . shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections." (Emphasis added) Thus, the only instance where it is proper for opposing counsel to instruct the witness not to answer is where the question calls for testimony about privileged matters, e.g., attorney-client privilege, work product privilege, privilege against self-incrimination, etc.

b. What to do about counsel who improperly instructs his witness not to answer?

(1) If the question is not all that important, continue with the deposition and move to compel discovery on the question in issue.

(2) If the question is important, adjourn deposition and seek an immediate hearing with the court; some judges will hold telephone conferences on discovery matters; if in federal court, consider having the judge refer discovery matters to the magistrate.

B. When are leading questions proper?

1. Before taking a deposition, always ask yourself the question: "May I interrogate this witness by the use of leading questions?"

2. Leading questions are proper when:

a. Interrogating an adverse party (Rule 43 of the Kentucky Civil Rules and Rule 6.11 of the Federal Rules of Evidence).

b. Interrogating the witness on preliminary matters.

c. Interrogating a hostile or unwilling witness, or a witness who has difficulty testifying, i.e., a young child.

3. Note that when a corporation is an adverse party, under the Kentucky Civil Rules, interrogation by leading questions is limited to a witness who is an "officer, director, or managing agent" of the adverse party. What about a former officer of the adverse party? Rule 43 does not address this issue.

C. How to deal with obstructive tactics of opposing counsel.

1. Ignore them.
2. Remind counsel of his or her professional obligation not to be obstructive.
3. If that doesn't work, adjourn deposition and seek hearing with the court or make a motion for a protective order.
4. Point – don't let obstructive tactics deprive you of control of the deposition.

D. What is the permissible scope of inquiry at a deposition?

1. Federal Rules and Ohio and Kentucky Civil Rules provide that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter" of or involved in the pending action.
2. Relevance is determined not only by the claims of the plaintiff but also by the potential defenses of the defendant. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (relevance is not limited to the issues raised by the pleadings; rather the text is the subject matter of the pending case.
3. Inadmissibility of the testimony at trial is not a proper objection "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

III. PREPARING A WITNESS TO TESTIFY

A. General Instructions:

1. Obligation to testify truthfully; preparation is intended to help witness do that.
2. Mental process witness should go through in answering each question:
   a. Do I understand the question?
   b. If I understand the question, am I able to answer based on personal knowledge, or on what I have been told?
   c. If I am able to answer the question, how do I answer it in the fewest possible words?

d. If the question calls for a yes or no answer, is it necessary to explain my answer in order that it be full and complete – and therefore truthful?

3. Don't guess, speculate, or assume.

4. Don't hesitate to state that you have no memory or recollection.

5. Don't agree to supply documents which may be requested. This is covered by the provision of the Federal Rules dealing with the production of documents.

6. Never lose your temper!

7. Let counsel state objections before answering

8. It is not only permissible, but encouraged for a witness to take his or her time in responding, if necessary.

B. Other thoughts on preparation:

1. Remember that most witnesses are apprehensive about testifying; this is just as true about a deposition witness as it is about trial witnesses.

2. The witness should understand that he is not just testifying orally; he is participating in the creation of a document which is the deposition transcript.

   a. That means it is important to take the time to *think about the answer to each question*.

   b. Try having witness turn to the stenographer when he answers so that he gets the feeling that he is dictating; this helps the witness think about his answer.

3. The witness should be firmly instructed that his testimony is to be based only on personal knowledge unless he is specifically asked what he was told.

4. Do not educate the witness about events of which he has no knowledge; be sure the witness understands the difference between refreshing memory and learning about particular events for the first time during witness preparation.

5. Be sure to tell witness that it is permissible to have a preparation session with counsel; if he is asked if he discussed his testimony with anyone, he should state that he met with you for the purpose of reviewing the issues which might be covered at the deposition.

LITIGATION 101: AN OVERVIEW FOR PREPARING TO TAKE YOUR FIRST DEPOSITION

by

Scott Palmer Mason[1]

At last, the opportunity to take your first deposition has arrived. Most likely, you have observed depositions, but now you are in the driver's seat and the responsibility rests on your shoulders. The following is a checklist that may provide some helpful hints and make your first deposition a success.

- **Know the rules.** Federal Rules of Civil Procedure ("FRCP") Rule 30 covers depositions upon oral examination. As with other rules, this rule will serve as a roadmap and will help you navigate down the highway to taking your first deposition. If the action is in state court, your applicable state rules of civil procedure will have a similar, if not identical, provision. In any event, be familiar with the rules, including the local court rules where the action is filed and the local court rules where the deposition will take place.

- **Use literature covering depositions.** If your firm has a library with books covering depositions, procedures or different strategy techniques—use them to your advantage. Do your homework and never think that you can learn all that you need to know by observing someone else take a deposition or preparing to take a deposition. If you do not have access to such materials at your fingertips, seek them out at the nearest law library or try to find helpful hints online.

- **Who may be deposed.** It is essential that you identify which persons may be deposed without leave of the court. FRCP Rule 30(a)(2) allows a party to "take the testimony of any person, including a party, by deposition upon oral examination without leave of court[.]" Generally, most depositions will be able to take place without court intervention, but a number of situations do exist that will require the court's approval of the deposition before they may go forward. By written stipulation the parties may agree to allow for more than 10 depositions to be taken or for a deponent to be deposed more than once. Absent a written stipulation, leave of court is required in these situations. Leave of court also is required if the deponent is confined to prison.

- **Deciding whom to depose.** The decision to take a deposition requires evaluation of each potential deponent's knowledge of the case and his or her importance to the litigation. It may be that alternative discovery tools such as interrogatories, requests for documents, or requests for admission, may uncover specific information thereby eliminating the need to take a particular deposition.

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- **When the deposition may occur.** FRCP Rule 26(d) states that "except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order, or agreement of the parties a party may not seek discovery from any source before the parties" have had their meeting as required by Rule 26(f). The Rule 26(f) meeting is to be held "as soon as practicable" but at least 21 days prior to the entry of any scheduling order.

- **Persons before whom the deposition may occur.** In selecting a court reporter, be sure to secure one who is qualified, reliable, familiar with you or your firm, competent and cost-effective. Ensure that the court reporter has performed a "conflicts check" so that the deposition is not prohibited from going forward due to a technicality. Furthermore, the court reporter should be able to administer the oath and take the deposition. FRCP Rule 28(a) details who may take depositions within the United States; FRCP Rule 28(c) details those persons who are disqualified from taking depositions. State rules may vary, so be sure to be familiar with them.

- **Notice.** Every deposition must be properly noticed. "A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." Failure to provide notice to all parties may prevent your deposition from occurring or cause it to be taken again. FRCP Rule 30(b)(1). By rule, the notice must contain specific information. The notice must contain the date and time of the deposition, the location in which it is to occur, and the name and address of each person to be deposed, if known. If the name and address of the deponent is unknown, a general description sufficient enough to identify the person is required. If you require the party deponent to bring documents, you must provide a request in compliance with FRCP Rule 34 for the production of documents along with the notice. If you desire a non-party deponent to produce any documents, you must attach to the notice a subpoena in accordance with Rule 45 which contains the "designation of the materials to be produced." In addition to serving the notice, send a copy to the court reporter, and call to reserve their services.

- **Strategic location.** Choose a location that provides you with the best strategic advantage after you have determined which places are contemplated by the discovery rules. Rule of thumb is to choose a location within the rules, but kind to you. If the deposition is to be taken out of town, try to use the offices of an attorney with whom you are familiar or at a court reporting service. If unable to secure a conference room at one of those locations, the next best place may be a meeting room at a hotel or the airport. Be sure to reserve a meeting room that contains a telephone, writing materials and beverages and one that is spacious enough to accommodate all parties that will be present.

- **Methods to record the deposition.** By rule, the party taking the deposition must state in the notice the means by which it will be recorded. Unless otherwise ordered by the court, "the deposition may be recorded by sound, sound-and-visual, or stenographic means." FRCP Rule 26(b)(2). If you desire another means by which to record the deposition, prior notice must be given to the deponent and the other parties. FRCP Rule 26(b)(3). State rules can vary; one state may allow a deposition to be "recorded by sound" *i.e.*, your opposition's tape recorder. The key is the notice should state how the deposition should be taken.

- **Who pays for the deposition.** The FRCP designate that the party "taking the deposition shall bear the cost of the recording." If taking multiple depositions on the same day, be sure to schedule them appropriately so that the court reporter is not idle between depositions. It is better to have the deponent waiting on you than you waiting on the deponent. The client will appreciate you making wise use of the court reporter's time, thereby, reducing the overall cost of the action.

- **Sending subpoenas.** Subpoenas are not necessary if you are deposing a party deponent. If you are taking the deposition of a non-party deponent, you should serve a subpoena in accordance with FRCP Rule 45. Remember to send a check covering the witness and mileage fees with the subpoena.

- **Calendaring the deposition.** It is absolutely necessary that the dates for the deposition are maintained on your firm's docket, if any, and any other calendars kept by you, your secretary or paralegal. By rule, if the party giving the notice of the taking of the deposition fails to attend and another party attends in person or by attorney, you may have to pay the other party its "reasonable" expenses, including attorneys' fees. FRCP Rule 30(g).

- **Scope of depositions.** The federal rules (and some state counterparts) permit broad discovery including deposition questions, which should be designed to elicit admissible evidence. However, the questions themselves need not produce answers which are admissible at trial. FRCP Rule 26(b). The rules allow for questions which may seek any information which is arguably relevant to the subject matter of the claims or defenses in the litigation.

- **Confirm the court reporter.** A day or two before the deposition, you or your staff should call the court reporter to confirm the date, time and location of the deposition.

- **Preparing for the deposition.** An essential part to taking your first deposition, of course, is being prepared. You must possess a good working knowledge of the facts, your position, your opponent's position and any elements of proof necessary to sustain your claim or defense. Formulate a substantive outline with the matters to be covered in the deposition organized in some type of discernible fashion: (a) by legal issues, (b) by time period or (c) by contentions. If you prepare a script, don't be married to it. Be flexible and able to deviate from the pre-determined path, so you can explore statements made by the deponent and cover other areas that you may not have considered at first.

- **Taking the deposition by telephone.** By written stipulation or order of the court, a deposition can be taken by telephone or other remote electronic means. FRCP 30(b)(7). This may not be an ideal manner in which to take your first deposition, but the situation could arise.

- **Preparing to handle objections.** FRCP Rule 30(c) states that objections "to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings" are to be noted; but the deposition is to continue. The objections should be made in a non-argumentative and non-suggestive manner. A deponent may be instructed not to answer only to preserve a

privilege, to enforce a limitation set by the court or to present a motion under Rule 30(d)(4). FRCP Rule 30(d)(1). If you run into problems, it may be necessary for the court to intervene. It is a good idea to have the number of the Federal Court Magistrate Judge assigned to the matter to resolve such disputes. If in state court, the telephone number of the judge presiding over the matter will be necessary. Often you may find that the mere suggestion of involving the court will quickly resolve the matter.

- **Don't forget about the "little things."** While preparing for the deposition, it may be natural to line up contention questions with the intent of tearing down your opponent's theory of the case or fully funding your position. However, don't lose sight of this one question, "what is this case all about?" A simple question, no doubt, but a very important one nonetheless. The history of the case, what is known about the case and its vulnerable aspects matter greatly and need to be uncovered prior to taking any deposition.

- **Documents and Deposition Exhibits.** It is essential that you have a clearly organized file with copies of the file's pertinent materials into a form suited to the deposition. Be sure that the file contains all relevant materials and that those materials are in the right place. Organize the documents into a coherent structure which allows the attorney "quick access" to the desired information or documents. Also, be sure that any "documents" are bates stamped and reorganized into a usable form. Depending on the case, it may make sense to organize potential exhibits chronologically or by topic. If you will be using exhibits and asking questions about those exhibits, prior to the deposition be sure to have enough copies for all parties prior to the deposition. It's also a good idea to have extra copies for the court reporter, deponent and counsel.

- **The role of computers.** In today's technologically savvy world, virtually all attorneys have access to computers in their practices. Use them. Computers can store and organize vast quantities of data thereby allowing you to have access to all information relevant to the case. In today's environment, an extremely competitive market has emerged for litigation software with software tailored specifically for deposition practice. If your firm has this type of software, learning how to use it and using it effectively will be to your advantage. If your firm does not, it may not be a bad idea to inquire about this kind of product.

This list is intended to help you get out of the gate running. Without question, the most important point on this checklist is the one entitled **Know the Rules**. If you rely on your staff to assist you in preparing for your first deposition or any deposition, remember that at the end of the day the "ball lies in your court." Be sure that you are knowledgeable of and familiar with any and all aspects of the preparation, especially the rules.

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LITIGATION 101: DEFENDING YOUR FIRST DEPOSITION

by

Joseph Siprut[1]

Defending your first deposition is an exciting milestone in the career of any young litigator. Though you will not be "taking" the deposition, do not be lulled into thinking that no preparation is necessary. The following checklist will help you cover the bases in preparing to defend your first deposition.

PREPARE YOUR WITNESS. If you are defending your client's deposition -- or an agent of your client -- you should insist on a preparation session. Anything you discuss in preparation for your client's deposition is protected from disclosure by the attorney-client privilege. If the deponent is a third-party unrepresented by counsel, you may try and communicate with them, but your communications are not protected -- *i.e.*, if the adverse lawyer asks about the content of your communications during the deposition, the third-party must answer truthfully.

In your preparation session, cover the following points:

- When you begin to speak or formulate objections, the witness should stop talking.

- Along the same lines, tell the witness to pause before answering all questions. Not only will this give him time to think, but it will give you time to interpose an objection, if appropriate.

- Explain that this deposition is not the witness's time to "tell his story." The time for that is at trial. The deposition is the opponent's chance to try and get information that will support his case; thus, the witness should make that lawyer work to get that information. Don't volunteer anything. If the questions is: "do you have the time?," the answer is "yes," not "three-o-clock."

- The exception to the previous point is if, for strategic reasons, the decision is made to show your cards and demonstrate the strength of your case in order to extract an early settlement offer. In such a scenario, it may indeed be better for the witness to "tell his story" at the deposition and volunteer information he otherwise should not.

- Explain to the witness that there is a difference between "I don't know" and "I don't recall" answers. If the witness doesn't recall something at the time of his deposition, he can always remember by trial.

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- Tell the witness that if he needs a break during the deposition, he should ask for one -- as long as there is no question pending. If you as the lawyer want to ask for a break -- whether it be to get a cup of coffee or to discuss strategy with the witness -- explain that the witness should not disagree with you and say he doesn't need a break. If you say a break is needed, it's needed.

- Remind the witness to be polite and likable. The better a witness the other side thinks he will make, the more they will fear him. A good pedagogical tool: tell the witness to imagine the opposing lawyer is his father-in-law and they're meeting for the first time.

- Above all, calm the witness by telling him you will protect him during the deposition, and that there is nothing to worry about.

DURING THE DEPOSITION. During the deposition itself, adhere to these general guidelines:

- Object when appropriate. Write the objections permissible at a deposition in the margin of your notes, and voice them when appropriate: form; misstates facts; mischaracterizes prior testimony; argumentative; relevance; calls for a legal conclusion; and attorney-client privilege. Review the pertinent court rules or status regarding any other privilege that you may need to assert, such as the confidential marital communication privilege.

- Note that even when you object, the witness must still generally answer the question. The one notable exception to this point is when you object to a question on the ground that it calls for information protected from disclosure by a privilege, such as the attorney-client privilege, -- in that case, instruct the witness not to answer the question.

- If the witness starts to ramble, you can interrupt with: "just answer the question."

- If opposing counsel becomes abusive during the deposition, describe for the records the conduct that is occurring -- e.g., "counsel is standing and shouting at the witness," etc. Threaten to walk out if the conduct continues -- and do so if necessary -- but first try and resolve the problem.

- Never waive signature if you're defending a deposition. Always reserve signature and give your witness a chance to correct any errors in the transcript.

- When opposing counsel finishes his questions, you have the right to ask questions of your own. Consider beforehand what questions may be appropriate and necessary, and make a note during the deposition if there are any areas of testimony you need to explore.

- Finally, as a general point, try and observe more senior lawyers in your firm defending a deposition before you jump in the water. Understanding the theory of defending a deposition goes a long way, but to be fully prepared, there is no substitute for seeing these principles in action.

PROFESSIONALISM DOs & DON'Ts: DEPOSITIONS

Issued by the Commission on Professionalism:

If there is one area of the practice of law that consistently gives rise to an inordinate number of complaints about lack of professionalism, it is the area of depositions. Depositions, of course, are an extremely important and valuable component of our adversary system, but, if abused and mishandled, they can engender unnecessary and costly strife that impedes and undercuts the entire process. To help correct this situation, the Commission on Professionalism is publishing the following guidelines, a set of deposition "dos and don'ts." The Commission believes that if lawyers follow these guidelines — which are consistent with, and to some extent provide specific amplification of, the Supreme Court's Statements on Professionalism — lawyers will be able to use depositions to advance the legitimate interests of their clients, while, at the same time, treating all participants in the process, including deponents and opposing counsel, with courtesy, civility, and respect. It is not the Commission's intention to regulate or to suggest additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. In short, by adhering to these guidelines, lawyers will be acting as professionals and in the manner that the courts expect.

Therefore, as a lawyer who is scheduling, conducting or attending a deposition:

DO

- Review the local rules of the jurisdiction where you are practicing before you begin.
- Cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time, and place. Then send out a notice reflecting the agreed upon date.
- If, after a deposition has been scheduled, a postponement is requested by the other side, cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client's rights.
- Arrive on time.
- Be prepared, including having multiple copies of all pertinent documents available in the deposition room, so that the deposition can proceed efficiently and expeditiously.
- Turn off all electronic devices for receiving calls and messages while the deposition is in progress.

(OVER)

- Attempt to agree, either before or during the deposition, to a reasonable time limit for the deposition.
- Treat other counsel and the deponent with courtesy and civility.
- Go "off record" and confer with opposing counsel, privately and outside the deposition room, if you are having problems with respect to objections, the tone of the questions being asked or the form of the questions.
- Recess the deposition and call the court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the "problem."
- If a witness is shown a document, make sure that you have ample copies to distribute simultaneously to all counsel who are present.
- If a deponent asks to see a document upon which questions are being asked, provide a copy to the deponent.
- Inform your client in advance of the deposition (if the client plans to attend) that you will be conducting yourself at the deposition in accordance with these "dos and don'ts."

DON'T

- Attempt to "beat your opponent to the punch" by scheduling a deposition for a date earlier than the date requested by your opponent for deposition(s) that he or she wants to take.
- Coach the deponent during the deposition when he or she is being questioned by the other side.
- Make speaking objections to questions or make statements that are intended to coach the deponent. Simply say "object" or "objection."
- Make rude and degrading comments to, or ad hominen attacks on, deponent or opposing counsel, either when asking questions or objecting to questions.
- Instruct a witness to refuse to answer a question unless the testimony sought is deemed by you to be privileged, work product, or self-incriminating, or if you believe the examination is being conducted in a manner as to unreasonably annoy or embarrass the deponent.
- Take depositions for the purpose of harassing a witness or in order to burden an opponent with increased litigation expenses.
- Overtly or covertly provide answers to questions asked of the witness.
- Demand conferences or breaks while a question is pending, unless the purpose is to determine whether a privilege should be asserted.
- Engage in conduct that would be inappropriate in the presence of a judge.