

1

Purpose of a Deposition

A deposition permits a party to explore the facts held by an individual or an entity bearing on the case at hand. Depositions occur well before trial and allow the party taking the deposition to learn the facts held by the other side and third parties. Too often, depositions are used to confirm the facts already known to one side. Depositions, properly done, do so much more and provide an avenue for accurate case assessments, and when required, for trial.

This chapter provides an overview of the various purposes that depositions serve. For each deposition that an attorney plans to conduct, he or she must determine which purpose or purposes might apply, as that will govern the types of questions that will be asked, the approach the questioner will take, and the tone of the questions asked.

The Purposes of a Deposition..... 1-2
 A Discovery Deposition..... 1-2
 A Deposition Seeking Admissions 1-3
 A Deposition Testing Theories 1-4
 A Deposition Supporting Trial Motions..... 1-5
 A Deposition Preserves Testimony..... 1-6
 A Deposition Permits Witness Evaluation 1-7

The Purposes of a Deposition

Q 1.1 What are the purposes of taking a deposition?

There are at least six reasons to take a deposition:

1. Seek discovery
2. Seek admissions
3. Test theories
4. Gain material for motions or trial
5. Preserve testimony
6. Observe witnesses for the other side.

You may well develop other reasons, but do not fall for the false premise that a deposition can only be taken for one purpose at a time. Depositions often seek to cover all of these stated purposes simultaneously. Part of the pre-deposition preparation process requires figuring out the purposes you wish to cover and deciding the order in which to address each one.

A Discovery Deposition

Q 1.2 How does a deposition seek discovery?

Discovery comprises three types of materials—documents, physical evidence, and testimony. The deposition deals with the testimonial aspect, but can also lead to other types of discovery material. The deposition may use documentary and physical evidence, but it

does so in a way that has a witness explain, expound, and add color. The deposition may also identify gaps in the prior document or physical discovery. The attorney for one side cannot roam through the records of the opposition, but can ask questions to uncover how and where documents and other materials are stored, identify the custodians, and determine whether those locations have been searched for responsive materials.

Not all witnesses are candidates for assisting with discovery issues. Depending on the witness's relation to the case, a witness might know additional areas of discovery or be helpful in explaining the discovery already provided. And, since most depositions are now subject to a time limitation—for example, the Federal Rules of Civil Procedure provide a presumptive seven-hour limitation (see chapter 2)—the questioner must make careful allocation of the time spent seeking additional discovery. There are no hard and fast rules that govern the allocation of time to particular purposes. The questioner must be alert for missing gaps in the information provided and be prepared to explore those missing gaps as the opportunity arises. For example, you probably would not think to pursue discovery issues with the CEO of a company. But, if the discovery issue is key information that has yet to be provided, a particularly good question for the CEO is who would he/she ask for that information.

A Deposition Seeking Admissions

Q 1.3 How does a deposition seek admissions?

By framing the questions correctly, a skilled questioner can eliminate issues from the case. The secret is learning how to phrase the question (essentially to make it short, without qualifiers, and limited to a single fact; see discussion in chapter 6), listen carefully to the answer, and then rephrase the question to remove any words that prevented the witness from answering the question with an unqualified yes. Since most witnesses are skeptical of deposition questions and look for ways to qualify their answers, the questioner must be prepared to spend the time required to make each admission-seeking question very simple and clear.

Admissions are the cornerstones of building your case. Each key fact admitted by the other side leaves one less matter you must prove in order to prevail. And, because it comes from the mouths of the other side, the fact finder will give the admission greater weight. With admissions, you build your case theory. Sometimes, the building process requires you to tear down your theory and start anew. This process permits a strong case theory to arise eventually—one with which the fact finder can easily agree.

Admissions also support motion practice. The best summary judgment motions are those that are based on concessions from the other side that support your legal theory. But, most witnesses will not admit so readily that their case lacks legal merit or that they are skewing the events to bolster their side, building on those small admissions until they show that result. The deposition skill becomes asking for small concessions that show that result.

A Deposition Testing Theories

Q 1.4 How does a deposition test theories?

Lawyers are constantly thinking of ways to explain to others why their side should prevail. In doing so, they hypothesize about the motives and rationale behind the decisions made by the other side. A defense lawyer might speculate that the plaintiff's injuries are not related to use of the client's product. The plaintiff's lawyer might imagine that the defendant manufacturer ignored safety concerns to maximize profits. These lawyers might be right, but what if they are wrong?

Imagine the impact at trial if the other side explains their actions in such a way that defeats any theory of liability. Our hypothetical lawyer is devastated and the client's case ends. Could this result have been avoided? Perhaps, through deposition questions, our hypothetical lawyer could have learned of the explanation before trial. That explanation might confirm the original hypothesis. If not, the lawyer still has time to develop a new theory or to revise the existing one to account for the explanation. The lawyer also has time to use additional discovery to determine the strength of the explanation.

Some lawyers believe that testing theories during the deposition provides the other side with insight into their case. These lawyers believe that they can anticipate and negate any explanations that

might be offered later. What if they are wrong? That is the risk taken by not exploring your case theories and confirming that the evidence will allow that theory to prevail. Your client's case suffers. And, since so few cases go to trial, what is the real goal of keeping your theory from the other side? Odds are that the other side has a good feel for exactly the theory you will try to run anyway. It is equally likely that the other side will have tested its case theories during the depositions of your witnesses. You might also find that the settlement value rises as the other side hears your theories confirmed.

A Deposition Supporting Trial Motions

Q 1.5 How do depositions gain material for motions or trial?

In testing theories, the questioner should also seek specific factual concessions that support the questioner's side. Usually, there are an array of facts not disputed. Using the deposition process to identify the areas where there are no disputes goes a long way to establish support for a summary judgment motion. The motion can be tailored to address only the areas in dispute. And, even if the summary judgment motion fails, knowing the areas of agreement will simplify the trial testimony and number of witnesses required to prove undisputed points.

To achieve this objective, you must have a handle on your client's view of events and on what the documents show. These alone are not enough. You must also have a keen understanding of the law applicable to the claims being asserted. With the law as a guide, the questioner begins deposition preparation by outlining the factual areas to address the legal elements of the claim. A negligence case will focus on the actions that led to the incident, the circumstances surrounding the parties at the time the incident occurred, and what could have been done to prevent the accident from happening. A contract case will focus on a contract, its relevant terms, and the events leading to the dispute over compliance with the terms of the contract.

As you think about the questions that will assist with proving your case theory, assume that the case will proceed to trial. Always ask yourself how the information you seek in the deposition will assist with the

trial and, as importantly, how the evidence will play in the courtroom. Those concepts assist in framing the areas of questions you want to ask at the deposition and how the answers can be used in pretrial motions.

A Deposition Preserves Testimony

Q 1.6 How can a deposition be used to preserve testimony?

Sometimes there are concerns that the witness with important testimony about a key event will not be available for trial. In the best of cases, this unavailability arises because of a vacation around the world. In the worst of times, there is a fear that the witness will not live long enough for discovery to proceed to the discovery phase. What to do in either case?

The process will vary depending on the jurisdiction involved and whether or not a complaint has already been filed. If the underlying case has not yet been filed and the case is in federal court, Rule 27 of the Federal Rules of Civil Procedure lays out the process:

1. File a verified petition in the district where the expected deponent resides; and
2. The petition must request an order permitting the deposition and must show:
 - a. That the petitioner expects to be a party to an action in a U.S. court but cannot presently sue or cause suit to be brought;
 - b. The subject of the future action and the petitioner's interest;
 - c. The facts that the petitioner seeks to establish by the deposition and the reason it must be perpetuated;¹
 - d. The identity of the expected adverse parties and their addresses; and
 - e. The name and address of the proposed deponent and the expected substance of their testimony.

As you might expect, the anticipated adverse parties must receive notice of the request at least twenty-one days before the hearing. The court then “must” issue an order to perpetuate testimony if it finds that doing so “may prevent a failure or delay of justice.” The court may allow the deposition only on written questions. But, if allowed, the deposition may be used just as any other deposition in a case already filed.

If the case is already filed, the question is whether the other side will agree that the deposition is needed to perpetuate testimony. If so, the normal deposition process addressed in more detail in chapter 5 should be followed. You might also need to request court permission if the time for deposition discovery has not yet arrived under the case management order. If the other side fails to agree, the process is similar to that used prior to an action being filed. You must file a contested motion with the court and convince the court of the need to proceed with the deposition prior to the normal discovery window.

A Deposition Permits Witness Evaluation

Q 1.7 How does a deposition allow a party to evaluate witnesses?

What a witness says is important. But, how a witness answers a question might be even more important. We have all met people who are not believable no matter what they say. We do not like their attitude or their appearance and conclude that they will not make a great witness no matter what they have to say. The other side will make the exact same judgments about your witnesses. The deposition allows you to observe the witness and make those judgment calls.

With the opportunity to observe comes the burden of asking enough “hard” questions to gauge realistically a witness’s demeanor. What’s a hard question? It is a question that goes to one of the key issues. A key question seeks to uncover the party’s motive for behaving as they did, or to establish a disputed fact in your favor. The form of the question is not “hard.” There is no need for shouting, a stern face, or any other melodrama. Sometimes, the best question is simply “why did you do that?”

As you listen to the answer, pay attention to the words used by the witness but pay more attention to the facial expressions and the body language. Those non-verbal signs are the ones that will guide your assessment of the witness. And, you can use those non-verbal signs to tell you areas of inquiry where you must follow up. Witnesses often give non-verbal cues in areas where they are uncomfortable testifying. The skillful questioner seeks to identify the cause of the discomfort.

Note to Chapter 1

1. The testimony sought to be perpetuated must be evidence that cannot come easily from other sources. *See In re Deiulemar Compagnia Di Navigazione S.p.A.*, 198 F.3d 473 (4th Cir. 1999).

