Tools for the Defense Deposition

By Amy M. Johnston and Erika L. Giroux

A deposition can be one of the most effective tools in the litigator's arsenal. A clean transcript from a crucial witness—friendly or hostile—could be the key to winning summary disposition for your client and avoiding the time and expense of trial. If your case does end up at trial, that same deposition transcript may be pivotal. So it is essential to remember that the important depositions are not only the ones that you take, but also the depositions that you defend. This article aims to help recently sworn-in Michigan lawyers understand key elements to deposition preparation, proper objections during depositions, and trial considerations.

Step 1: Preparation

As with most things in life, effective preparation is key to a successful deposition. That likely means re-familiarizing yourself with the facts of the case, any major unknowns in those facts or gaps in the timeline, any key disputes, the elements of the opposing party's claims or defenses, and the law supporting your position. Start the research early. Develop your trial themes. Before any deposition occurs, know what testimony you need to prove your case and which witness will provide you with that testimony.

Generally, you should plan to schedule a pre-deposition meeting with each witness shortly before the deposition. Timing is important, as the witness likely has other duties and responsibilities. Schedule close enough to the actual deposition so that the rules for the deposition and facts of the case remain fresh in the witness's mind, but far enough in advance so the witness has time to internalize your guidance and ask follow-up questions. The goals of the meeting are to get a better idea of what facts are within the witness's personal knowledge, further your understanding of the case, and identify in advance any issues that may require clarification.

As for preparing the witness for the likely unfamiliar deposition setting, there are many ways to make certain the witness is ready. The following simple rules for the witness may serve as a foundation for your deposition preparation strategy.

Listen to the question

It can be easy for the back-and-forth in a deposition to become conversational, and for a witness to fall into the habit of thinking that he or she knows which question will be asked next. One of the most critical tasks for the witness is to slow down and consider the question thoroughly. Everyone involved in the process—from the examiner to the deponent and, ultimately, to the fact-finder—has an interest in an accurate answer. You want to avoid having your witness confessing that he or she *assumed* the question was seeking "X" information, but on reflection, understand that it explicitly sought "Y" information. Proper preparation will educate your witness that this is a fact-finding process, not an informal conversation.

Answer the question

Remind the witness that he or she will be under oath to tell the truth and should, unless directed otherwise, answer questions truthfully and accurately. As a corollary, if the witness does not know the answer to a question, he or she should say so. Again, everyone involved in the process gains from accurate answers. While "I do not know" may make the witness feel uncomfortable, it is an acceptable response when accurate.

Tell the truth

Most importantly, remind the witness to always tell the truth, even if that truth

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Step 2: Deciding when and whether to object

Michigan and federal rules allow an attorney to object during a deposition only in two circumstances: (1) where the objection would be waived if the deposition is used at trial, e.g., objections to the form of the question or answer, to irregularities in the deponent's oath, or to the qualifications of the court reporter[1] and (2) when the objection is "necessary to preserve a privilege" or other limitation ordered by the court.[2] Objections must be made concisely in a civil, nonargumentative, and nonsuggestive manner.[3]

Except for limited circumstances such as privilege, the deponent must answer the question regardless of the objection.[4] One of the acceptable times for you to instruct a witness not to answer a question is when the answer would require him or her to disclose privileged information.[5]

When defending a deposition, watch for questions that are compound or argumentative, that ask the witness to agree with a legal conclusion ("You agree that you had a duty to warn, don't you?"), or are phrased in terms of "always," "sometimes," or "never." Also pay attention to questions that mischaracterize the witness's testimony earlier in the deposition: "You testified earlier that you did 'X' so why didn't you do 'Z'?" Finally, be wary of (intentionally or unintentionally) vague or ambiguous questions: "Did you talk to 'A' about *it*?" Make sure the record is clear as to what "it" is supposed to mean.

On the issues of privilege, the most obvious are the attorney-client privilege and work-product doctrine. As to the former, the questions with the most pitfalls can be those that attempt to discover why a witness took a particular action ("And you did that after speaking to your attorney?") or what advice was given to the witness from his or her personal or in-house lawyer. Indeed, the fact that a witness communicated with a lawyer on a particular topic to seek legal advice *is* privileged. In advance of the deposition, it is recommended that you determine what your witness has said about a case and to whom to make sure you are aware of when the privilege objection applies and when it doesn't.

The work-product doctrine sweeps more broadly than the attorney-client privilege, extending to all "notes, working papers, memoranda or similar materials" prepared in anticipation of litigation.[6] Unlike the attorney-client privilege, the work-product doctrine may still apply even when the materials at issue have been shared with third parties, such as investigative reports or claim files, and when the materials were prepared by the attorney or an agent.[7] In this sense, be particularly on guard when the examiner begins to inquire about any matters that occurred after the claim at issue arose, and consider carefully which materials might be shielded by this protection. If you are uncertain during the deposition, you may want to voir dire your witness to develop a record that the inquiry extends to information protected by the work-product doctrine.

Most witnesses will also be familiar, at least colloquially, with the Fifth Amendment privilege against self-incrimination, which can be invoked in a civil case when necessary to protect against criminal liability.[8] By statute, Michigan also recognizes a variety of other evidentiary privileges, including the accountant-client privilege,[9] clergy-penitent privilege,[10] counselor-client privilege,[11] physician-patient privilege,[12] spousal privilege,[13] and psychologist/psychiatrist-patient privilege.[14] Depending on the facts and issues in your case, it may be important to confirm in advance of a deposition whether any of these privileges could apply.

Step 3: Determining how much is too much

Over the course of your career, you will likely experience other lawyers defending depositions in different ways—some object to nearly every question while others are more sparing in their interjections. Striking a balance should be the goal: preserve your objections when needed, but try not to clutter the transcript in a way that creates unintended confusion as to whether the examiner and the witness are talking about the same event.

Being overzealous in your objections could lead to discipline by the court. Take, for example, the case of the attorney from a major East Coast law firm who lodged unspecified form objections "at least 115 times" on "roughly 50 percent of the pages" of key depositions to "quibble with the questioner's word choice" or to coach the witness (by, for example, stating that the question involved a hypothetical or interpreting the questions for the witness).[15] Although the order was later vacated, that firm was ordered by an Iowa federal court to create a training video cautioning other lawyers of "the impropriety of unspecific 'form' objections, witness coaching, and excessive interruptions" and providing "specific steps" for other attorneys to conduct depositions in compliance with the federal rules.[16] Be careful with your objections and, if needed, take a break during the deposition to thoroughly consider your objections.

On the flip side, deliberate objections may be necessary when you have grounds to believe that the deposition is being conducted in bad faith or in a manner that

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unreasonably annoys, embarrasses, or oppresses the witness.[17] In these instances, if you have reason to believe the deposition should be terminated, you must make your record to support it. In fact, if you do not make a proper record, the deposition should proceed.[18] Make sure you use the proper language and elaborate on your objection. Continued and multiple citations to the applicable rules, law, and controlling language are imperative. One example may be: "Objection under Rule 30 as this line of questioning is in bad faith, for no legitimate purpose as to any matter at issue in this case and will be subject to a Rule 30 motion for protective order." Building a complete contemporaneous record is absolutely essential if you believe that termination is the best option.

Step 4: Questioning your witness

At the end of the deposition, think carefully about whether to question your own witness. Some considerations include the clarity of the testimony that has already been provided, whether the questioning opens the door to new inquiries from your opponent, the availability of your witness later in the litigation, and what you need to prove your case. This directly relates to your deposition preparation. You must be an expert on the law and facts needed for your case-in-chief. If the witness can provide those facts and they were not elicited during the primary questioning, you may need to obtain the testimony at the deposition. The decision is unique to each case, but one each litigator must make after consideration of all the potential benefits and detriments.

Step 5: Use of depositions at trial

Remember that a deposition may be used at trial in lieu of live testimony on agreement of counsel or when a witness is unavailable because of death, disability, or imprisonment, or is located more than 100 miles from where the trial is taking place.[19] The transcript likely will also be used to impeach a trial witness[20] or for any other purpose condoned by the rules of evidence, such as establishing an organization's routine policy;[21] evidencing a person's reputation;[22] or showing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.[23]

Introducing a deposition transcript at trial for any of these purposes gives you the opportunity to raise the objections you have preserved during the deposition and opens the door to all other objections under the rules of evidence, such as relevance, competence, materiality, or hearsay.[24] In this way, planning your trial strategy early in the case and adapting it as discovery proceeds and new documents are uncovered can help you determine which witnesses—and which portions of their testimony—may be the most likely to resurface at trial, and consequently, where you should direct particular attention as the depositions proceed.

Conclusion

Ultimately, while each may be unique, a deposition can be incredibly useful. Prepare thoroughly in advance of the deposition. Know your law; know the basis for your objections; and consider carefully the appropriateness of your questioning. Bear in mind that the deposition will be used later, either in motion practice or at trial. ■

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ENDNOTES

1. MCR 2.306(C)(4)(c)(i), MCR 2.308(C)(2)–(3), and FR Civ P 30(c)(2).
2. MCR 2.306(C)(4)(c)(ii) and FR Civ P 30(c)(2).
3. MCR 2.306(C)(4)(b) and FR Civ P 30(c)(2).
4. MCR 2.306(C)(5)(a) and FR Civ P 30(c)(2).
5. MCR 2.306(C)(5)(a) and FR Civ P 30(c)(2).
6. *D'Alessandro Contracting Grp, LLC v Wright*, 308 Mich App 71, 77; 862 NW2d 466 (2014) and *Hickman v Taylor*, 329 US 495, 508; 67 S Ct 385; 91 L Ed 451 (1947).
7. *D'Alessandro*, 308 Mich App at 78–80; *Powers v City of Troy*, 28 Mich App 24, 32–33; 184 NW2d 340 (1970); and MCR 2.302(B)(3).
8. *In re Blakeman*, 326 Mich App 318, 334–336; 926 NW2d 326 (2018).
9. MCL 339.732.
10. MCL 600.2156.
11. MCL 333.18117.
12. MCL 600.2157.
13. MCL 600.2162.
14. MCL 330.1750.
15. *Security Nat'l Bank of Sioux City, Iowa v Abbott Labs*, 299 FRD 595, 616-09 (ND Iowa, 2014), rev'd by *Security Nat'l Bank of Sioux City, Iowa v Jones Day*, 800 F3d 936 (CA 8, 2015).
16. *Security Nat'l Bank*, 299 FRD at 610.
17. MCR 2.306(D)(1) and FR Civ P 30(d)(3).
18. FR Civ P 30(c)(2), an objection "whether to evidence, to a party's conduct, to the officer's qualification, to the manner of taking a deposition, or to any other aspect of the deposition," must be noted on the record, "but the examination proceeds."
19. MRE 804(a)(5), MRE 804(b)(5), MCR 2.308(A), FR Civ P 32(a)(1), and FR Civ P 32(a)(4).
20. FR Civ P 32(a)(2).
21. MRE 406 and FRE 406.
22. MRE 405 and FRE 405(a); MRE 803(21) and FRE 803(21).
23. MRE 404(b)(2) and FRE 404(b)(2).
24. MCR 2.308(C)(3)(a) and FR Civ P 32(d)(3)(A).