# Rethinking Depositions

## Outlines and Exhibits

By Steven Susser

A good deposition elicits admissions. And admissions win cases. Most lawsuits do not go to trial but many get to the deposition stage. Pound for pound, an effective deposition is probably the best way to improve your odds for success. For this reason, it deserves a healthy dose of respect.

This article addresses two related tools for a successful deposition in a commercial dispute: a good outline and effective use of exhibits. Both are critical and can lead the deponent to make admissions he or she otherwise would not make.

### Outline

A good deposition outline will guide but not distract you. You want your outline to provide a structure for your exam with bullet points to cover. You don't want it to become a crutch because you risk losing the spontaneity of the exchange and the meaning behind the answers you are eliciting.

The best deposition answers are those that flow naturally from the give-and-take you establish with your witness. This exchange should be a dialogue in which your question plays off—and takes advantage of—an earlier response. The question will be asked using words, tone, and body language, and you want to be sure to grasp the communication tools used in the return response. If you are reading a script, you lose the richness of the exchange.

This does not mean, however, that you waltz into a deposition without a plan. Far from it. You want to construct a blueprint for your deposition, charting out the topics to cover and the order in which you want them addressed. For example, if you want to put your deponent at ease—often the best tactic—you would do well to begin with easy, familiar questions about his or her background, saving the difficult questions for later. But if you wish to take the witness by surprise—perhaps to deflate an overly aggressive deponent—you might choose to jump straight to the most difficult questions. The point is that you should think more about the overall structure of the deposition topics than about the exact words you will use. The words will naturally fall into place around the structure.

Before you can arrive at a structure, you need to decide on the goals of your deposition; that is, what you can expect to get from the deponent. Be reasonable. If you expect capitulation, you are likely setting yourself up for failure. A more realistic expectation is the deponent's conceding that your client's position is reasonable or partially correct. Not perfect, but good—and likely good enough. Once you have an attainable goal, you can work backward to develop a structured outline that is likely to elicit statements to meet that goal.

Let's look at an example. Assume that one goal is to get the deponent to admit that your client was reasonable in expecting the defendant corporation to make payment to your client. Here's a suggestion for structuring your outline, with the outline cue words leading and the purpose of the question in square brackets:

Goal: Admit reasonable expectation of payment.

- Contract says X [summarize the relevant contract language]
- Plaintiff partial performance [get admission on partial performance]
- If full performance, payment [get admission that if full performance, payment due]
- No payment [conclude section by closing loop on nonperformance]

In this simple example, the examiner headlines his goal and lists some bullet points to elicit the desired answers. The bullet points provide convenient, nondistracting reminders to consult during the heat of the deposition. If successful, the examiner would have narrowed the issue in dispute to whether the performance was full or partial.

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We lawyers like using scripts because we tend to be conservative—and perfectionists—by nature, and we are afraid of forgetting a question. Address this head-on by preparing a separate checklist of topics (not verbatim questions) that you want to cover. Here are some sample items that might be on your checklist:

- Answer to interrogatory No. 5
- List of most knowledgeable people
- Financial statements
- Did he pay others for the same work?

Again, this is a different document from your outline and should be used differently. Consult this checklist before, not during, the deposition. Near the end of the deposition, go back to your checklist and mark those topics you have covered. Ask about the topics you did not address that are still relevant. This way, you can have your cake (the spontaneous outline) and eat it too (the comprehensive checklist).

## Exhibits

A deposition outline will often reference exhibits, which are an integral part of depositions in commercial cases. They have many purposes. For example, you can use an exhibit to refresh a dimmed memory, or you may need the witness to explain a document that is not clear.

An exhibit's most important function, however, is guiding. That is, you want to use an exhibit to induce an admission that helps your case. So choose documents that will direct the deponent to give an answer favorable to your case. Here's an example from a recent case: I wanted the deponent to admit that my client worked for the deponent as a consultant, whereas he wanted to claim that my client was only volunteering to help. We found a letter from the deponent to my client offering a bonus for work performed. This effectively shut down the deponent's attempt to distance my client.

When selecting deposition exhibits, start with what you can reasonably hope to get the deponent to acknowledge. Have these goals firmly in mind before you begin to look for exhibits, then work backward to find documents that direct the witness to a position as close as possible to your goals. Don't be greedy; close is good enough. That is, focus on documents that advance your theory of the case, even if they don't give you all—or even a majority—of what you want.

It is worth dwelling on the "half a loaf" concept. The temptation is strong to "go for the kill" in a deposition. Wouldn't it be great to force the deponent to concede infringement in the face of my withering examination? A nice daydream, but unlikely to occur. More likely to happen is the half-measure. For example, instead of getting the deponent to admit that your client performed the contract, you obtain an admission that your client partially performed. Here's another example: You want the deponent to admit that your client was the key contributor to a successful product, but you seek only an admission that your client was one of many important contributors.

Partial concessions have considerable value. First, they narrow the area of dispute—you are no longer fighting about full performance versus no performance, but only on the amount of performance. Second, a series of partial concessions can, in the aggregate, give the judge or jury the impression that your client actually did more than what your adversary is willing to concede. The *impression* from a series of concessions becomes as important as the actual words used.

Therefore, when it comes to choosing deposition exhibits, look for those that will give you a partial concession.

Let's put these two tools together in one example. Here's the earlier example outline with an exhibit reference:

- Contract says X
- Plaintiff partial performance
- **Look at Exhibit A [partial performance exhibit], which says…**
- If full performance, payment
- Here, at least partial performance
- But no payment

You now have merged three key elements of your deposition. First, you have a clear goal. Second, your outline directs questions designed to move you toward your goal. Finally, you have an exhibit that nudges the deponent in the direction you want him or her to go.

## Conclusion

By combining a clear goal with a structured outline and carefully selected exhibits, you can help your case by steering your deponent toward your desired result. You may not get a touchdown, but cases are won by yards. And you can, using these techniques, get closer to the end zone. ■

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