

SHOULD I TAKE A DEPOSITION?

Depositions are the most costly form of discovery. In a legal services practice in particular, there will often be economic pressures not to take a deposition and a relatively high need threshold for taking one. The determination whether or not to take a deposition will ordinarily require you to reflect on whether you can accomplish your primary result by other discovery means. Some of the needs and factors that weigh in favor of a deposition that are not easily accomplished by other means:

- I need to assess the demeanor of a witness while seeking information from them and/or in testing their response to different kinds of questions and examinations in anticipation of trial
- I want to make a wide ranging inquiry about where information is hidden and who has knowledge of things and I don't expect candid and comprehensive answers to written requests
- I need to closely question a witness about possible exhibits to be used at trial
- I think the nature of my inquiry is such that it will only be productive in an environment in which I can ask follow up questions and pursue unanticipated paths
- I need to preserve testimony of someone I fear won't be available at trial
- I don't think I risk tipping off an opponent to my strategy and rehearsing them for trial to an extent I wouldn't expect them to already be prepared or understand my strategy (don't underestimate the extent to which an opponent is likely to prepare and discern your strategy in any event – be realistic before deciding not to conduct a deposition because you don't want to reveal your strategy)
- Depositions are best when research, refreshing of recollection and inquiry is not reasonably expected to be necessary to answer the questions you want answered. If research is necessary, written discovery approaches are the better idea.
- Depositions are uniquely valuable when you want a witness' true impressions, thoughts and ideas and when candor matters. In other discovery formats responses will be filtered through and attorney.
- Depositions are uniquely apt if your need is to pin down a witness or party's story and have impeachment material if it differs at trial.

- Depositions are often helpful to understand what you can expect from an expert witness but note that in many jurisdictions your right to depose adverse experts is severely limited by rule. Note also that under Federal Rules and some state rules, experts are required to automatically disclose the nature and basis of their opinions by other means.

WHEN SHOULD I DEPOSE?

- When your case is document intensive, it is generally useful to get the documents first by requests for production so they can be reviewed and inquiries about them carefully constructed
- Depositions of adverse witnesses and parties involving disputed facts are often most effective early, before the witness or party gets grounded in your theory of the case and trained in how to respond to it.
- The countervailing consideration is whether the matter is sufficiently complex and its time frame long enough ago that without some level of preparation and familiarity with the nature of the dispute the witness or party will repeatedly respond that they don't know or can't recall and will have a genuine basis to do so. If that's the case they may offer a more productive deposition after they have been grounded in the case and had their recollection refreshed by the need to respond to preliminary written discovery.
- Note that local jurisdiction discovery rules may dictate some of your choices in this regard and should be very carefully reviewed and followed.
- Don't forget informal discovery – it is often the case that non-party witnesses can be questioned informally without opposing counsel's involvement and often by taking notes and having the witness sign them you can achieve the same witness control and impeachment potential, all at no major cost and without providing information to the opponents. Be careful however about rules in your jurisdiction regarding some types of non-party witnesses that may have some responsibilities or duties of loyalty to your opponent – like employees. Often you cannot approach them without notifying counsel. Cases on this vary widely and should be carefully consulted.
- Note that courts virtually never allow two depositions of the same witness or party so don't expect another crack at it when you know more about your case and theirs.

GETTING STARTED AND DEPOSITION FORMALITIES

Every attorney struggles with the “usual stipulations. The best approach is to avoid use of the entire idea, while understanding what opposing counsel is likely to mean if they say it.

In Massachusetts the usual stipulations are not always consistently described so whatever decisions are made as to stipulations should be explicit and not couched in terms of the usual stipulations at all. What is typically but not uniformly alluded to as the usual stipulations in Massachusetts are the following:

1. Reservation of all objections except as to form for trial
2. Deposition WILL be read and signed by the deponent but filing of the deposition is waived
3. Motions to strike unresponsive answers are preserved for trial
4. Stipulate as to the qualifications of the court reporter.

You should have written versions of the stipulations you seek to use with you and after an agreement is reached these should be provided to the court reporter in writing. The Court Reporter will typically have their own written version of what they consider the usual stipulations and you can ask to see this before you begin, while setting up the deposition or even at the time you retain them, and see if it is acceptable to you. If so, work from it or provide the reporter your own.

QUESTIONING TECHNIQUES:

Virtually everyone has words of wisdom about depositions. Write out your questions. Never write out your questions. Be friendly and open. Be stern and forceful. The bottom line is that everyone is right and no one is right. You should follow whatever technique will result in an effective deposition based on what you hope to accomplish through the deposition. Determine your objectives first, then determine your approach based on your objectives. Some general observations:

A deposition is most effective if you can carefully listen to the deponent's answers and ask appropriate follow up questions. Some people find they can do this effectively asking question from a written list. For other people the use of written questions discourages them from asking appropriate follow up questions and being focused appropriately on the information that is being elicited when a question is asked as opposed to the question itself. Above all else listen to and consider every answer? Is it appropriately responsive to the question? Does it lead to other avenues of inquiry? Is it inconsistent with an earlier answer? Is it impeachable based on what you know already and if so should you inquire concerning the inconsistency?. Does it make sense? Will it be unclear in a written transcript?

For some people having an outline of areas of inquiry helps structure the questioning without discouraging unplanned inquiries. For others, having an outline focused on what you hope to learn as opposed to what you hope to ask is the more effective means to focus the questioner on the product of the deposition and produce an effective result. In any event, if you choose

not to have a set of written questions (probably the majority view about how to proceed) there are almost certainly particular areas of inquiry where, in order not to tip the witness off to where you are going or signal the “correct” answer, you will need and want to write specific questions and order them to avoid these results

Whether you want your deponent to be at ease or uncomfortable is also a strategic choice and your answer to the question “why am I conducting this deposition” informs the nature of your questioning. While there are no easy rules, it may be more likely that you will seek a comfortable deponent if you are seeking to learn new information and aspiring to create a willingness to be expansive. In a deposition focused this way, there is considerable value in structuring early question to elicit agreement. A person who finds that they can say yes to you and be comfortable doing it is far likelier to continue to provide information openly and is also more likely to agree about things that may not be in their best interest. Often the desire to quickly establish opportunities for the deponent to agree with you will lead you to write out at least the preliminary questions you intend to ask verbatim to establish this relationship.

In other instances a deposition may be designed to in part model for an opponent the unpleasantness they are likely to suffer if this case continues. If that is in part the purpose of the deposition then obviously sweetness and light and mutual understanding is not your modus operandi. Common sense, grounded in a solid sense of what you want to accomplish, is the best guide for technique in any deposition.

Always listen and assess whether you have gotten what you were seeking from any interchange with a witness. A very common mistake in early deposition practice is to ask a question, have the opposing counsel object or otherwise interrupt, have the deponent fail to answer the question because interrupted by the objection and then, after arguing over the objection, forgetting to ask the question again. Always focus on the product not the process.

If you are seeking a coherent story and are trying to learn information from the deponent, it is generally best to begin by asking open ended question and organize them in a way that is logical to the deponent. This may be chronologically or it may follow another pattern but the pattern should be obvious and consistent. As always, assess the answers and gradually narrow your question to hone in on areas of particular interest not fully explained in the open ended responses.

On the other hand, if you are looking for damaging admissions, you may well want to avoid a coherent questioning pattern that leads logically from one place to the other and by doing so allows the deponent to get there before you and construct an artful and less than candid response. One technique used by some is to arrange deposition questions or areas of inquiry on index cards or separate sheets of paper with a few related questions or reference to a single area of inquiry on each. These can then be rearranged depending on the effect you seek to establish to whatever level of coherence or randomness you desire as the deposition proceeds. Less radically, it is useful in these contexts to construct your questions carefully within each topic area to avoid providing the deponent signals about where you are going before you ask

the question that is most significant. Avoid “working up” to the meat of the topic. If the important admission is a logical one rather than an admission of fact (“you weren’t paying attention to the light were you?”) consider in a deposition context not asking for the admission at all. Rather ask discretely for agreement to the facts that lead to the inevitable conclusion (for the judge or jury) (“You were placing a call on your cell phone at the time?”). Save the other for trial. There is little point ordinarily to rehearsing an adverse witness or party.

Ask staff in your office to provide you with deposition transcripts from prior cases. It doesn’t matter what the case is about or how the deponent was or for what purpose they were deposed. Just read as many deposition transcripts as you can to get a sense of what a deposition ends up looking like on paper (the only way in which it will ever likely be used formally). There are a number of surprising observations you will probably make when you read transcripts in this way:

- What seems like just thoughtful persistent questioning in the present of the deposition can read like horrific badgering on paper. It is most often the case that being unfailingly friendly and polite both to the deponent and to counsel presents a better product for use in court later.
- It is often the case that when an attorney secures a valuable admission of some sort in a deposition it feels so good they cannot resist the temptation to keep asking the same question over and over again and coming back to it later in the deposition. What results is a transcript with many mutually exclusive answers to the same important question. If you enter one of those answers at trial, your opponent will ordinarily be allowed to enter all the alternatives. The power of and impeachment potential of the admission is largely lost. If you are happy with the first answer to an important question, let it stand.
- Remember that the record of the deposition is a written one. If something transpired that is non-verbal it will not exist in the record unless you make note of it or work to convert it into a verbal exchange. Coaching by counsel, paper passing, and the like are typically worth noting both to discourage the behavior and to have the transcript recognize that the following artful answer wasn’t the deponent’s alone.
- Uncomfortable silences, unlike badgering, are invisible on the page. They are represented by a carriage return and no more. Thus, silence - waiting a deponent out - can be an effective control technique without producing an ugly transcript. Its often useful when a deponent you feel is being evasive says, I’m not sure, I can’t recall right now, to respond, well we have all the time in the world, Take a few moments and think about it.
- In an information gathering deposition part of the information that is worth collecting is almost always, who else knows relevant information, where is it written down, who has relevant documents – use the opportunity to find out not just what the deponent knows but also what they know about who else knows and where any information is recorded and kept.

DEALING WITH OPPOSING COUNSEL

One of the major challenges in deposition practice involves the interactions with opposing counsel and/or the deponent in relation to their counsel. Some counsel will approach defense of depositions passively, presenting little in the way of problems or resistance. Others, outside of an externally regulated environment like the courtroom, will consider it their role and their right to attempt to control or disrupt the proceeding. Frustratingly, these counsel really can cause significant disruption and interfere with the effectiveness of the deposition and its value. There is a fine line that deposing counsel must walk in these situations. On the one hand, it is not effective to simply let it happen. On the other, engaging in a test of wills with the opposing counsel is rarely effective. Some possible strategies that can be attempted and decisions that this situation calls for are listed below:

Begin by modeling openness and cooperation both to counsel and to the witness or party. Obstreperous counsel are sometimes motivated by a desire to show their client that they are earning their pay, which they think the client interprets, or they interpret themselves, as involving being dramatically adversarial and oppositional. If you can put the witness or party at ease and comfortable with you, the oppositional tactics may feel less appropriate to opposing counsel and often they will be muted.

If opposing counsel instructs their client not to answer one or more questions or objects incessantly.

- The fundamental rule is that counsel can appropriately instruct a client not to answer based only on privilege. That's easy to say, however, and far more difficult to translate into an effective action plan for the deposing counsel. Some suggestions and alternatives:
- All of the following observations are premised on the reality that your ultimate alternative, if all else fails, is to take the discovery dispute to the court for a ruling on a motion to compel. While there are exceptions to every rule, it's often true that courts strongly disfavor being injected into discovery disputes in this way and are loath to reward the party that drags them in, even when that party is right on the merits. Thus, you may wish to set a very high threshold for exercising the nuclear option here – stopping the deposition and taking the matter to the judge. There are certainly times when this is appropriate but it is best to vigorously exhaust your alternatives first and, if you need to go forward to the judge, construct a record of your efforts that is particularly compelling. Since, from the Judge's perspective, you will be the one punishing her by dragging her into the dispute and creating work, the judge's first reaction is often to want to punish you, unless you can present them with a record that successfully redirects their ire to the other side by virtue of their word and deed, and yours, as recorded in the transcript.
- With the first instance of this behavior – First make sure that the instruction is given by counsel to the witness on the record, then consider asking politely for the basis of the

objection or concern, but in the context of expressing politely but forcefully to counsel your understanding that aside from questions of privilege counsel ordinarily has no right to instruct not to answer. (“While I believe the law is well settled that in the absence of a claim of privilege there is no real basis for any counsel to instruct their client not to answer a question in a deposition such as this, I’d be happy to hear the nature of your concern and see if I can be helpful in alleviating it.” What is the basis of your objection?”). Do so on the record. It may well be legitimate, at least to the extent that you can change the nature of the question or your approach to alleviate the concern without harming your ability to proceed effectively.

- You cannot do this effectively if the witness is repeatedly instructed not to answer. If that becomes the case, you will want to be sure that each subsequent instructions not to answer is on the record but you will quickly want to abandon an accommodation for each instruction – you will need to say that in your view you have been as accommodating as you can but that these repeated instructions are simply improper and are prolonging the deposition unnecessarily and that if they continue they will almost certainly require the deposition to be temporarily terminated and require the deponent to return for at least an additional day that would not otherwise be necessary. You should also make clear that you will seek sanctions and costs if that becomes necessary. You can then invite the attorney to take a break and discuss this with his client with the expectation that either 1) the attorney will come back to the table agreeing not to issue such instructions on any basis other than privilege or 2) the deposition will be temporarily terminated while you seek an order requiring answers as well as appropriate sanctions.
- If counsel won’t cooperate in this effort to reach common ground or, after the resulting colloquy, you have no common ground to reach, you are put to the choice of seeking to compel or not, and to the further choice of when and how to do so. Your choices are: 1) stop the deposition and seek an immediate judicial determination on an expedited basis, 2) stop the deposition and make a motion to compel in the regular course, or 3) complete the deposition, note explicitly on the record that the deposition is not completed and will be reopened after seeking appropriate orders from the court. The first option is probably only reasonable if you believe that time away from the deposition to consider or manufacture an answer will fundamentally alter the value of the deposition and centrally harm your case.
- In cases in which both sides expect to conduct depositions it is frequently useful to talk about the ground rules for all depositions more generally and in these conversation you can often come to agreements about the basic etiquette in advance as a mutual agreement covering all depositions. These ground rules often include: no speaking objection other than brief grounds and where objections to other than form are reserved when counsel has a form objection they should simply state that they object with an agreement that this will be taken as an objection to form that can be carried forward to trial. The deposing counsel is then free to inquire about the particulars but they will otherwise not be offered; counsel will not instruct witnesses not to answer except as to privilege, agreement as to the

stipulations for all depositions, agreement not to pass or communicate information to witnesses either orally or in writing during the course of any deposition.

- Even in an isolated deposition it is often worth providing, as part of the opening instructions, your views as to how the deposition is to be conducted, identifying these issues and controlling their discussion. To this end you might say –“this deposition is being conducted under a stipulation that objections as to anything but form of questions is preserved for trial. Under these rules, your attorney may occasionally object to a question. When that happens I may rephrase the question, or I may decide not to. In either event, despite the objection, it is your obligation to answer the question and you will be expected to do so.”
- When counsel objects incessantly, with speaking objections (they carry on about the grounds for their objection and pontificate about the inappropriateness of the question), you have a series of choices:
 - Say nothing, continue to stare at the deponent expectantly, communicating your continued expectation that they will answer – essentially ignoring the objection and the person making it – useful at times if the attorney is particularly verbose and you want to negatively condition them
 - Note the objection and then restate the question verbatim or ask the court reporter to restate it verbatim from the record.
 - Rephrase the question to meet the objection particularly if it is as to form – it’s tempting not to do this, because it seems like you have given in, but if the question was improper as to form, it’s better to fix the problem now and thank the opposing attorney for the opportunity. Whether you rephrase under these circumstances is a bit about whether you feel you are engaged in a test of wills that makes this concession significant, If not and the question was bad, ordinarily rephrase, if to do so would be an important strategic problem based on the relationships developing during the deposition, don’t rephrase but consider coming back to the topic a bit later with a properly framed question.
 - Make a merit based response to the objection – this is rarely useful unless you consider the exchange so important that you may well take the matter before the court to compel if you are not allowed to get the information you want. In this instance you do want to show the court that you made every effort to politely convince the attorney not to continue with the objection.

IN SUM...

Be skeptical about offers of unequivocal rules about how to conduct a deposition. The proper approach will ordinarily be fact bound and case specific. One hard and fast rule that always applies: LISTEN. A deposition is about the answers you receive, not the questions you ask. Don't be seduced by your questions into ignoring the answers. Finally, forget magic words. If someone says "usual stipulations" or some other nonsense like it's a secret handshake, just ask what they mean and deal with it on the merits. And have fun.

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