

QUESTIONING TECHNIQUES
Getting the Most Out of Your Deponent
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I. Introduction

When considering the techniques of questioning a deponent, you must consider first the purpose of taking the deposition. We take discovery depositions to mainly gather information. When gathering information, we:

Find out what we don't know

Confirm what we do know

Test factual and legal theories

We do all of this to prepare for the trial, which is the end result of our crusade in litigation. Without knowing what the deponent will say, you cannot effectively cross examine him on the stand.

In some circumstances, we will also take depositions to preserve testimony (ie, a witness we know will be moving out of state, or a doctor we know doesn't want to testify at the trial for convenience purposes).

In other circumstances, we will take depositions merely to get an idea of what type of witness the defendant will make. I often will take a short deposition of a defendant in an admitted liability case, just so I can see how he will stack up against my client. This is helpful when you get to mediation because if the defendant does poorly, you can point that out to help facilitate settlement.

II. Establishing a Rapport with the Witness

Remember the old adage; you will attract more flies with sugar than you will with vinegar!

In any discovery deposition, your main objective is to find out as much as you can (the good, the bad and the ugly) so you can be prepared for trial. You need to probe the "bad" and the "ugly" as deeply as the "good" so you are not caught by surprise at trial.

In order to get the good, the bad and the ugly, you have to adopt an attitude or demeanor that will encourage a witness to talk. It is always best to adopt an open and friendly style.

Be interested in what they have to say

Maintain eye contact; not copious notes

Nod your head along with them to encourage them to keep talking

Show the witness you understand and sympathize with what he is saying

Different witnesses may demand different styles in how they are handled:

A non party witness – be more assertive and official; they have no stake in the matter and generally want to just tell the truth.

A party witness – friendly and warm will encourage trust; they will have been thoroughly prepared by their attorney to be distrustful of you and you need to break that perception immediately.

Remember: You want to strive for a conversational exchange.

<u>Open Up</u>	<u>Clam Up</u>
Warm	Mean
Friendly	Rude
Encouraging	Abrupt
Patient	Disbelieving
Believing	Condescending

III. Putting the witness at ease.

The first opportunity you will have to really put the witness at ease is during the preliminary instructions. My standard remarks go something like this:

“Good morning, Ms. Jones. My name is Beth Leone and I’m an attorney practicing law in Dunn, North Carolina. I represent John Dolittle in this lawsuit that he has filed against you which stems from this auto accident you were involved in on May 7, 2000. As I’m sure your attorney has told you, I am here to just ask you a few questions surrounding the accident. My intent is to make you as comfortable as possible during our conversation today. And although we have a court reporter here taking down everything we say, and you have been put under oath, we are also informal here in that you can take a break any time you want, or you can get up and stretch, whatever you like. You just let me know what I can do to make you comfortable and we’ll do it.”

By these remarks, I am letting the person know that I am considerate of their feelings and I am not here to be the bad guy.

Next, you will want to go over some standard ground rules but keeping in mind, that you still want to foster an atmosphere of ease and comfort. I next go through the rules but pose them as if they are purely for the deponent's benefit, and not mine.

I usually first ask if the person has ever been deposed before. Usually, they have not. So I will next say:

“If I ask you a question that confuses you, which I’m bound to do, please let me know and I’ll rephrase it so I can make sure you understand exactly what I’m trying to find out.”

Compare that to: “If you don’t understand a question, you need to tell me so. If you answer the question, I’ll assume you understand it and you will be bound by your answer”.

Because many witnesses get into the easy habit of answering non-verbally, it’s always good to remind them at the start that everything must be verbal. I’ll remind them:

“Sandy down here is a court reporter. Everything we say, she speaks into that mask and then later will listen to us and transcribe all of my questions and all of your answers. Therefore, it’s important that she can hear what we say. She can’t take it down very well if you shake your head no, or nod your head yes. For example, I often have the bad habit of saying, uh-huh, and uh-uh, and I’m sure Sandy would like to strangle me sometimes when I do that. So, I will try to help you out if I catch you lapsing into some of those bad habits that I have”.

Remember: In the deposition, if the deponent does lapse into those bad habits, of nodding their head in a non-verbal response, you need to clarify the answer for the record. When they nod their head up and down for a “yes”, you need to ask, “Is that a yes?” Usually after that happens a few times, they will get into the proper habit. If you don’t clear these issues up during the deposition, it can be murder trying to read the transcript 3 months later when you are getting ready for trial.

Some other preliminary instructions you will want to incorporate:

1. If you need to talk to your attorney at any time, feel free to ask to take a break for that
2. Have you reviewed anything before today
3. Clarification of a prior answer is okay at any time, or if you remember something else during the course of the deposition, you just pipe up and let me know

There are some preliminary instructions that I think can put a witness off, and if asked, may destroy any ease or trust you have started to build up to this point. Some things I don't recommend asking:

1. You understand you are under oath
2. You understand that what you say will be typed up, and anything you say here can be used against you at trial
3. Are you on medications or under the influence of alcohol today
(Note: This can be an important question; however, I usually cover this issue in a different way. At the end of my deposition, I ask if they have understood all my questions and is there anything we need to clear up before we go off the record. This is less threatening).

IV. Demeanor/ Strike the Bond

We're all common folk, so use common language. Don't get stuck talking legalese. It makes you look as if you think you are better than the other person. Talk on the witness' level.

If talking to a doctor, be professional.

If talking to high school student, go back to that time in your life.

Strike a bond with the witness if you can:

I once took the deposition of the young man that hit and killed my client. He was from my hometown of Jacksonville. I found out in my investigation and before his deposition that he had gone to my old high school with my brother several years after I graduated. So, during the background questions, I purposely asked questions to strike a bond. The exchange was very short but went something like this:

LEONE: Where did you grow up?

ELLIS: Jacksonville, NC.

LEONE: No kidding. So did I. You didn't by any chance go to Southwest High School, did you?

ELLIS: I sure did.

LEONE: Cool. That's where I went. My brother too. Do you know Tony Leone?

ELLIS: Yeah, he was a grade behind me I think.

LEONE: What a small world, huh? Go Stallions!

ELLIS: (laugh) Yeah, go Stallions!

This small exchange and bond I developed set the tone for the rest of the deposition. He was unreserved in his answers to me. I continued a very warm approach with him, especially because he was quite traumatized over killing my client. By contrast, the attorney for the UIM carrier took an aggressive approach in his questioning, and you could see a literal change come over him. He clammed up and it was like pulling teeth to get anything from him during those questions.

V. Background Information

Always start off depositions with simple background questions. A deponent is often nervous and doesn't know what to expect at the start. By asking questions that are easy to answer, you will help to put the person at ease.

You may be thinking, "why do I want to make it easy on this person; they injured my client?" Remember: a person that you make comfortable will open up; someone who is tense will clam up.

A short outline example of questions you want to ask:

Name, where live
Married/ kids/ names
Work

You really may not care, but ask those questions: What are your kids names?
How old are they? Do you like your job?

I specifically do not ask for date of birth or social security number. I already have this information from their answers to interrogatories. Many people get put off and feel it is an invasion of their privacy to give out their social security number.

Then I get into the important background questions.

Where live for past 10 years

Where work for past 10 years

You ask questions like this so you can go back to check into their criminal background for impeachment purposes.

At this point, I do not ask for prior lawsuits, criminal record, driving history. Again, these are personal questions that are asked obviously to try to discredit the person. They know why you are asking these questions and you don't want to breach any trust you've developed at this point. Save it until later.

VI. Collection of Information

Again, the purpose of your deposition is to learn as much as possible so you don't get any surprises at trial. Your purpose is NOT to show how much you know about the case. Although you need to be prepared and know all of the facts before going in, you should treat the deposition as if this is the first time you are hearing what happened. You want to encourage the witness to be open and forthcoming. You get that with the way you act and handle the person as discussed above. However, you still need to ask the questions right to elicit as much information as possible.

Funneling Technique:

You are a reporter covering an exciting news story that just surfaced. You really don't know the details, just a general idea of what is going on. Your job, should you choose to accept, is to get all of the details so you can flash your smile as the first to bring this breaking news. You, of course, are going to ask:

Who, what, where, when, why

How, describe, explain, tell me about

Then you are going to pin down the details that make the story exciting.

This is how you do it.

Who, what, where, when, why

How, describe, explain, tell me about

Follow up questions

What do you mean? Give me details

Exhaust

What else? Is that it? Always? Never?

Fill in gaps

What about ____? Did you?
Was there? Have you? Is it?

Recap/Lock Testimony

As I understand it? Is that right?
Nothing more?

Make Statements

Leading Questions

Theory Test

Agree with me that
Do not dispute
It's true that
You admit that

Outline versus Detailed Questions:

If you go into a deposition with detailed questions, you will become so enraptured with your own questions, chances are you will not hear what the deponent is saying when he answers your questions.

It is recommended that you go with an outline form. You can have detailed topics that you wish to talk about but don't write out your questions. As you get more comfortable with taking depositions, your outlines will become more sparse as you will actually develop habit in the types of questions and topics you cover.

Attached to this manuscript is a suggested outline for deposing defendants in automobile accident cases.

When a Witness says: That's all I can remember at this time.

When I prepare my clients for depositions, I often instruct them to be careful when asked all inclusive questions. For example, when they are asked, "Tell me all the ways in which this accident has affected your life"? I tell them to finish their answer with, "I'm sure there are other things I'm not remembering right now, but that's all I can remember at this time."

I do this to leave the door open so when my client does remember other things as we are preparing for trial, he can testify to them without getting impeached.

This same scenario will happen when you are deposing an adverse party. You may ask, “Tell me all the witnesses that were at the scene of the accident?” You may get an answer naming out some witnesses, and when you exhaust the topic, they will say, “That’s all I can remember right now”.

You need to exhaust further. Do not give them an opportunity to come back at trial with the surprise witness that will kill your case. Set up your impeachment. Ask questions such as:

- Did you make any notes immediately after the accident?
- Did you write down any of the witnesses names?
- Have you talk to your husband about this accident? Co workers? Children?
- Any documents that you can check that might refresh your memory right now?
- Anything else that might help you remember?

Pinning Down

Sometimes we will ask questions to which the Defendant is uncomfortable taking a stab at answering. You may ask:

How fast were you going at the time of impact?

How far away were you when you first saw my client?

Often, witnesses will answer “I don’t know”, or “I’d hate to speculate”. You can sometimes pin them down further with a few more questions.

LEONE: How much time elapsed from the time you first saw my client, until the time of impact?

WITNESS: I don’t know; I’d hate to speculate on that.

LEONE: Well, was it a minute?

WITNESS: Oh, no, not that long.

LEONE: Less than 30 seconds?

WITNESS: Yes, less than thirty seconds.

LEONE: Was it more than 5 seconds?

WITNESS: No, I believe it was less than 5 seconds?

LEONE: Would it be less than 3 seconds?

WITNESS: I believe it would be somewhere between 3 and 5 seconds.

VII. Theory Testing

You must have a factual and legal theory that harmonize with each other to win your case. You need to consider what you are trying to prove and make sure you ask those questions needed to do so. You must also ask questions that go to your opponent's factual and legal theory and tie those issues down.

Ask: What do I need to prove the elements of my claim and what do I need to ask to refute the opponent's claim?

EXAMPLE: Low impact cases.

The opponent's theory in the low impact scenario is that there was not enough force in the collision to have injured your client. You have to show injury to prove your case and this will be done mainly through your client's testimony of how the impact felt and your treating physicians when discussing causation. However, you can also tie your theory down, or at least expose the Defendant's theory by asking "theory testing" questions to the Defendant.

What happened to your body inside the car?

When you looked at the damage, what was the distance between the front of your bumper, and the rear of my client's bumper?

Did the seatbelt catch you?

Anything on the inside of your car fly about upon impact?

Were you injured? Sore?

Did you brace yourself for impact?

Which way were you looking upon impact?

Any passengers in your car that were injured?

EXAMPLE: Contributory Negligence.

When I have a contributory negligence claim asserted against my client, I will often ask the Defendant directly:

“You’ve claimed contributory negligence in your Answer to my Complaint. Tell me the ways in which you believe my client was negligent in this accident?”

This can catch a deponent off guard because often they will not even know what that means, or that their attorney has pled that in his Answer.

VIII. Impeachment

Regarding impeachment at a deposition, the key is to set up impeachment, not to execute it. Save your impeachment for trial, no matter how compelling the urge to shock everyone with the great lie you just caught the witness in. You need to save the surprise at trial because if you impeach at a deposition, you give them all the opportunity in the world to devise a perfect response and demeanor to handle the impeachment at trial.

One way to set up impeachment is to ask some of the same questions that are in your interrogatories. Get specific on times, distances, speeds in each. Show the difference in the answers at trial.

I once tried an automobile accident case where the defense attorney gave me the Defendant’s recorded statement that was done by the insurance adjuster. I asked the same questions during the deposition of the Defendant that were in my Interrogatories and the recorded statement. Not surprisingly, the Defendant answered many of the same questions in three different ways, blatantly changing questions regarding speeds and distances. At the deposition, it was difficult not to blast her with the inconsistencies but they were better served shown at trial. In fact, I called the Defendant as a witness during my case in chief, which added extra value as she was totally unprepared for my cross as an adverse witness.

After going through and impeaching her on all of the changed answers, the last question of my cross was to read back to her the final question in her recorded statement. It went like this:

ADJUSTER: Have all of the answers that you have given me here today been true?

DEFENDANT: Yes, all of my answers have been true and honest and if they haven’t, you can hold me liable.

Of course, the jury held her liable!

There are sometimes you may want to impeach at a deposition if it will provoke settlement or dissuade an expert from testifying.

If a witness gives you an answer and you know the impeachment value is such that it will brand the witness as a liar or fraud, you may want to impeach during the deposition to show the other side their witness is a phony. This can be particularly true in your discovery deposition of the Defendant's expert witness.

See attached portion of transcript of expert witness with impeachment during deposition.

IX. Documents

You can use documents in depositions in a variety of ways.

Want to authenticate something for later use

Is this your handwriting?

Is this your signature?

What does this say?

Accurateness of photographs

This can be important where damage to vehicles is in question. Ask the witness if the photograph portrays a fair and accurate description of the damage involved.

Diagrams/ depictions

Sometimes it is difficult to determine exactly how an accident happened, especially if the accident report is unclear. It is often useful to have the deponent draw the scene on a piece of paper, and have them mark areas significant for impact, resting point, etc.

Accident report/ agreement with portrayal

When using documents in a deposition, always have it marked and read on the record what exactly you are handing to the deponent. Example: "I'm handing to you what's been marked as Plaintiff's Deposition Exhibit #1".

Always remember that you need to vividly describe what you are doing when handling documents so you can follow along later when reading the transcript. Nothing is more frustrating then going back through a transcript months after the deposition and trying to determine what you were actually looking at.

Also, if you ever have a deponent draw an item, don't forget to have it marked as an exhibit when done and offer it in. Make sure you have the witness' testimony match up to what he is drawing on the diagram. For example, he draws a rectangle and says this was my car at the time of impact. Have him, on the record, mark that rectangle with an "A" and then say, "Let the record reflect that the rectangle marked "A" is where the Defendant's car was at the time of impact".

X. Listening

Most important piece of advice you can take with you in any deposition you do, is to Listen, Listen, Listen. When you read a book and have the TV on in the background, you are hearing the words and voices from the TV, but you are not listening to what is being said. You are not processing what is being said because you are concentrating on your book.

When you are taking notes, or flipping through your file as the witness is talking, you are not fully processing what is being said. Keep eye contact, nod your head in encouragement with what they are saying to encourage more talking, and don't write those detailed notes. You will not exhaust your topics and you will forget to ask important follow up questions to funnel information if you are busy writing notes; you must concentrate on what the witness is saying and formulating follow up questions to what they are saying.

Remember: You have a note taker for you sitting in the deposition; she's called a court reporter. Let her take the notes for you. If a witness gives a long and involved answer, maintain your eye contact and listen to what he says. Then turn to the court reporter and ask her to read the answer back to you; take your notes then.

Treat your deposition as if it was a conversation between two people talking about a topic of mutual interest. You're at a bus stop and strike up a conversation with someone and you are interested in their story; it prompts you to ask more questions and a full out discussion ensues. That's how you want to be in a deposition.

XI. Summary

You will gain much from a deposition where you are an avid listener. Handle your witness with professionalism, yet the warm and friendly attorney will encourage much more responsiveness from the deponent. There are times when you will need to be forceful with a witness, but let the witness dictate those times by their unwillingness to be forthcoming or truthful.