CHAPTER 13

Basic Deposition Techniques

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Angus asked a one word question, like he does in emergencies. "Indicted?" he said.

"No," said Andy.

"Then it could be a lot worse," said Angus. "But anyway—what's wrong?"

"It's a deposition," said Andy. "I've got to take one tomorrow, and I've never done it before."

"You're not serious," Angus said. "Four years with Windstrom and Crusher and you've never taken a deposition?"

"Right," said Andy. "And that's part of the problem. I'm not with Windstrom and Crusher any more. They let more than half of my class go in the last three months, and I was one of them."

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"Anyway," said Andy, "I'm on my own. I've got a construction case, and I've got to take this deposition tomorrow. There's no way out."

"There's always a way out," said Flash Magruder. "Get a postponement. I do it all the time."

"I've had three postponements already," said Andy. "That's part of the problem, too. I know I should have taken a deposition course or something, but I just haven't had the time—or the money."

"Hear that," said Regis McCormick.

"So what I need," said Andy, "is a few guidelines. Not the sophisticated tactics. Just enough basic ideas to keep me from looking like a complete doofus at 9:00 o'clock tomorrow morning."

"I can give you a couple of ideas," Angus said, "but there's a serious limitation."

"Yes?" said Andy.

"I don't give anti-doofus guarantees."

Andy got out a legal pad and wrote "No Anti-Doofus Guarantees" across the top of the page. Then he started taking notes.

Getting Ready

There are three things you must do before you take any deposition:

1. Study the pleadings and all the documents. Take notes.
2. Know what kind of deposition you are going to take.
3. Write an outline of your deposition—do not write out your questions.

First, a deposition is just part of a good discovery plan—and is usually not the right place to begin trial preparation. Instead, start with written interrogatories to get names, dates, places, production runs, serial numbers—the kind of "hard data" they have to give you without argument. Then use document requests to get all the basic written information. When you get ready for a deposition, the first you thing you do is study the pleadings, the answers to interrogatories, and all of the documents.

Second, you've got to know what kind of deposition you are going to take, because what you want to accomplish has everything to do with how you go about it.

The discovery deposition is the most common kind, where you want to learn as much as possible about the case and find out what this witness has to say.

An evidence deposition is completely different. Then you are not discovering anything, but actually presenting part of your case before trial, typically with your own witness.

But that isn't all. Taking a settlement deposition is sort of like showing your opponent a settlement file. You use it to turn over just enough of your cards—say with a short, tough cross-examination of the witness—to make the other side think about whether they really want to try this case.

Some people use the deposition of the other side's expert to test their own theory of the case. The problem with that is, the cost is high. It gives the opponent a lot of information about your basic trial strategy and you may not get much in return.

Whatever kind of deposition you take, if you have your object in mind before you start, you will literally know what you are doing, even if you are not very practiced at it.

Third, make an outline of your deposition, so you will cover all of the major points you need to deal with.

But don't write out your questions. If you have a script, it will dominate everything you do. You will look at it instead of the witness. You will concentrate on your questions instead of the witness's answers. Most importantly, sticking to the script will keep you from asking the follow-up questions you need to ask because the witness doesn't understand, is reticent—or is actually dodging your questions.

The Usual Stipulations

The chances are the other lawyer—or even the court reporter—will ask, "The usual stipulations?" And unlike the law of contracts, failure to say "no" will probably be taken as consent.

The problem is, no one really knows what the "usual stipulations" are. The one stipulation that is almost always included is waiving the reading and signing of the deposition by the witness—which is something you probably don't want to do.

Why not? Isn't it just a reasonable accommodation of the witness and the lawyer on the other side?

Nope. While waiving the reading and signing usually means that the deposition may still technically be used for all the same purposes that it might have been if it had been read and signed, in real life it doesn't always work very smoothly.

If the witness hasn't read and signed the deposition, then he is left with a series of convenient weasels every time you try to hold him to his testimony.

"That's not what I said. He got it all wrong."

"I'm sorry, if I had known that's what they had written down, I sure would have fixed it."

"What is it with you lawyers? Why wasn't I shown this before today? Did you rascals just make this whole thing up?"

The result is, lawyers who actually try cases usually don't want to waive reading and signing.

Boilerplate

Most depositions start with a series of statements by the lawyer taking the deposition that sound like standard boilerplate. And

that's all they are unless you put them in question form and make sure you get an audible answer to every one. First, this turns the boilerplate into a series of cages that hold the witness's weasels if the case gets to trial. Second, it gets the witness into the Pavlovian mode of hearing and answering instead of hearing and challenging:

Q: You understand you are here to give your formal testimony concerning an accident that happened on April 2, 2004, in Shorewood, Wisconsin?
A: Yes.
Q: You know you are under oath, that you've sworn to tell the truth?
A: Yes.
Q: I am going to ask you a series of questions. If you do not understand any question, will you tell me?
A: Yes.
Q: And if you don't hear any part of a question, will you tell me?
A: Yes.
Q: So if you don't tell me otherwise, we will assume that you've heard and understood the question?
A: Yes.
Q: If you need to take a break to get a cup of coffee, or go to the rest-room, or if you just get tired, will you tell me?
A: Yes.
Q: Then we will take a recess.
A: Yes.
Q: There is one exception to that. There will be no break or recess between a question and your answer. Do you understand?
A: Yes.

You may also want to have a series about how the witness can correct mistakes, but a lot of lawyers like to save that for the end.

Get the Story

Taking a deposition is not just collecting a series of facts—which is what you get with short, tight, closed-end questions. Especially if you are taking a discovery deposition, you want full,

complete answers. Later on you may want to nail a witness down with some short, "yes or no" questions. But right now you want the witness to talk. You want the whole story.

How do you get that?

There are two main techniques that work hand in hand—headlines and open-ended questions.

Use headlines to announce the topic, like this:

Q: Ms. Quincy, did you ever meet with Mr. Mark Ralston of the Rapid Transit Authority?

A: Yes, once.

Q: I'd like to talk about that meeting.

Notice what's happened. In a handful of words we have a nice, broad topic. Then come the open-ended questions—questions that ask who, where, what, when, how, and why. Pay special attention to why questions. What are dangerous questions on cross-examination in the middle of trial are often exactly what you want in depositions.

And don't stop there. After you're finished with who, where, what, when, how, and why, start asking for help in understanding what happened. You want the witness's attitude, her bias, her point of view. So ask for explanations, for reactions, for what the witness thought about the situation, for her feelings, what did she want, what did she actually get?

Are you concerned that some of these questions might ask for information that wouldn't be admissible in evidence?

So what?

The test for a proper question in a deposition is whether it is calculated to *lead* to admissible evidence, and all of these questions pass the test.

Follow-up Questions

Everybody conceals something. Everybody. So count on the witness doing it in your deposition. There are three qualities you must develop to take good depositions. Just as in informal investigation, you've got to be:

1. Curious,
2. Suspicious, and have a
3. Sense of Context.

Curiosity heads the list for a good reason. If you're truly curious, you want to know all kinds of things. You read voraciously.

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