Focusing the Deposition

Most of us learned how to take depositions by watching other lawyers do it. The problem is, we were usually watching lawyers who did not have a clear plan of what they wanted to accomplish or how to go about doing it.

The result is that thousands of lawyers mimic the mediocrity of their mentors. So what ought to be interesting episodes of witness examination often turn into endless days (and sometimes weeks) of unstructured interrogation.

Most depositions lack focus. And if you try telling that to a lawyer who is taking one, you are likely to get the standard response—"this is discovery"—as if that were an excuse for a rambling, disjointed examination that seems to take forever.

But there are some simple principles that make the whole business more productive and (believe it or not) more fun.

- Know as many of the pertinent facts as you can before you take the deposition.

  Maybe it would have been better if the drafters of the Federal Rules of Civil Procedure had never said that depositions were part of discovery in the first place, because the truth is, a deposition is a poor way to learn what a case is all about. You will save a lot of time, money, and pain if you learn as much as you can through formal discovery before you start putting witnesses under oath.

- Go to the scene. Study the pictures. Read the correspondence. Talk to your clients. Do everything you can to get educated before you start formal discovery.

  When you do start, do not begin with depositions unless you must. Start with written interrogatories to get names, addresses, telephone numbers, product names, and production dates—"hard" data—information no one can argue about. This is the kind of information that will help you decide which witnesses you want to depose and which documents you want to request.

  But don't use interrogatories as a substitute for depositions. When you use interrogatories to ask about conversations or other "soft" information, you are asking for a discovery war that will add months or years to the life of the case.
- Next, get the documents. Study them to sharpen your understanding of the case and to decide which witnesses you are going to depose and what you are going to ask them.
- Learn as much as you can about the witness before you take the deposition. You need to know something about the person you will be talking to before you walk into the deposition room; it will affect everything you do. One of the easiest ways to miss something big is to go to the deposition cold.
- Know what kind of deposition you are going to take.

As far as the rules are concerned, a deposition is a deposition. But as far as you are concerned, every one is different, and what you do depends on what you want to accomplish.

1. Testing the witness and the lawyers

Nearly every deposition involves evaluating the witness. You want to know how she holds up under fire. Does she have a short temper? Is she likely to lose her cool in the stress of a trial? How credible does she seem? Does she make the facts seem simple and clear, or fuzzy and complex? Is she the kind of person the jury is likely to identify with?

This is essential information. These are the kinds of questions that are answered by your personal observation, not by reading the cold transcript.

While you are testing and evaluating the witness (and her lawyer), the other side is testing and evaluating you. Wanting to see how witnesses and lawyers respond is one reason why some liti-

gants refuse to eve
principal witnesse

2. Getting info

No matter ho
always some facts
the deposition.

How do you
ing the witness.

Ask open-en
witness to help y
before this will p
ration the witness
an hour before he
questions. And if
ness, do it later—

Through all
Miller of Clevela
tion is the transcr
sition room goes
Lawyers who bra
sition are usually

3. Building y

When you
tions and encou
know the facts a
ing—very carefu
You break the si
one at a time. Sy
need persistence
be worth the eff

Building yo
end of the dep
cross-examinati
him to respond
relax and open

4. Testing y

When you
first job is usua