

On the Deposition Trail: Achieving the Best Result for Your Client

October 29, 2015 By [Matthew Moeller](#)([Edit](#))



One of the most challenging aspects of being a young litigator is navigating the process of learning to take depositions properly to achieve the best possible result for your client. My first experiences consisted of attending and participating in mass tort depositions on behalf of a manufacturer of industrial products. These depositions were invaluable learning experiences. There were anywhere from 15 to 30 defense attorneys present at each deposition. I had plenty of opportunities to watch other lawyers with varying levels of experience in action. I learned firsthand what worked and, more important, what did not work. The following are a few basic lessons that I have always found to be helpful.

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Be Yourself and Develop Your Own Style

In my first depositions, it was not difficult to spot what was an act and what was genuine, and I learned the importance of focusing on what flows naturally from your personality traits. Don't try to be something that you are not. If you are somewhat soft-spoken, consider using a more engaging tone and try to develop a level of trust and comfort with the witness to elicit the most favorable testimony possible. However, if you have a stronger personality and are more comfortable being aggressive, there is nothing wrong with a more direct approach. It is all about what works best for you. In the end, what works best for you is what will work best for your client.

Listen Up and Pay Attention

Paying close attention sounds simple enough, but, particularly in multiparty depositions, it can be difficult because of the level of activity in the room with so many parties present. Occasionally, an attorney's question makes it obvious that the attorney has not paid attention to the prior testimony. Although this could turn out to be harmless, it could also mean the difference between whether the client pays a settlement or is dismissed from the case.

I soon began taking depositions of plaintiffs in single-party personal injury matters. This presented a fresh set of challenges, and I was eager to broaden my skills and learn a new aspect of the deposition practice. I focused on knowing the facts, thoroughly preparing, anticipating objections, and reminding myself to listen to the witness's response before racing ahead to the next question. Building on what I had already learned, I ascertained two more principles that can be difficult for a young lawyer to grasp fully but that are essential to developing the most favorable evidence possible.

Clearly Define Your Objective

Each case presents a unique set of facts and circumstances, and the purpose of depositions can vary from case to case. In some cases, the objective may be to prove no liability, to limit damages, or to challenge causation. In other cases, it may be to perpetuate testimony or simply to learn the witness's version of events. At the outset, you must define your objective clearly to maximize the effectiveness of the testimony and achieve the best possible result for your client.

Ask Precise Questions to Pin Down Testimony

As a young lawyer, it is difficult to appreciate fully the importance of how you phrase questions until you read the transcript and imagine how the question and response would look enlarged on a screen at trial. It is useful to ask broad and open-ended questions concerning some topics as a way of testing credibility, but when it comes time to commit a witness to testimony that goes to the heart of the claim, you must be precise to ensure that the testimony can be used at trial. Questions that are not specific as to time are particularly problematic. A witness's response may have everything you want, but if there is no context as to time, it quickly becomes meaningless.

Beware of the Charm Factor

Occasionally, a witness who has given depositions before, who has an engaging personality, and who can sense that you are much younger may try to charm you. The witness may engage in friendly side talk, make jokes, or even offer compliments on the record. This is an attempt to lighten the atmosphere and make the setting more informal in hopes that you will take a more casual approach to the examination. Avoid this pitfall by simply ignoring these tactics or by politely reminding the witness that the purpose of the deposition is for you to ask the questions and for the witness to provide the answers to those questions only. If you desire to engage in small talk with the witness, the time to do that is when you are off the record.

Maximize the Impact of an Expert's Testimony

The deposition of an expert is another challenging aspect of the learning process and presents unique obstacles. As I was preparing to take the deposition of a treating physician for the first time, I thought back to my first week of law school when my professor explained, "If you have ever seen an attorney cross examine an expert, it can often be like two ships passing each other in the dark of night." After taking a few expert depositions, I quickly realized my professor had a good point. I found that the following two principles are vital in maximizing the effectiveness of the expert's testimony.

Educate Yourself about the Expert's Profession and Specialty

Nomenclature and industry jargon are significant issues in the deposition of an expert. Being familiar with terms and phrases that are used in the expert's practice is essential to gaining a clear understanding of the testimony, asking the right follow-up questions, and keeping the deposition focused on your objective.

Clearly and Accurately Articulate Any Applicable Legal Standard

Most of us have always been advised that it is much better to have a general outline than to write out specific questions. However, when there are specific questions that you plan to ask, write them out. This is particularly helpful in an

expert's deposition when, because of experience, it may be difficult to articulate a proper standard. Improperly articulating a legal standard in your questioning can mean the difference between satisfying and failing to satisfy the burden of proof on a point at trial.

The learning process associated with deposition practice is something that should be embraced, not feared or rejected. View each deposition as not only an opportunity to serve your client's interests but also an opportunity to further your professional development. Whenever possible, seek advice from more seasoned and experienced attorneys, and take that advice seriously. However, be true to yourself and realize that, although there are fundamental principles that you should always bear in mind when taking depositions, only you can discover the approach to depositions that is right for you.

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