

Deposition Preparation: The Ten Essential Steps

As a new associate you're likely to be taking depositions. Here's a ten-step checklist to help you avoid common pitfalls that can hurt a deposition.

1. DEPOSE OR DON'T DEPOSE?

Is the deposition even necessary? Might the deponent reveal previously unknown factual information, give useful (i.e., damaging) admissions, or admit to bias? A deposition is also warranted if the witness will not be available for trial or will testify as an expert for the opposing party. Otherwise, interrogatories, requests for production or requests for admissions—might suffice.

2. REVIEW THE HOW-TOS

Review how to take a deposition so you can create a crisp, polished transcript. Basic guidelines include having the deponent clarify ambiguous responses (e.g., “uh-huh” and “unh-unh”), asking simple, straightforward questions (keeping in mind how the question will sound if read aloud to the jury), and remembering not to interrupt the deponent during an answer.

Several valuable resources are available from LexisNexis, including:

- The Effective Deposition: Techniques and Strategies That Work (from NITA®)
- Tangible Evidence: How to Use Exhibits at Deposition and Trial (from NITA)
- Deposition Practice Handbook; Civil Discovery and Depositions
- The Deposition Handbook; and Video Depositions (ABA).

3. KNOW THE RULES

Read the rules that will govern the deposition to avoid making an embarrassing, perhaps costly mistake. Rules and statutes applicable to depositions in various jurisdictions can often be found at *lexis.com*®.

Be prepared to respond to an opposing attorney who may try to “coach” the deponent with objections that go beyond simply stating the basic objection, or instruct his/her client not to answer in a way that is not appropriate.

4. RESEARCH THE APPLICABLE LAW

To ask the right questions, you need to be familiar with the applicable law. Only after determining the legal elements of not only all the claims but also the potential defenses, can you have the deponent establish those elements or give testimony disproving them. Accordingly, you will want to review relevant case opinions (both reported and unpublished opinions) and applicable statutes, regulations, etc.

5. IDENTIFY THE FACTS OF THE CASE

Knowing the facts of the case is essential. Facts can be gathered from many sources, including pleadings, documents received via discovery, as well as independent sources (online public records, news and private investigators). The more you know going into the deposition, the more you'll learn during it.

6. BECOME AN EXPERT

If the deponent is an expert who will testify on a particular specialty (medical, technical), you need to learn about that specialty. Educate yourself by reviewing explanatory materials, such as *The Attorney's Textbook of Medicine* and/or various medical/trade journals online.

Consider retaining your own expert to help prepare for the deposition. Numerous expert directories exist online on LexisNexis at www.lexis.com ("Legal Expert Pages," "Northwest Directory of Expert Witnesses & Consultants," etc.).

If the case involves a particular product, you may find that reviewing patent applications online is a great way to find experts.

7. KNOW THE DEPONENT

Search public records online through LexisNexis to find assets held by the deponent, bankruptcy records, or judgments and liens filed against the deponent.

For the opposing party's expert, look in relevant case summaries in verdict reports online, e.g., "Combined Jury Verdicts and Settlements." Retrieve journal articles written by the expert and search news articles online to see whether anything has been reported about that expert.

8. UNDERSTAND OPPOSING COUNSEL

Investigate the defending attorney. Some attorneys are passive during depositions while others are more aggressive. Knowing how the defending attorney may act will help prepare a strategy.

After reviewing their listing in Martindale-Hubbell®, you can utilize case opinions to determine whether the defending attorney has been the subject of discovery disputes, sanctions or motions to compel in previous cases. If you know what to expect, you'll be better prepared to deal with it.

9. PREPARE AN OUTLINE

It is tempting to write out every question you intend to ask, but don't become a slave to the questions. Maintain flexibility in questioning. Outline the topics or general areas you intend to cover making it easier to actually pay attention to the deponent's answer. Practice to help reduce reliance on written questions.

Read a standard opening statement that covers the deposition basics to get yourself and the deponent into the flow and reduce nervousness. Introduce yourself, explain the purpose and mechanics of the deposition, and ask the deponent if he/she is competent to testify or under the influence of any medications that may affect ability to understand or respond to the questions.

10. TAKE CARE OF THE LITTLE THINGS

All the preparation in the world will be worthless if you ignore the little things: (1) have all your documents in order so they can be easily retrieved. (2) Make sure a competent court reporter has been retained and has all the necessary information (location, time, etc.). (3) Review/rehearse difficult medical and/or technical terminology to be used. (4) Remind yourself that basic rules of civility apply.