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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2024

Deposition disruption

DITCHING THE OLD DEPOSITION PLAYBOOK CAN REVOLUTIONIZE YOUR LEGAL STRATEGY

At the heart of every deposition lies the potential for much more than just securing evidence for trial. Why exactly do we conduct them? Sure, one obvious reason is to gather valuable information and evidence that can bolster our case against the opposing party. But is that all there is to it? Certainly not! Depositions serve multifaceted purposes. They provide an opportunity to uncover unknown details, identify relevant witnesses, and perhaps even explore alternative strategies. So, while securing information for trial is crucial, leave room for the possibility that there are other ways of thinking about taking a deposition.

I believe in thinking differently. As Steve Jobs once said, "The people who are crazy enough to think they can change the world are the ones who do." I believe in embracing disruption because it's the disruptors who rule the day. Consider companies like Amazon and Uber. They've revolutionized their industries by challenging conventional norms. Amazon, for example, is essentially just a marketplace, a concept as old as civilization itself. But what sets Amazon apart is its unconventional approach to solving age-old problems. So why not apply this same unconventional thinking to the process of taking a deposition? Let's shake up the traditional methods and find innovative ways to tackle this familiar challenge.

Key considerations

First, here are two key considerations:

Depositions are trial tools

Every deposition should be crafted with its court use in mind. This ensures depositions are not just fact-finding exercises but strategic elements of trial preparation.

Video recording depositions is a must

The Code of Civil Procedure allows us to use an opposing party's expert witnesses at our discretion, which includes video. This is a powerful tool to challenge credibility.

I propose a bold strategy that may initially surprise you: Consistently depose your client at the outset of every case. I know this sounds like the craziest thing to do, but let me explain. Typically, what happens is you sue the bad guys, and your client ends up being deposed much later in the case, usually towards the end or after a significant amount of time has passed, like a year, six months, or even 18 months into it.

So, by that time the defense attorney coming after your client is fully prepared. They know every detail of the case inside out. And who's conducting the deposition? If it's nearing trial, it's likely the top attorneys: "The Big Guns." As a result, your client is going to face significant challenges, especially considering that their memory might have faded over time, particularly if the events occurred years ago. This is the harsh reality we're dealing with. But here's the thing: I don't believe we should just accept it as inevitable. Again: T*ake your client's deposition!*

After filing a complaint and serving it, there's typically a hold on discovery. But here's where we shake things up. The moment we receive their answer, we swiftly send out a deposition notice for our own client. Picture the defense reaction: confusion, maybe even questioning if there's been a mistake. But no, it's deliberate. We issue the notice with a 10-day window, maybe a few extra days if needed. When the phone rings with objections or claims of illegality, we stand firm. "You can't do this," they protest. But yes, we can. "That day doesn't work for us," they argue. "Fine, we'll reschedule for next Wednesday," we reply. The key point here, Mr. Defense Counsel, is that you're not a required party for this deposition. You're invited, but your attendance is optional. Any lawyer can conduct the deposition of any party, including their own. And there's nothing in the rules that says otherwise.

So, what's the reaction in the evil empire's camp? Panic sets in. They're scrambling to figure out how to stop it. But think about it for a moment. How can they halt this strategy? There's only one way: They have to file a motion for a protective order. Now, consider the absurdity of that scenario. The defense lawyer

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rushes in, "Your Honor, we can't allow the deposition of the plaintiff to proceed, that's preposterous!" But they're unlikely to take that route. Such a move would damage their credibility irreparably, and the motion would likely fail because we have the legal right to conduct the deposition. Moreover, they might even face sanctions for lacking a valid reason to prevent it.

What's the outcome? In that moment, the opposing side knows nothing about the case. Absolutely nothing. Consequently, they'll likely assign the deposition to a junior lawyer – someone who isn't busy that day because the senior attorney has deemed other matters as more pressing. As a result, you'll end up with a deposition where the adversary is ill-prepared. Moreover, the lawyer conducting the deposition may lack the necessary skills.

Taking the deposition

Now, how is the deposition handled? We take the lead, we go first. And so, we get to pose all the questions to our client. Softball questions, you might call them. "Mr. Jones, could you share with us the challenges you face navigating those stairs every night?" It's all gentle and friendly. We get all the essential information out using these softball questions. And by the time we're done, we've covered every conceivable angle, all in a supportive environment.

And then it's their turn. However, by this point, you've already covered every single topic. They may ask a few questions, but they're usually not significant. That was their opportunity, and they missed it. Now, contrast that with the scenario where they are fully prepared, loaded for bear, with their top attorney aiming to dismantle your client. Which situation would you prefer?

This single chance to depose your client is crucial. So, I urge you: Take your client's deposition in every single case. Even if there's an insurance company involved, as is often the case, providing them with all the necessary information allows them to make a reasonable assessment and potentially accept your policy-limits demand. Typically, when you send over the demand, they might hesitate, claiming they need your client's deposition first. By taking this step, you have everything to gain and very little to lose.

Why admonitions?

There are other ways to think differently about how we look at depositions. For example, the traditional approach to conducting a deposition typically involves starting with admonitions, then delving into the facts of the case, and finally examining the opinions of any expert witnesses. This method is commonly followed by lawyers, often learned through experience rather than formal education. It's a standard practice ingrained in the legal profession, perpetuated by the example set by those who came before us. As a result, many lawyers simply assume this is the correct and necessary procedure. But what if we approached an old problem with a fresh perspective?

Admonitions serve no real purpose or value. In my 29 years of experience, I've never encountered a situation where giving an admonition was necessary. The idea that witnesses might be confused about being under oath and unable to give their best testimony is simply not a valid concern. Moreover, remember that the witness is adverse, meaning they're already prepared for a rigorous cross-examination. Additionally, admonitions are a way to ease into the deposition and calm one's nerves. However, it's crucial to recognize that this initial period also allows the deponent, often just as nervous, to acclimate to the environment and settle their nerves. Instead of wasting time on admonitions, it's more practical to dive straight into questioning. There's no need for formalities when the real task at hand is to challenge the witness.

I challenge the conventional practice of giving admonitions by suggesting a different approach: Start with a loaded question. For instance, begin with something direct and hard-hitting, like, "Why did you try to kill my client?" Although objections may arise, this tactic prevents the opposing party and witness from gaining their footing. By initiating with a charged question, you maintain control of the energy and momentum of the deposition. It may seem unconventional, but there's no legal requirement to adhere to unnecessary practices like admonitions. Avoid them altogether.

No soft questions for defendant

My primary focus during a deposition isn't to explore facts, except perhaps for first responders or treaters. Instead, I approach it as if the witness is already on the stand in a trial setting. There's no room for soft questioning; I hit hard with questions that I anticipate will be crucial for my case. Essentially, I'm executing my entire cross-examination strategy for trial during the deposition. This approach requires careful planning and consideration of what's needed to win the case, focusing on proving each necessary element. Every deposition is treated as a step toward victory, with the cross-examination serving as a critical component of that strategy.

Deposing experts

In the realm of expert depositions, it's the uncharted 'negative space' that often holds the key to unraveling their credibility. When it comes to expert depositions, the common approach is to ask about the expert's opinions and delve into why they hold those opinions. However, I prefer a different strategy, especially effective with medical experts. Instead of focusing on their opinions, which are typically outlined in reports or summaries, I explore what I call the "negative space." This means I don't spend time rehashing their stated opinions, as I already know what they are.

Instead, I concentrate on what they didn't do or consider, which often yields valuable insights. If I don't have their opinions in a report, I'll briefly ask them to list them out and then move on to exploring the areas they didn't address.

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This approach allows me to uncover important information and challenge the expert's credibility effectively.

The first question I ask is straightforward: "You're working for the bad guy, right? You weren't appointed by the court." This immediately establishes the expert's affiliation, setting the tone for the deposition. Then, I proceed to ask a series of questions aimed at highlighting the expert's lack of knowledge about key details related to the case. Questions like, "Is my client's bedroom on the first floor or the second floor?" and "How far is the bathroom from my client's bedroom?" consistently receive responses of "I don't know" from the expert. This intentional line of questioning frustrates the expert and emphasizes their lack of familiarity with crucial aspects of my client's case. When the expert inevitably asks why I'm not asking about their opinions, I simply reply, "No, I'm not." It's not unusual, then, for the expert to stipulate to their own ignorance just to get me to move on. This exchange is captured on video and played for the jury, showcasing the expert's incompetence, and reinforcing our case.

The beauty of video depositions is that we can strategically choose what to play for the jury. By timing it right, we can juxtapose the ineffective expert's testimony with that of our own knowledgeable medical expert, further strengthening our position.

And then, who do you put on next? Your medical expert. "Now, Dr. Goodfella, the jury just heard the bad guy's expert, who doesn't know anything about anything. Let me ask you the same questions. Where is our client's bedroom?" "Well, Mr. Michaels, that's on the second floor." "Why is that meaningful to you?" "She can't ambulate up and down those stairs. And that's a big deal because she has to have someone help her. And man, that really contributes to her pain and her suffering and what she's going through." You just contrast what our expert knows versus what the other expert doesn't. At that point, their opinions aren't even that relevant.

The next step is to attack their credibility. It's a common tactic understood by everyone in the legal field. Here's what we do: The moment we receive the bad guy's expert witness list, I conduct a Google search of the expert's name along with the keyword "fraud." You'd be surprised at what can come up. The internet is vast, and there could be valuable information out there that sheds light on the expert's credibility. Additionally, I search everywhere else this person is mentioned. There could be a goldmine of information waiting to be uncovered. This process only takes a few minutes, and if you have support staff like paralegals or assistants, you can delegate this task to them.

Crucial strategies for depos

Here are some tips that round out my approach to depositions, which may seem obvious but are crucial to remember.

1. Don't let the witnesses escape the question

Corporate representatives and high-level individuals are adept at dodging questions, and experts can be particularly skilled at this. When they start going off on a tangent, bring them back by politely interjecting, "Okay, I appreciate that. My question was..." Alternatively, you can assertively say, "Great, move to strike," and then rephrase the question if you want to be more confrontational.

2. Let them ramble

Another effective tactic is to let them ramble and then ask, "Sir, do you even remember what question you're answering?" If they admit they don't, you can use that exchange to your advantage when presenting the video to the jury. So, the bottom line is, don't allow them to evade the question, and if they do, be prepared to hold them accountable or use it to your advantage.

3. Leverage objections

It's crucial to understand what an objection is, and more importantly, what it is not. Many attorneys get caught up in lengthy back-and-forths with opposing counsel over objections, but in reality, they rarely hold any weight. Personally, I welcome objections from opposing counsel because it signals that I'm onto something good. When they object, I simply let them go through their motions without engaging and then proceed with the questioning as planned.

During video depositions, all those objections are edited out, as they are typically unnecessary. In my experience, objections are rarely sustained because I ensure my questions are proper and avoid asking anything speculative or compound. So, I advise ignoring objections and letting the witness speak. However, be mindful – frequent objections from your side might indicate to opposing counsel that they're onto something significant, potentially leading to complications. So, while I may object occasionally when defending a deposition, I do so sparingly.

4. Ask the same question again

Continue asking the same question despite objections. When faced with an objection, simply acknowledge it, affirm that the question was indeed asked and answered, and proceed to ask it again. Repeat this process persistently, even attempting to phrase the question slightly differently each time. Introducing subtle variations, like an extra comma, may provide an opportunity for admissibility if the judge perceives a difference.

The goal is to capture the perfect sound bite – a compelling video clip to present to the jury. Thus, the strategy involves relentless repetition of the question, regardless of the "asked and answered" objection. The worst-case scenario is the judge disallowing the use of the footage, but even then, it's a minor setback considering the potential value if the question elicits the desired response. Therefore, the approach remains steadfast: Keep asking the same question repeatedly.

5. Lengthy depositions don't impress anyone

We often witness this trend, especially with insurance defense firms, who conduct depositions that drag on for seven hours or more. In a recent case slated for trial in just a month and a half,

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our client endured a two-day deposition. Personally, I find it difficult to conduct depositions lasting more than two or three hours. However, it's unnecessary for depositions to be lengthy to make an impact. You don't impress anyone by prolonging them. With a well-calculated plan for cross-examination and a clear understanding of the negative space or the credibility gaps in the deponent's testimony, you can be efficient and surgical in your approach. My approach to depositions is focused and precise – I can typically conduct three in a day. Even when dealing with expert witnesses or complex subjects like engineering, thorough preparation simplifies the process. Lengthy depositions are not a reflection of effectiveness; rather, strategic precision is key.

6. Invite the jury into depositions

During the deposition, I make a deliberate effort to involve the jury in the conversation. It's like I'm saying to them, "Let me tell you about X, Y, Z," or acknowledging that by now, the jury is probably curious about what happened, so I bring them into the conversation. This approach creates a sense of camaraderie, making us all feel like one big family engaged in conversation, just as we would be during the actual trial.

When addressing particularly serious issues, I might instruct the deponent to look into the camera and speak directly to the jury. I emphasize that I will be playing this footage for the jury, urging the deponent to explain their actions or decisions. It's a powerful moment that demands accountability and transparency. Bringing the jury into the deposition transforms it from a mundane conference room affair to a dynamic interaction. We can have fun with it, adopting a conversational tone and even expressing thoughts like, "If I were a juror right now, I'd probably be wondering..." This approach adds a human touch and keeps everyone engaged in the process.

7. Learn to embrace the silence

Most people are uncomfortable with silence and will try to fill it with more information, especially if they feel like they're hiding something. If I sense that someone is being evasive or withholding information, I'll simply sit quietly and look at them. More often than not, they'll start talking to break the silence and end up revealing more than they intended.

While maintaining politeness and courtesy, I am relentless in my questioning. I don't hesitate to push hard and challenge the deponent, even if it means dragging them through uncomfortable territory. Our approach can be intense and unyielding, but it's effective. We've encountered some resistance, especially from experts who are used to controlling the narrative, but our novel tactics catch them off guard and often lead to revealing insights.

Conclusion: Be inspired by disruptors

In sum, the transformative power of unconventional thinking can be a game changer. By challenging traditional norms and embracing innovative strategies, we not only enhance our ability to secure evidence, but also open new avenues for legal success. This approach, inspired by disruptors in various industries, encourages us to think differently about depositions, turning them into powerful tools for uncovering truths and strategizing for trial. As we move forward, let's continue to push the boundaries of conventional legal practices, ensuring that our methods are as dynamic and effective as the cases we champion.

Jonathan Michaels is founder and principal of MLG Attorneys at Law. *His practice focuses on automotive-defect law and he has litigated against nearly every car manufacturer in the world.*