The art of the winning deposition

Pamela E. Barker, Rita Bolt Barker, Kevin J. Bruno, and Jeffrey M. Pollock

Pamela E. Barker is a member of Lewis Rice in the firm's St. Louis, Missouri, office. Rita Bolt Barker is a member of Wyche in the firm's Greenville, South Carolina, office. Kevin J. Bruno is a partner in the New York City office of Blank Rome LLP. Jeffrey M. Pollock is a partner in the Lawrenceville, New Jersey, office of Fox Rothschild LLP.

A deposition is an essential discovery tool for learning relevant facts and establishing (or undermining) claims and defenses. In most jurisdictions, each party in a lawsuit has the right to take the depositions of the other parties, third-party witnesses, and expert witnesses. Here are some general pointers:

1. **Determine your goal**. The first question to ask yourself is "What is my primary goal for the deposition?" No, it is not to make sure everyone in the room stays awake without drinking five cups of coffee. Do you wish to learn more about key facts, determine a witness's reliability, lock a witness into a particular position, have a witness authenticate documents, preserve testimony of a witness who may be unavailable at trial, lay the groundwork to impeach a witness at trial, or test your case theories? If your case is definitely headed for trial, you may decide to reserve certain questions or documents for use at trial. On the other hand, if your case is likely to settle and your deposition may be useful in gaining leverage for settlement, you may decide to employ a more comprehensive approach to questions and documents. Consider what elements you need to prove (or disprove) in arguing a motion for summary judgment, making a mediation presentation, or presenting your closing argument, then focus your deposition questions around these elements.

2. **Educate yourself**. Sure, you have spent three years acquiring a J.D. educating yourself on the law, but have you educated yourself on the case? To take an effective deposition, you will need to be familiar with the facts and applicable legal standards. Review the pleadings, research applicable law, review discovery, and research your witness.

3. **Prepare an outline**. Your outline provides a roadmap for your deposition and should, at a minimum, include the topics for your examination and the exhibits you will explore with the witness. Some attorneys identify topics by general categories or concepts, while others are less spontaneous and prefer to script most questions. If you fall in the latter category, do not let your script keep you from listening carefully and allowing the witness to lead you to other relevant questions.

4. **Think graphically**. Prepare simple demonstratives or chronologies, and get the witness to accept or comment upon those graphics. If an opposing witness adopts

your chronology, then you are a long way to proving your case. A simple demonstrative establishing some core facts that are incontrovertible can eliminate multiple requests for admissions or interrogatories.

One particular type of deposition is a Federal Rule of Civil Procedure 30(b)(6) deposition of the party's corporate representative. Under Rule 30(b)(6), the named organization must designate one or more officers, directors, or managing agents, or designate other persons to testify on its behalf. The entity may set out those matters on which the designated person will testify. During the deposition, the designated representative must testify about information known or reasonably available to the organization. Here are several tips for preparing to take a 30(b)(6) deposition:

1. **Determine the best time to take the deposition**. Is it better for your case to take the Rule 30(b)(6) deposition in the beginning of the discovery period to gain a general understanding and assist in tailoring future discovery—or at the end of the discovery period to tie up loose ends and fill any gaps in information? There are pros and cons to each approach, but make this decision part of your overall case strategy.

2. **Prepare a deposition notice**. The deposing party must craft a notice of deposition that identifies the areas of inquiry with "reasonable particularity." Courts may disagree as to whether you may question the deponent on subjects that were not enumerated in the deposition notice, so it is best for the notice to include all possible topics of inquiry. Insufficient notices may be quashed or modified, so time invested in perfecting your notice may save time down the road.

3. **Confirm the deponent party has designated appropriate individuals**. The corporation must designate deponents who can testify on its behalf. Designees are not required to have firsthand knowledge, but they must be prepared to provide complete and binding answers. Begin the deposition by confirming with the designee that he/she is fully prepared to provide the information known to the organization. If it becomes evident that the identified designee is not adequately prepared, you may demand that the organization designate additional witnesses. Doing so will probably not strengthen your relationship with opposing counsel, but it will show everyone you know how to use Rule 30(b)(6) to advocate for your client.

Another critically important type of deposition is the expert witness deposition. Lawsuits are oftentimes won or lost on the basis of expert witness testimony. The following are several suggestions:

1. **Review the expert's report.** Typically, the expert witness will have provided his/her expert report in advance of the deposition. Put away your *NY Times* bestseller and make the expert report your preferred reading material in advance. The expert report provides a helpful starting point for your questions. Explore the contents of the report as well as the assumptions on which it is based. The report

is typically a product of negotiation between the expert and the attorney, so look for areas of vulnerability where the expert might be willing to concede points or reach different conclusions based on assumptions other than those in the report.

2. **Learn as much as possible about the expert's area of expertise.** Even the brightest attorneys (and you certainly fall in that category for having chosen to learn more about taking winning depositions) do not know everything. An expert witness likely has more depth of knowledge and experience in his/her area than the attorney deposing the expert, but learn what you can about the area so that you can identify the relevant vocabulary and key concepts. Additionally, identify the expert's prior testimony and publications. This background research will assist you in identifying areas to explore during the deposition, not to mention all the new conversation material you will acquire for cocktail parties.

3. **Consult with your expert to expose areas of weakness.** The best suggestions for deposition questions will often come from your expert. He/she will know the strengths and weaknesses of the opposing expert's opinions and can assist you in exposing those during the deposition. The ultimate goal, if your case is heading for trial, is to exclude the expert's opinion, so begin setting up your *Daubert* challenge at the deposition.

With ample and thoughtful preparation, you can maximize your likelihood of success at the deposition and make the record you need for use during the balance of the litigation, including negotiating settlement, drafting your summary judgment brief, or preparing for trial.