PRACTICE TIPS

Deposition Tricks: The Dirty Dozen

Everyone knows that lawyers are a tricky bunch. Just ask the man on the street, or better yet, your average juror. However, all tricks aren't necessarily bad. Some actually enhance the search for the truth. The following practice tips probably will be of the most use to younger litigators. To the more senior lawyers who use these tricks, this litany will resonate loudly. Accordingly, I hereby provide a dozen tricks of the deposition trade (which, now disclosed, I probably won't be able to use —however, I still have some others in reserve).

1. "The Big Pause"

In a pure discovery deposition, the questioner typically wants to learn all the facts that the witness possesses. In order to get the witness talking, the examining lawyer pauses for several seconds after the witness answers a question and stares at the deponent. Many times, the witness will continue to talk to fill the silent void. The void is created by looking at the witness as if it is expected that the witness hasn't completely answered the question. The questioner's silence and gaze invite the witness to talk some more. Another variation on this polite and eager stare at the witness is a tilt of the examiner's head which also makes it look like the questioner is eagerly awaiting the rest of the witness's answer. I have anointed this stratagem as "The Big Pause."

The antidote: As with all of the tricks set forth in this article, advance preparation is the key. Advise your client that once he has answered the question, he should stop talking and wait for the next question. If The Big Pause occurs, and the silence and stare persist, you should consider intervening and asking if the examiner has another question.

2. "How Boring"

You are taking a deposition. Your opponent acts bored. He appears impatient. His goal is to fluster you into speeding up your questions, moving on and getting done (while hopefully failing to follow up on answers and omitting to obtain important facts). While you are questioning the witness, your opponent is sighing, yawning, stretching or otherwise demonstrating boredom. Sometimes, the opposing lawyer asks how much longer you are going to be and then gives a big sigh or makes a comment unless you say that you are almost done. All these antics are designed to get you to rush; with the hope that you won't follow up on answers or that you will forget something. (Note: Sometimes (okay, often), depositions really are boring, so this may not always be an act.)

The antidote: Ignore, ignore and ignore. Do not accommodate your adversary, who may be feigning boredom and impatience. (If they are genuinely bored, it is too bad.) Stay the course. Keep pressing on with your questions. Don't let your opponent get under your skin.

3. "Mr. Nasty"

Some lawyers (and they know who they are) utilize gruff and even nasty behavior as a tactic to throw the questioner off his game. A deposing lawyer is unpleasant in an effort to get the witness to hurry his answers by thinking that if he answers quickly, the deposition will be over sooner and he can escape. Some of this nastiness can be blatant and some is more subtle. The ultimate objective of this ploy is the strategic goal of making the deposition so unpleasant that neither you nor your client ever want to see this guy again and will settle.

The antidote: Object, if the questions constitute harassment. Ignore, if you are asking the questions. If you know in advance that your adversary is Mr. Nasty, consider a videotape deposition. (A good quality audiotape is a less expensive alternative.) When a microphone is attached to Mr. Nasty's clothing, he tends to be better behaved. The volume and tone of his voice are now part of the videotaped deposition record. If things really get bad, and more importantly, interfere with your questioning, consider going to the court for relief. You will be able to play the

videotape so the court can hear Mr. Nasty in his full glory.

4. "The Stick"

This tactic is a close cousin to Mr. Nasty's strategy, but goes a little further. The deposing lawyer intentionally wants to get the witness angry. This tactic is designed to get the witness so riled up that he no longer remembers to follow your pre-deposition instructions (i.e., pause before you answer the question, think about your answer before you speak, etc.) Asking accusatory questions, unfairly attacking the witness's credibility, using an uncivil tone and harassing the witness are all tactics designed to aggravate the witness (and maybe you as well) so that the witness blurts out something that makes him look bad.

The antidote: Object, if the questions constitute harassment. Prepare the witness in advance by warning him of this tactic. Tell him to stay cool and calm. Ignoring this behavior is difficult, but is the best route. If you think this tactic is likely, consider using a videotape or audiotape to record the deposition. If things really get heated, make a call to the judge.

5. "The Carrot"

"I only have a few more questions for you, Mr. Jones and if you cooperate, we will get out of here soon." This tactic is used to entice the witness to give the questioner the answers she wants in short order and to ignore your instructions to pause before answering questions. This type of inducement usually occurs late in the day when the witness is tired and wants to get out of Dodge. The carrot is that "if you give me what I want, I will set you free." However, freedom should not come at the expense of the case.

The antidote: Tell the witness to stay the course. There is no guarantee that once the ransom is paid to the interrogator, he will let the prisoner go free. Many "informants" meet with an untimely demise after "singing." Remind your client that it is a grave error to take the bait, violate your instructions and capitulate because he or she is tired. If you see this happening, take a break, have the client get a drink, take a lap around the hall, or otherwise get back on the careful and deliberate track.

6. "The Fireside Chat"

This is the opposite of the last two tactics. This time, the examiner "appears" to be the witness' friend. The deposition now has become an informal and surprisingly pleasant "Fireside Chat." Many times this ploy starts even before the questioning begins. When the witness enters the conference room, the examining lawyer congenially introduces himself and invites the deponent "to have a cup of coffee." He tries to engage in "harmless" chit-chat with your client. The idea is to get the witness to relax and let her guard down so that she forgets that the deposition is a formal, important and binding event.

The opposing lawyer wants your client to talk, talk and talk some more. If this tactic is successful, the witness starts to think of the opposing lawyer as not such a bad guy, and forgets that he represents the enemy. At its extreme, this friendly approach may even drive a wedge between you and your client since the client thinks that all of your admonitions about opposing counsel being an ogre were off the mark, that he is really a nice guy just doing his job and may even be sympathetic to her case. Sometimes, the client is convinced that she can actually convince the other side's "good guy" lawyer to drop the case or to at least agree with her position.

The antidote: Again, anticipation and preparation are the key defenses. Do not let your client engage in banter with opposing counsel. Impress upon your client that this is a ruse by opposing counsel to find out information. The client must be reminded constantly that she is to answer the questions specifically and truthfully and then stop talking. Remind her that the opposing lawyer is not there to be her friend, but has a duty to his client to try to win the case at your client's expense. The client must be told that the deposition is not the trial and that the client is unlikely to persuade the enemy to surrender - rarely does a client "win" the case at a deposition.

7. "You Must Be An Idiot"

Trying to make the witness feel stupid is an oldie, but a goodie. This one works best with senior executives, owners and bosses. These types usually feel very confident and are used to being in command. However, in reality very few people know all the ins and outs of a particular business. The examiner will try to make the witness feel foolish if a question is asked to which the witness does not know the answer.

Many powerful people tend to guess at the answer so that they appear knowledgeable. They are embarrassed when they don't know the answer to a question—especially when it appears that the questioner "must think" that they know the answer. (A "red flag" buildup to this tactic is when the examiner starts a line of questions with "Mr. Jones, you are the president of ABC Corporation, correct? And, of course, you are the most knowledgeable about its business, right?"

Then, when the witness says "I don't know" to subsequent specific questions, the examiner acts incredulous in an attempt to get the witness to feel that he should know the answer. Many people then guess (and usually guess incorrectly). This creates the possibility of inconsistent statements among witnesses for the same party. For example, the president of a large corporation is unlikely to know the details of the company's computer system, but may be

made to feel foolish if he is asked questions relating to this topic and doesn't know the answers.

The antidote: Make sure that your witness sticks to his guns and doesn't fall for this ruse. If the witness doesn't know the answer, she should say so and stick to it.

8. "Karnak" (a/k/a ESP questions)

Johnny Carson used to have a segment on the Tonight Show called the "Amazing Karnak," in which he would hold an envelope containing a piece of paper with a question to his forehead and then provide the answer to the question before he opened the envelope. The deposition analogy to this is the "ESP" question - asking a witness what someone else thought. Most witnesses do not possess extrasensory perception. The real goal of the questioner is to get the witness to speculate about what someone else thought, what their job duties entailed, etc. in an effort to create inconsistencies in the testimony among witnesses. Once the witness with first-hand knowledge actually testifies, the "ESP" witness is often proven wrong.

The antidote: Object. The witness should be told not to guess and should persist in answering "I don't know" if it is the truth.

9. "Slimy" Questions

Long, convoluted questions containing hidden (unfavorable or untrue) assumptions or facts are a specialty of some lawyers. They like to ask wordy questions that contain traps and then try to get the witness to agree by trying to get the witness to focus only on the last part of the question. Sometimes multiple questions are used. If the witness agrees to the question, he may inadvertently agree to an incorrect fact or inference. The classic is "When did you stop beating your wife?"

The antidote: First and foremost, such questions should be objected to because of improper form. Questions are improper if they are compound, contain multiple sub-parts or contain assumptions. The witness should make the questioner rephrase the question so that the witness gets one clear question at a time to answer. If the new question is similarly defective or contains a trap, then the witness should say that he cannot answer the question as phrased because it is misleading, or that he disagrees with the incorrect premise. The witness may answer part of a question, while making it clear that he is not answering the question as asked.

10. "The Motor Mouth"

Asking rapid fire questions (speed talking) in an effort to get the witness to answer quickly before his lawyer has time to object is common. It is human nature to adopt the cadence of the questioner - the faster she talks, the faster the witness responds. The questioner's goals include getting the witness to respond without thinking, to get an answer before the defending lawyer has a chance to object, and to obtain an unwitting admission.

The antidote: Make sure that your witness pauses after the question and answers carefully and deliberately. There is nothing wrong with telling the witness to "slow down" as it does not suggest the answer to the question and accordingly, does not constitute impermissible coaching on substance. If necessary and appropriate, interject an objection before the witness answers as a reminder to the witness to slow down so you have time to object.

11. "The Idiot"

Sometimes lawyers play dumb at depositions in an effort to see if the lay witness or expert will try to take advantage of this feigned ignorance. The objective is to see if the deponent will exaggerate the facts or overstep the bounds of her expertise.

The antidote: The witness should be cautioned to answer the questions without exaggeration and to stay within her knowledge base. She should be told that if she strays, the "dumb" lawyer will be a lot smarter at trial and will take advantage of the overblown deposition testimony to make the witness look as if she lacks credibility.

12. "The Stall"

Many lawyers intentionally delay asking the most important questions of the deponent until late in the day. It is anticipated that the deponent will be tired and less sharp than earlier in the day. They want this. When a deposition has gone on all day and the important stuff has not yet been asked – beware. Another variation is the deliberate attempt to stall the completion of the deposition by slowing the questioning and going off on irrelevant tangents so that the deponent has to come back on another day to finish the deposition. That way, during the hiatus the deposing lawyer has a chance to evaluate the testimony and come up with more questions.

The antidote: Prepare your client for this common ploy. At 4:00 p.m., tell your client to throw some cold water on his face and get ready. Don't let a lawyer make your client return for another day, unless there is no choice. Try to press on if your client is still alert and try to get the deposition completed.

There are many more lawyer tricks. However, the ones set forth above are relatively common. Prepare yourself and your client for these, stay vigilant and you will have nothing to fear.

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