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Deposition Admissions: Maximizing the Number and Force of Admissions in Key Depositions

Creating Streamlined and Simple Narratives in Complex Cases and Sowing Distrust of Opposing Themes

THURSDAY, APRIL 7, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Mark H. Bloomberg, Of Counsel, **Zuber Lawler**, New York, NY

Anthony L. Cochran, Partner, **Smith Gambrell & Russell**, Atlanta, GA

Joseph E. Mais, Partner, **Perkins Coie LLP**, Phoenix, AZ

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August 19, 2021

FEATURE

An Alternative to the “Funnel” Approach for Taking Depositions

In complex civil cases with high stakes, starting with open-ended questions and funneling down with narrower and increasingly more detailed questions can be counterproductive.

Joseph Mais

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As many of you were, I was taught to take depositions using the funnel method championed by the National Institute of Trial Advocacy. Start with open-ended questions and funnel down with narrower and increasingly more detailed questions. Once satisfied that all material, granular information on a topic has been elicited, complete that line with a summary question to confirm the key testimony before moving to the next topic.

I haven’t used the funnel method for decades. When the purpose of the deposition is to gather unknown facts and avoid unfair surprise, it may be a worthwhile method. But in complex civil cases with lots at stake, that is rarely—at least in my experience—the purpose, particularly in depositions of key witnesses.

For those, the funnel method is not only less than ideal but also counterproductive. The goals at those depositions are very similar to the goals for cross-examination at trial: maximize thenumber and force of admissions that can be obtained from the witness that validate the narrativeof our case; and set up powerful lines of impeachment when the admissions are not forthcomingand thereby sow distrust of the other side’s narrative and key witnesses. Using depositions todiscover unknown facts is, at best, of secondary importance. And while locking a witness into hisor her testimony to avoid unfair surprise at trial is a reasonable objective, the funnel method is thewrong way to accomplish it.

A better approach, particularly in depositions in complex civil litigation, is a direct, point-by-point, leading-question pursuit of specific admission and impeachment goals, rather than the open-ended, witness-driven approach of the funnel method. Don’t fill up some large evidence jeroboam with discharges from a funnel. Power-wash the witness and the record to present the cleanest version of the narrative we can.

> Illustration by Dave Klug.

That approach to depositions grew from lessons learned as defense counsel in securities arbitration hearings. Unhappy investors brought claims against their stockbrokers and employers. Document discovery was permitted, but depositions were rare. Typically, the first exposure to a claimant was on the first day of the hearing.

The Five-Part Approach

Cold cross-examination is challenging because trial lawyers who ask questions without knowing the answer can do serious damage to their case. Over time, I developed a five-part process for cross-examining the claimant in those arbitrations.

The first step was to develop the overall narrative and themes of the case. While refined and updated as new information was received and reviewed, that narrative was always the starting point for developing the cross-examination outline.

Second was to figure out how to get the claimant to admit as many of the facts supporting that narrative as possible or to effectively impeach him if he resisted or equivocated. The absence of deposition testimony created a challenge. There was, however, the statement of claim, account records, and knowledge of what other witnesses would testify; and usually there were records of the claimant’s other investment accounts, communications between and among the key participants, information from public sources or subpoenaed from third parties, and expert reports. In short, a treasure trove of information from which to outline the cross-examination.

Third, focusing almost exclusively on the desired and achievable admissions, I developed a detailed outline, structured by subject matter. Each segment was designed to obtain admissions that together would advance a meaningful point in our narrative or corroborate our version of events.

Fourth, within each segment, I framed each question of consequence so it did not matter how the witness answered. I forced the witness into a choice—either he could provide the admission that advanced our narrative or he could fight, which enabled us to wound his credibility and make our points at the same time by confronting him with something he had previously written or received or through business records the authenticity and reliability of which could not be credibly challenged.

Drafting questions for which it doesn't really matter how the witness answers is hard work, but it is also the key to the entire exercise. The intent is that the witness either gives the desired answer or gets punished for quarreling. Heads, we win; tails, the witness loses.

Crafting questions to which the witness has no good answer is not something that can be done by most lawyers while winging it in a hearing. Cross-examination outlines should be detailed. Key questions should be scripted so that the admission, or the impeachment following denial, will be as unambiguous and as impactful as possible.

Fifth, and finally, I drafted the cross-examination outline over several days. Insights, including connections among different pieces of evidence, often occur at odd hours, over time. Belated insights frequently improve the substance and structure of the outline.

Experienced trial lawyers and instructors may think that none of this is innovative or controversial. They might correctly note that there is no risk at a deposition, unlike in cross-examinations in evidentiary hearings, in asking a question to which you don't know what the witness will say. Eliciting a bad fact is not bad when the witness is expected to testify at trial. So why should you use this approach and abandon the funnel approach to depositions?

Why Abandon the Funnel Approach?

The primary goals in a deposition of an opponent's key witnesses are the same as effective cross-examination at trial—to frame questions that elicit admissions or set up effective impeachment. The best way to achieve those primary goals is substantially the same as conducting a cold cross-examination at an evidentiary hearing: develop the narrative; determine from the voluminous record where the witness fits into that narrative; identify the segments for cross-examination, with the key documents and an overarching objective for each segment in mind; script the key

questions in the heads-we-win/tails-the-witness-loses style; and then refine and restructure the outline and specific questions within each segment over time.

Those goals, and the method for achieving them, are effective, regardless of whether you are representing the plaintiff or the defendant.

The widespread use of video cameras in many depositions underscores the strategic value of clean admissions. Playing a prior inconsistent answer at trial is powerful impeachment. Based on debriefing numerous fact finders over several years, one leading researcher reports that jurors generally place greater weight on deposition testimony over live trial testimony when the two are in conflict.

What about the other, more traditional objectives of depositions, such as discovering unknown information? In a complex civil case, the examiner will usually have a robust array of available information before the key witness depositions begin: pleadings, documents, relevant legal research, witness interviews, disclosure statements, interrogatory answers, and deposition transcripts from witnesses of lesser importance.

If the opposing party is a large entity, the important witness likely sent or received hundreds of emails, memoranda, agreements, PowerPoint presentations, text messages, and the like. If the examiner has done the hard work of carefully reviewing the documentary record to develop the overarching case narrative and determining what the witness can be forced to concede, unknown and unsuspected facts should be rare.

The Downsides of Open-Ended Questions

What about locking down the witness’s testimony to avoid unfair surprise at trial? That, too, is a worthwhile, albeit secondary, objective, but the funnel method is not the solution. Open-ended questions such as “What happened next?” or “Tell me about the meeting” or “Who else attended?” or “What was said?” are the wrong starting point. They invite the key witness to describe events in his or her own words or, more typically, on the basis of rehearsed talking points. That approach rarely results in evidence with any value as an admission or a basis for impeachment at trial. There may be some modest value in knowing, rather than not knowing, precisely how the witness is going to do damage at trial, but the right goal is to neutralize the witness or at least minimize the

Instead of "Tell me about the meeting" or "Who else attended?" or "What was said?," better to start with specific questions based on contemporaneous documents and press for admissions. If the topic is a specific meeting, seek admissions based on the agendas, minutes, presentations, and communications relating to that meeting, and the fair inferences from them. Only after mining the records and posing specific questions designed to elicit admissions as to that event might we ask what else the witness recalls about the meeting.

Once that topic is exhausted, don't ask "What happened next?" Better to go straight to the next event of importance for which records exist, and repeat the exercise. If appropriate, you can always ask the witness whether he or she recalls anything that occurred between the two events or anything else relating to that subject.

What about asking a summary question that would recap the key testimony before moving to the next topic? If we've done a good job identifying the admissions that can be obtained and have carefully crafted the key questions to elicit that information, then the recap question is usually unnecessary and may be counterproductive. A carefully crafted examination outline should elicit all the admissions or opportunities for future impeachment. The recap question opens the door for the witness to backtrack and explain away previous admissions.

A good attorney defending the deposition will have prepared the witness to have some thematic responses at the ready. Allowing room for a thematic response only helps the opponent's case. Consider limiting summary questions to circumstances when a single question and answer will materially increase the impact of the admissions and you are confident that you will get the expected answer.

Aside from the direct benefits in securing admissions and bolstering impeachment, I have found that this process puts me in the best position to gain new insights into my own case. Preparing for depositions with a relentless focus on securing admissions almost certainly triggers connections between seemingly disparate strands of evidence. The presence at a meeting of a particular corporate officer that appears innocuous may take on significance when coupled with other documents. The examiner whose primary objectives are discovery or avoiding unfair surprise, and who is content to begin new segments with "What happened next?" inquiries, is unlikely to make those connections. And a well-prepared, sophisticated witness allowed to work through talking points will not blurt them out.

Open-ended questions and answers often create another challenge. Sometimes we feel certain that we got a good piece of testimony, only to discover when preparing our cross-examination outline that it isn't quite as good as we thought because it's included in a lengthy answer or spread across several questions or dependent on surrounding context. Starting with the exact desired admission is cleaner. We can't fool ourselves into thinking we've got something when we really don't. And because we know in advance the precise admission we want, it simplifies the decision when we get a pretty good admission whether to try to improve on it or instead move on.

Moreover, it can be an unsettling experience for a witness to be under relentless attack from a focused line of questions by an examiner who is thoroughly familiar with the record. A witness under pressure is less likely to remember his or her talking points and more likely to make an unexpected admission than one operating in a comfort zone. And when the witnesses are decision makers for our adversary, they tend to be less enthusiastic about going to trial and subjecting themselves to another round of heads-we-win/tails-they-lose questions.

If the Case Goes to Trial

What if the case goes to trial? The sponsorship theory of advocacy holds that juries treat evidence differently depending upon who presents it, discounting testimony favorable to the party that calls the witness, while ascribing special weight to admissions. If one subscribes to this commonsense theory of persuasion, all the more reason to make admissions and impeachment the focus of deposition preparation and examination. Let the other side do our talking.

Another advantage to this approach is that it reduces the risk, and accompanying anxiety, of cross-examination. In a recent case that went to trial, we had in reserve for cross-examination more than 100 video clips of deposition testimony from both a key fact witness and an expert witness. We were able to cut and paste those clips in a sequence that advanced our narrative in a structure similar to what we used in direct examinations, with very little to no risk of eliciting harmful testimony. An increasing number of cases see the use of such video clips embedded in opening statements. When we can show such a video clip of an opposing witness during opening, we gain control of the fact finder's first impression of the witness.

Some advocates say that a good trial lawyer worries only about getting the necessary evidence into the record, confident of putting that evidence together for the fact finder in the closing argument. That view is wrong. People are hard-wired to form impressions and make judgments

with limited information. Most form an early impression of who deserves to win and view all additional information they learn in the form of evidence and argument through the prism of that initial impression.

Impressions can shift through trial, but early opinions carry serious weight. We want the trier of fact to thoroughly understand our narrative from the opening statement before the first witness is called; and we want every witness, including those called by the adversary, to reinforce that narrative to the fullest extent possible.

So go quickly to the substance. Unless the witness’s educational or employment background is relevant to potential admissions or impeachment, don’t dwell on it. Early softball questions permit the witness to feel comfortable. Better to set the tone immediately. We mean business. And when those background facts are relevant, the most efficient approach is to authenticate a LinkedIn profile and use it as the primary basis for questions.

What if you conclude before the deposition that the witness will vigorously dispute a key part of your narrative? Get what you can and move on. Having the witness confirm one fact after another, even if those facts are mostly undisputed, creates an opportunity at trial to cover key subject matter. Make the witness agree with as much of your narrative as possible while still controlling the witness.

Most cases turn on the resolution of one or a few inflection points—key factual disputes that are central to the outcome. Before the deposition, try to marshal all the potentially helpful facts relevant to an inflection point in a single segment. Think of that exercise as similar to the classic naval warfare tactic used from the late 19th to mid-20th centuries called “crossing the T,” in which the crossing line of warships brought all its firepower to bear on the forward ships of the enemy.

Typically, the same basic process works for Rule 30(b)(6) and expert depositions. The structure of the segments in designee deposition outlines is usually driven by the topics on which the witness is testifying, but admissions are even more valuable when the witness is testifying on behalf of the entity. The entity’s entire document production can be effectively mined for that purpose.

Also, with a designee witness, creatively identify and exploit the inherent tensions between a party’s policies, performance, and litigation positions, where “I don’t know” and “That’s not my job” responses are treacherous. Indeed, it is possible to effectively examine the 30(b)(6) witness at trial

with no admissions in the tool kit, just a video of the witness acknowledging the purposes and requirements of designee testimony, followed by repeated responses of "I don't know" to carefully framed and sequenced questions.

For testifying experts, Federal Rule of Civil Procedure 26(a)(2)(B) requires disclosure of written reports that include a "complete" statement of all opinions and the bases for them, and all facts considered in reaching those opinions. So the goals are the same—admissions and impeachment—using the entire record that was or could have been provided to the expert. The one caution here is not to ask questions that invite the expert to embellish on or correct statements in the report.

This approach of front-loaded preparation and heavily scripted, choreographed questions can—at least on the front end—be significantly more expensive than the more traditional funnel method. But, when the stakes are high, the incremental cost is immaterial in relation to the amount in controversy and modest in relation to the overall costs of litigation. Moreover, even when a smaller amount in controversy does not allow for detailed outlines, scripting of key questions, or time spent refining one's thoughts, the basic process of knowing the narrative, understanding how the witness fits in, and posing questions designed to maximize admissions and opportunities for impeachment still seems best.

Try it sometime.

Authors

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An Alternative to the "Funnel" Approach for Taking Depositions

JOSEPH MAIS

The author is a partner with Perkins Coie LLP, Phoenix.

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