AVOIDING DEPOSITION DISASTERS

Presented by the
American Bar Association
Section of Litigation,
Section of Environment, Energy, and Resources,
Solo, Small Firm and General Practice Division,
Section of Family Law,
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This publication accompanies the audio program entitled "Avoiding Deposition Disasters" broadcast on June 8, 2016 (event code: CE1606ADD).

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ONLINE RESOURCES

How to Take a Deposition
Dan Goldman and Mor Wetzler
http://apps.americanbar.org/litigation/committees/youngadvocate/articles/spring2011-take-deposition.html

The Power Prep: Effective Preparation of Your Client for a Deposition
Erin E. Rhinehart
http://apps.americanbar.org/litigation/committees/pretrial/email/winter2013/winter2013-0213-power-prep-effective-preparation-your-client-deposition.html

Avoiding Deposition Disasters

Speaker: Janet S. Kole
Moderator: Spencer M. Punnett II

Speaker: Janet S. Kole

- > 30 years as environmental litigator (AV rated)
- Author of four ABA books for young lawyers:
  - *Chasing Paper*
  - *Pleading Your Case*
  - *A Brief Guide to Brief Writing*
  - *How to Avoid Bad Depositions*
- Former Editor-In-Chief, *Litigation News*
- Author of two mystery novels about lawyers:
  - *Suggestion of Death*
  - *The Smell of Money*

Goal

The topic of depositions is huge and complex

My goal: Simplify it for you

Survey Question:

How many years have you been practicing law?

- Less than 5
- 5 to 10
- Old hand

Avoid Deposition Disasters

- Preparing yourself
- Preparing a witness
- Finding solutions for the unexpected

Objectives

To help you:

1. Prepare yourself for the deposition
2. Prepare a witness for the deposition
3. Deal with problems that arise during the deposition

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Are you taking or defending?

- Common issues
  - Preparing yourself
  - Dealing with difficult witnesses
  - Dealing with difficult lawyers

Deciding Whether to Take a Deposition

Ask yourself:

Do I need this witness, under oath, before trial?

Purposes of Depositions

Two possible reasons to take a deposition:

- Fact-finding
- Preserving testimony

Fact Finding

Remember, depositions are a discovery tool.

Preserving Testimony

- People can forget things
- Better to pin down a witness early
- People can die before trial

Uses of Deposition Testimony

Uses:

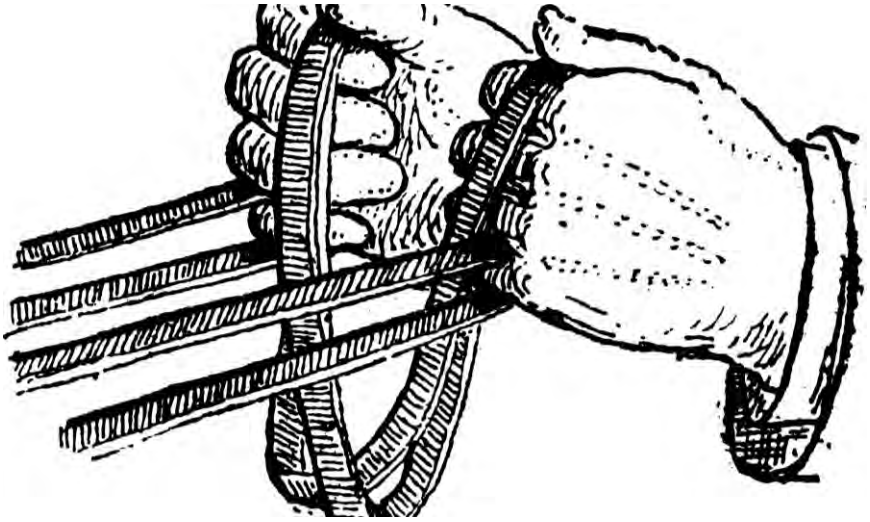
1. "Discovery"
   A. Preparing for trial
   B. Preparing for settlement
2. Scaring or annoying your opponent, within the ethical boundaries

Problem Witnesses

Three common types of "problem" witness:

1. "Long Talker"
2. "Condescender"
3. "Lying liars and the lies they tell"

Reining in The "Long Talker"



The "Long Talker"

Challenge if you're taking the deposition:

To *focus* the witness on what you want

Challenge if you're defending the deposition:

Keep the witness from overexplaining and from giving too much information

Rein in the long-talker by:

- Using *short* questions
- *Repeating* as necessary
- Take the witness to the woodshed

The "Condescender"

Your key to success against condescension:
Be unflappable

Dealing with the "Condescender"

How to be unflappable:

- Maintain your composure
- Remind witness that she is there to offer facts
- Don't rise to the bait
- Persist in asking questions
- Take the witness to the woodshed, if she's yours.

Dealing with Lying Witnesses

The lying witness who is yours:

- A. Take a break with the witness
- B. Withdraw as counsel
- C. Make a noisy withdrawal

The lying witness you are deposing:

A. Determine whether or not you want to cross-examine now or wait for trial

B. Come prepared

Survey Question

Have you had to deal with problem lawyers at a deposition?

- YES
- NO

Problem Lawyers

Three types of problem opposing lawyers:

1. Jerk
2. Witness Coach
3. Serial Objector

The "Jerk"

Dealing with "Jerks"

Tactics for handling jerk lawyers:

- If the lawyer is . . .
  - Violating a rule, cite it specifically
  - Gesturing or eye-rolling, put it on the record
  - Pounding the table, put that on the record
- If you can foresee problems, use video
- If all else fails, use the "nuclear option": suspend the deposition.

The Witness Coach

Benching the "Coach"

How to blow the whistle:

- Make a record
- Use the rules
- Seek the court's help

The Serial Objector

Muting the "Objector"

Press the "mute" button:

- Try to use reason
- Use the rules
- Stop the deposition

Preparing Yourself for the Deposition

Contexts of Self-Preparation

Different depo prep is needed depending on whether you are:

- Taking
- Defending
- Auditing

Taking a Deposition

- Super prep
- Just the facts

Defending a deposition

- Know the entire file, discovery and pleadings
- Prepare your witness with documents
- Anticipate questions to the witness
- Train the witness
- Let the witness see you defend him

Auditing a deposition

- At least read the pleadings
- Stay awake

Preparing Your Witness

- 1. The litigant-witness
- 2. The fact witness

When the witness is a party

- Review the pleadings with your witness
- Review the documents
- Remind the witness of the keys to success:
  - A. Listen to the questions
  - B. Only answer the questions asked
  - C. Don't try to win the case

The non-party witness

- Show the witness all documents involving the witness
- Anticipate questions and practice with the witness
- Tell the witness to keep answers short and to the point
- Explain deposition objections

At the deposition

- Ground rules
- Stipulations
- Read and sign?

After the deposition

- Errata sheet
- Filing

Summary of Objectives

- We have shown you what factors go into deciding whether or not to take a deposition
- We gave you tools to deal with problem witnesses
- We showed you what you need to prepare yourself for the deposition
- We discussed how to prepare a witness for a deposition, depending on whether or not the witness is also a party you represent

Avoiding Bad Depositions

A Simple Guide to Complex Issues

Janet S. Kole

Chapter 10

Dealing with the Problem Witness

In Chapter 9, I discussed what to do about the lawyer who acts like a jerk during depositions. You have to address this problem with the lawyer first, then with the court. This is true even if the lawyer takes the passive-aggressive tack of telling his witness not to answer questions, or to be evasive.

But you may find yourself trying to depose a witness who is bad all by himself. In this case, you have a first line of attack—controlling the witness. If this doesn't work, you can try to enlist the help of the witness's lawyer, who is probably as exasperated as you are. Finally of course you can seek the help of the court, by terminating the deposition and moving for sanctions.

I have developed over the years some tactics for dealing with problem witnesses. One technique I avoid, and I advise you to do so too, is becoming angry. It is probably best not to exhibit bad temper, since this makes you appear out of control yourself. Joe Jamail, a trial lawyer famous for his tirades, once said at a deposition

that opposing counsel could "gag a maggot off a meat wagon." No matter if even a maggot would find the deponent's behavior putrid, don't give in to the desire to show you're angry. Instead, persist in asking the question you want answered.

How to Deal with the Long Talker

As I mentioned, certain deponents are not willfully obtuse. It is in their nature to gab, gab, and gab. For example:

Q: Mr. Raines, where were you on December 20 at 10:20 p.m.?
A: I always go for a walk after dinner, because I find it really helps my digestion. My wife comes with me, and of course I always bring my dog.
Q: Mr. Raines, please focus on the night of December 20 at 10:20 p.m. Where were you?

By making the questions to Mr. Raines short, or breaking them up into small chunks, you have a better chance of obtaining short answers. If, however, the deponent doesn't know how to shut up, you have two choices: wait him out until he runs out of steam, and then ask your short question again, explaining that he didn't answer it, or interrupt him mid-flow and insist that he answer the question you asked. Lastly, be persistent.

Q: Mr. Raines, please focus on the night of December 20 at 10:20 p.m. Where were you?
A: I'm trying to explain. Whenever you have a dog—by the way, do you have a dog? Walking with a dog tends to mean you go the same way every time.
Q: Mr. Raines, where were you that night?
A: Around my neighborhood, as I'm trying to explain.
Q: So at 10:20 p.m., where were you?
A: At the corner of Main and 22nd street.
Q: Did you see anything occur out of the ordinary?
A: Oh, yeah, a horrible accident.

How to Deal with the "Valley Girl" Witness

The deponent whose conversational style is vagueness—like, you know?—will frustrate your efforts to get information without necessarily meaning to. For this witness, you will need to listen to the answers carefully, and be sure to elicit every fact before moving off a topic.

For example:

Q: Did Mr. Kraft raise with you any issues that he thought that I might raise today during the deposition having to do with your environmental report?
A: No.
Q: Did he discuss any problem areas that he foresaw about today's deposition?

A: No, none specifically.
Q: Well, how about in general?
A: Generally, we talked about the groundwater results that were included in the report.
Q: What about the results did you discuss?

Again, the key is persistence. If a deponent answers "not specifically," you should follow up with a question that allows her to answer "generally."

The deponent who ends an answer with "you know?" or "something like that" also has to be pinned down. Make sure you have all the possible information in her head before moving on.

How to Deal with the Condescending Witness

Although it is often the expert witness who will act condescendingly to an opponent's counsel (and sometimes even to counsel for the party who hired him), it isn't only experts who sometimes behave badly. There are the deponents who attempt to squash opposing counsel who are questioning them by trying to undermine counsel's sense of self worth.

Some of my favorite comments from my own experience:

"That is a stupid question."
"What makes you think you'll understand my answer?"

"Does your client know you need me to answer that question for you?"
"How long have you been practicing law?"
"Did you read what was in the report before you asked me about it?"

There is only one way to deal with a condescending witness, and that is to ignore the condescension. Don't get mad. Don't stoop to answering those questions that don't require an answer. The proper response to all of the questions I've listed above is: "I'm not here to answer questions. You are." And go back to the question that elicited the arrogant response.

As I mentioned, often the witness's lawyer is just as aggravated as you are about how the witness is answering the question. If your ministrations can't cure the witness's attitude, you should try the direct approach to the lawyer, on the record. "Joe, please direct your witness to answer the question." In my experience, this is usually enough to cut through the witness's bull.

The most important thing to remember about this kind of witness is that you are not going to change his attitude, but you can change his behavior. You will do that by persistently asking the question you want answered, ignoring his editorial comments along the way.

If you are the lawyer representing the condescending witness, you will want to set him straight, on the record.

"Ms. Blank is here to ask you questions and to get your answers on the record. Please just answer her questions."

How to Deal with the Lying Witness

You have clearly spelled out for the witness that she must tell the truth at her deposition. And then she opens her mouth to answer the first question, and she lies, and she doesn't stop lying until the deposition ends. What can you do?

Whether your witness is your client or just a fact witness whom you have prepared for her deposition, when your witness lies, it puts your client's case in jeopardy and puts you in jeopardy as well. Because if you know the testimony is false, you are suborning perjury. You will be sanctioned by the court for allowing false testimony.

There are two ways of dealing with your lying witness. You can rein her in, and get her to stop lying. If this doesn't work, you can resign as her lawyer.

Rein in the Witness

Take a break. Talk to her outside the room. Remonstrate with her that she must tell the truth. Get her to promise to tell the truth. Remind her she's under oath. And lastly, tell her you will have to make a "noisy withdrawal" if she doesn't stop lying.

Withdraw from Representation

The civil rules of procedure in almost every jurisdiction allow—and in some cases require—a lawyer to withdraw from a case if the client is about to commit a fraud on the court. The lawyer also has a duty to make things right on the record. Sometimes, the mandate to correct a lie conflicts with the lawyer's duty of confidentiality to the client. However, the potential harm to the case and the integrity of the judicial system mandate that the lawyer withdraw.

For example:

> [A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
> (1) the representation will result in violation of the Rules of Professional Conduct or law; . . . (4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud.

Fla. Rules of Prof'l Conduct, Rule 4-1.16.

As the comments to the rule make clear,

> A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the

> Rules of Professional Conduct or law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Withdrawal is also mandatory if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud. Withdrawal is also required if the lawyer's services were misused in the past even if that would materially prejudice the client.

The "noisy withdrawal" is the lawyer's way of letting the court know why she is withdrawing, without divulging client confidences.

> [C]ourt approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional

considerations require termination of the representation ordinarily should be accepted as sufficient.

Comments, Fla. Rules of Prof'l Conduct.

What if the witness isn't your client, but is someone you have prepared for a deposition? The same rules apply. You have presumably been asked by your client to represent the witness. If the witness lies, it becomes attributable to your client. And the client must rectify the lies or withdraw the witness and her testimony.

The American Bar Association has promulgated Model Rules of Professional Conduct that have been adopted, in one form or another, in almost every jurisdiction. Model Rule 3.3 says, in pertinent part:

Rule 3.3 Candor toward the Tribunal
(a) A lawyer shall not knowingly:

* * *

3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of

> a defendant in a criminal matter, that the lawyer reasonably believes is false.

I have had to threaten to withdraw when a client has wanted to proffer evidence I knew to be false. However, the threat would be an empty one if the rules and the law did not require such action. As the comment to Rule 3.3 says:

> The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. . . . Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Comment 11, MODEL RULES OF PROF'L CONDUCT R. 3.3.

I want to be clear that the lie must be material to the issues in the case. A lie on some tangential matter doesn't require draconian measures. For example, sometimes

witnesses lie about their education. Unless this is material, you are under no obligation to withdraw. However, as a practical matter, such a lie can turn around and bite your client; it gives your opponent ammunition to undercut the witness's credibility. If you decide that the witness's credibility is important to your case, you should do everything you can to get the witness to "correct" the error—in other words, to withdraw the lie.

Obviously, a witness's credibility is paramount when she is being offered as an expert. I'll discuss this in the next chapter.

Another State View of Deposition Lies

With only a few exceptions, Mass. R. Prof. C. 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless the client consents. The lawyer's obligation to maintain confidentiality is subordinated, however, to obligations owed to a tribunal under Mass. R. Prof. C. 3.3. If a client has engaged in a criminal or fraudulent act affecting a tribunal, or if the lawyer has offered material evidence that is later discovered to be false, the lawyer must rectify the fraud even if, as a last resort, rectification requires disclosure of a client confidence otherwise protected under Rule 1.6. Your client

Continued

Continued:

> lied during his deposition rather than before a judge or jury, and the deposition transcript has not been submitted in court. Although there are no Massachusetts cases expressly ruling on the applicability of Rule 3.3 to pretrial discovery, Bar Counsel takes the position that a deposition should be treated in the same manner as a proceeding before a tribunal because of its potential use as evidence and its impact on the judicial process. This is consistent with the position of the American Bar Association's Standing Committee on Ethics and Responsibility. In ABA Formal Opinion No. 93-376 (1993), the Committee determined that Rule 3.3 applies to depositions, noting that reliance upon their content could be "outcome determinative, resulting in an inevitable deception of the other side and subversion of the truthfinding process which the adversary system is designed to implement." Comment [6] to Mass. R. Prof. C. 3.3 is to the same effect. In addition, Comment [2A] to Rule 3.3 advises that the rule is "intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against the contamination of the judicial process."
>
> . . . The lawyer must first try to persuade the client to rectify the situation. This is good advice to the client whether or not the misrepresentation was material because even an inconsequential misrepresentation under oath could seriously undermine the client's credibility in the case. Disclosure by the client can also ameliorate the impact of having falsely testified in the first place, particularly if the correction to the record is prompt and accurate. Under some circumstances, it might

be possible to amend the transcript and rectify the misrepresentation without outright disclosure that the client had lied. See ABA Formal Op. 93-376. In any case, advice to the client should include the warning that the lawyer will have to rectify the record if the client does not. See Comment [6] to Rule 3.3.

If efforts to persuade the client to rectify the fraud fail, the lawyer is required by Rule 3.3(a)(4) to take "reasonable remedial measures." See Comment [5] to Rule 3.3. The question then arises whether the lawyer's obligations can be satisfied simply by withdrawing from the case. The client's lies and refusal to correct the record give the lawyer grounds for withdrawal under Mass. R. Prof. C. 1.16(b), and the lawyer has to withdraw if staying in the case would make the lawyer a participant in the client's fraud. Mass. R. Prof. C. 1.16(a)(1) (withdrawal required when continued representation will result in violation of rules of professional conduct). Upon withdrawal, the lawyer could disaffirm any positions taken by the lawyer that were based on the client's misrepresentations. Mass. R. Prof. C. 1.6, Comment [16]. . . . however, withdrawal alone would not constitute a sufficient remedial measure. Rule 3.3(a)(2) requires a lawyer to disclose a client's fraud to the extent necessary to avoid "assisting" the fraud, even if the information is otherwise protected by Rule 1.6. . . . [A] lawyer's mere failure to disclose an unrectified client fraud of itself constitutes assisting in the fraud. Thus, the lawyer in our scenario would have to disclose the client's misrepresentations to the court or to

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Continued:

> opposing counsel even if the lawyer withdrew from the case. Moreover, after disclosure and rectification of the fraud, withdrawal might not be necessary.

Roger Geller & Susan Strauss Weisberg, *Lies My Client Told Me*, Mass. Bd. Bar Overseers, Off. of Bar Couns. (2001).

Your Dignity Might Disappoint Your Client

My lawyer persona was always that of the reasonable woman. Quiet. Dignified. Taking everything in stride. Never getting riled.

That's all fine and dandy for the rest of the world, but not for your clients. Your clients want to know you're there for them. So while I would never recommend that you become the Rambo litigator, I do think that in certain circumstances you should allow your passion for your client's case to show.

A case in point: my client and his son, two building contractors, were having their depositions taken. Dad went first. Opposing counsel was being an ass, asking his questions in a sarcastic voice, and rolling his eyes at dad's answers. Of course, neither the tone of voice nor the facial antics made their way into the transcript. My client was getting upset, I could tell. At my request, we took a break. I had clued my clients in to the fact that I couldn't confer with them during breaks. But dad and son went to the men's room, and the son whispered to me before we went back into the deposition room

that his dad was upset. Not that I didn't already know that.

So when opposing counsel again used a sarcastic tone, I said, on the record, that his sarcastic tone of voice was unnecessary, and that my client was answering to the best of his abilities. When opposing counsel rolled his eyes at this, I added that he was rolling his eyes at me, and that he'd been doing that throughout the deposition, and that it was uncivil. I said: "My client and I have come here in good faith to answer your questions. I know that my client is answering every question forthrightly. He is a man of integrity, well known in his community for it. Please show some respect."

I'd like to say that the jerk stopped being a jerk. He didn't. But my client relaxed and believed I was there as his protector. Plus, I had made a statement on the record revealing my opponent's tactics. Best of all, it restored my client's faith in me as a lawyer.

"I thought that guy was going to whip our butt at trial," my client said later. "Now I'm not worried."

Multi-Level Depositions

by Christopher Lutz

Some years ago, John McPhee wrote a short book about tennis called *Levels of the Game*. In it, he described the contests contained within a single match at Wimbledon. What seemed to be three hours of two men beating a ball back and forth across a net was much more. It was in fact a contest of mind games, personality, and psychology. The match was played on many levels.

Few would confuse a civil discovery deposition with a championship tennis match. Depositions are longer, less graceful, and, usually, not as sweaty. But depositions too can be contested on many levels. Besides the asking and answering of questions, information is gathered and judgments are made in many ways. The mere transcript of a deposition is topsoil: It obscures many strata of gamesmanship.

Notice that the preceding paragraph says depositions "can" have such layers. The word is not "must" or "should" or "do." What is described here is optional. Many lawyers do not conduct a deposition on many levels—and they should not. If you cannot ask questions crisply and keep track of your purpose; if you fumble with documents; if you are thrown off by an obstreperous opponent—in short, if you have not taken many depositions—read this article for amusement but not (now anyway) for guidance.

For those who want to brush up on deposition basics, there is a seemingly endless supply of articles and books. Among the best guides are Suplee and Donaldson, *The Deposition Handbook* (1988), and *The Litigation Manual*, 2d at 186-240 (ABA 1989).

Another cautionary note: Even if you are a pro, never forget the principal purpose of a deposition: discovery. You must not let the secondary levels of a deposition dominate fact gathering. Such efforts are no excuse for extending the length of questioning, much less making it abusive or offensive. The trick is to play the game on many levels simultaneously.

Doing anything right requires the proper attitude. With depositions, you must begin with an appreciation of the advantages and opportunities they offer. On points like this, I am what an investment analyst might call a contrarian. Many litigation practices that receive abundant praise—"fast track" court procedures, alternative dispute resolution, or abundant use of computers—I find often oversold or ineffective, and sometimes harmful.

On the other hand, I like depositions. Yes, depositions. Nowadays, the word "deposition" rarely appears without one of these words before it: endless, excessive, expensive, unnecessary, abusive, boring, rambling, multi-track, repetitive. A distinguished judge recently decried in these pages the fact that in many lawsuits "deposition notices drop like autumn leaves." Schwarzer, "Mistakes Lawyers Make in Discovery," LITIGATION Vol. 15. No. 2 (Winter '89) at 31. And there are war stories; when lawyers complain about litigation, they talk mostly about reviewing mountains of documents and sitting glassy eyed through depositions.

Someone needs to speak up for depositions. Anything good can be made bad. The fact that some people overuse depositions or stumble through them is not a general indictment. It is like food. The possibility of poor cooking or gluttony does not mean there is anything wrong with the idea of eating. Depositions in fact have many advantages, but unless you understand what they are, you cannot get the most out of them.

First, and unchallengeably most important, depositions work—not always, not cheaply, not simply, but far more often than any other discovery device. Along with document requests, only depositions bring a lawyer eye to eye with what the other party (not his attorney) thinks or knows. (I won't waste readers' time on the well-known shortcomings of interrogatories, requests for admissions, and other discovery techniques.) *Better* than document requests, depositions ordinarily develop information in one effort. There is none of the teasing, tedious back-and-forth of document discovery: an encyclopedic request; the production of 20 documents and 50 objections; a wheedling and then threatening letter exchange; a meet-and-confer session; a further dribble of documents; a motion to compel; a hearing; the passage of time; an ambiguous ruling; dispute over the meaning of the ruling; further resort to the judge; and, finally, maybe, more

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documents. Compared to that, a deposition does it all at once.

Depositions are also obviously better than witness interviews, the sort of "informal discovery" often prescribed as a cure for litigation ills. You usually *can't* just interview the other party. If your opponent is a corporation, hundreds will be claimed off-limits. And depositions are compulsory; if a notice is defied, there are penalties. If the witness's oath is ignored, there is perjury. Besides, when impeachment is called for, your memory of a casual chat or even a signed statement you drafted has limitations.

The final—and, for present purposes, most significant—plus for depositions is harder to describe. Put it this way: They give you room. An opportunity to stretch out. You can experiment, even make mistakes. Though they have a certain formality and a serious purpose, depositions are blessedly more casual than many aspects of litigation. The trier of fact is not peering over your shoulder, evaluating your tie and haircut. Neither, usually, is the client. Your pauses and doubts will rarely show up on the transcript. Neither will your tone of voice. You can journey down factual side roads without fear of the confusion it may cause. You yourself can be confused but recover without fatal damage. You need not persuade or convince anyone.

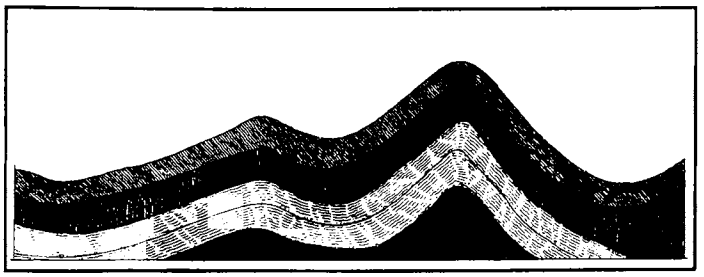
Compared with a trial or motions argument, this freedom is a tonic. Part of the drudgery of many trials is a constipated formality caused by excessive preparation. Every fact is known, every document analyzed. The proof is outlined and the jury (plus shadow jury) scrutinized. Dominating everything is the fear of making a mistake, even of falling short of perfection. Except for supremely confident courthouse veterans, there is little reliance on spontaneity or instinct.

Depositions should be different, though they too are often afflicted by a nose-to-the-outline stiffness. You must be prepared, of course, but you have freedom. And by using the freedom and flexibility of a deposition, you can do more than ask for the facts.

Remember, however, an important limit on deposition freedom: the transcript. Almost all that matters once a deposition ends (as long as videotape is not involved) is the transcript. That is the only remaining record. Whatever you do, however many levels you play on, you must know at all times how the transcript will read and look. You want it clear and coherent. You want, if possible, for each question and answer to stand on its own. A reader or judge should not be forced to leaf back seven pages to determine what the "it" or "arrangement" or "this situation" you are asking about means.

Such attention to the printed transcript will lead sometimes to stilted phraseology. You will use the same nouns and phrases over and over again. It will also lead you to jettison phrases that are not self-executing: "Strike that," "Let me start over again," and "Maybe I've asked this before" can be done away with. In addition, you must be careful about phrases that derive their sense from emphasis or tone of voice. "How can you say that?" means different things depending on whether the emphasis is on "how," "you," or "that."

The limits of a printed transcript are not especially confining, however. Tone of voice cannot give meaning to a question because it does not show in print, and that can be to your advantage. You can use a long pause between words, employ



an incredulous tone of voice, or stare at the ceiling without anything appearing on the transcript. So—to begin with—remember what shows on the transcript and use what does not.

With the preliminary concepts out of the way, what contests can you plan to play in depositions while you gather information?

First is assaulting the fortress of preparation. The witness comes schooled in all the commandments of testimony: Answer only the question asked; don't guess; don't volunteer; and on and on. You want to make him violate those commandments. There are many reasons for doing this. It assists the accumulation of information. It lets you assess the witness and how he will perform at trial. And it helps you determine what witnesses and issues the other side cares about.

To break down preparation, you must be able to recognize it. Every litigator in the world knows how to prepare a witness for a deposition—or should. But what does a prepared witness look and sound like? As you ask your initial questions, look for signals like these:

- A flat, uninflected voice.
- Dead pauses between question and answer.
- A dull, serious demeanor; no sense of humor.
- Terse, dehydrated answers.
- Quibbling over questions and the meaning of words.
- And, of course, those favorite phrases of the prepared witness: I don't know (or recall); please repeat that; and can I talk to my lawyer?

In general, if the witness before you looks human but sounds like an irritable android, if she is a successful executive in a complex business but cannot remember yesterday, then what you have is an intensely prepared witness.

How do you get through this protective shield? Recall how the witness got that way. His lawyer has taught him you are the enemy and has schooled him in an unnatural discipline. For most witnesses, keeping the testimonial force field up requires concentration and memory work (How do I phrase that answer? What questions do I fear?), plus an enforced antagonism toward you. It is hard work, as all the witnesses who stray from the prepared path show.

If this is the preparation process, undoing it probably involves getting the witness to relax and drop his level of antagonism. There are exceptions, but many deposition interrogators go wrong by starting out intense and unfriendly. More often than not, that keeps the witness on edge, reminds him why he needs to be careful, and confirms his lawyer's warnings about the other side's hired gun.

So start friendly and apparently casual. Be solicitous of the witness's comfort. Engage in friendly banter and joke with opposing counsel during breaks. Make your questions precise, but simple and conversational, not formal. Above all do not—if you want to undercut the other side's

preparation—become angry, threatening, or rude.

Often an effective aspect of "good cop" interrogation is to ask the witness's help—in explicit terms. You might ask, "Mr. So and So, I'm not an engineer, can you help explain what this patent means?" Or you might say, "Mr. Closemouth, I've been confused for weeks by the relationship between these six companies. Can you explain to me who owns what?" Questions like this are not what the defending lawyer warned about. For decent, ordinary folks, who find deposition preparation unnatural and a little silly, the human urge to help may well lead to relaxation and information.

Throughout, your goal should be to convert the deposition into something like a friendly chat between you and the witness—one in which you have careful control over what you ask, and the witness just talks.

The opposing lawyer will rarely sit, mute and inert, while you try to relax and untune his finely strung witness. He will interject and sputter, object and prompt. He will try to pick fights with the questioner. Sometimes, the "objections" will be pretty explicit: "Objection. Mr. Lutz is just being tricky with that question. He's trying to confuse you."

These tactics may work. Like an electric prod on cattle, they may jolt the witness down the chute of preparation. All the while, this drama will tell you more than just what the answers convey. You begin to learn how the witness may perform at trial—where the cattle prods will be shorter and less frequent. You gain insight into the opposing lawyer (Is she alert? Does she try to protect the witness?), and you learn, by measuring the frequency of sputters and interjections, what areas of inquiry worry the other lawyer.

Sometimes defense efforts to stiffen the witness's spine do not work. Sometimes, in fact, they help the questioner. Most litigators have conducted depositions in which the witness is more irked at his own lawyer than the questioner. Recognize the signs: an impatient look while the lawyer blathers out her objections; complete failure to get the not-so-subtle hints in those comments; requests for breaks to talk to the lawyer; answering even when the lawyer has said, "Mr. Jones can't possibly know that. . ."

If you sense this division between lawyer and witness, exploit it. Without being coy or obsequious, turn up the charm. Stay on the relaxed-witness program. You can sometimes be direct about it, in appropriate cases. If, for example, the lawyer says, "Objection. That question is unintelligible," your response might be, "Oh, I think Mr. Jones understands the question and I'd like him to try to answer it."

In doing all this, realize that things are being learned at levels other than the responses to your questions. Knowing that a witness and her lawyer disagree or do not get along has value and may be exploited later. You may detect that they have different views of the case. Better, the particular issues or facts that cause trouble may stand out.

Sometimes, congeniality fails to compromise witness preparation. Some witnesses are better students than others. Some stay antagonistic because they are mean by nature. And some have an inbred, dull terseness. For folks like that, your charm will be like a wave against a rock. You can try and try, but the preparation will still be there.

What is the approach for a hard-bitten or well-schooled witness? Again, hostility and tough stuff are not the answer. That will lead, in most cases, to the hours-long shouting matches that deposition critics rightly complain about. No information will emerge—on any level.

There are, however, other ways to undercut preparation. Again, recall what a prepared witness has gone through. After getting rules for testimony, she has been run through fake questions and answers. Probably, the facts she knows about have been reviewed in chronological order. What she has gotten is a highly structured set of do's and don'ts and a lot of memory work.

One thing to do is to surprise the witness—put her off balance. If it is feasible after a few preliminary questions, do *not* begin at the beginning. Start in the middle. Given the nature of predeposition preparation, the witness has probably begun to brace for particular questions in a particular order. Programmed to worry first about his early employment career, an unjust-discharge plaintiff may be thrown off stride if the first questions concern lost wages.

A word of caution. Do not disorder your questions if you cannot, or the case does not permit it. You must know what you are doing and be in complete command of your subject. Otherwise, the person off balance will be you. Besides, in some, maybe most, cases, your deposition strategy will depend on the patient accumulation of facts, from beginning to end.

Another unbalancing technique—which also requires skill—is to ask about *almost* the same topic at different times. The idea is not to cover the same ground twice. That would waste time and provoke legitimate objections. Instead, what you do is cover half a topic and then go on to something else. Later, come back to the second half. It might go like this:

Q. Mr. Jones, did you discuss the terms of the contract with Mr. Smith?

Part of the deposition game is asking questions in a way that undermines witness preparation.

A. Yes.
Q. Face to face?
A. No, we talked on the phone.
Q. Did you review the contract documents before calling?
A. Yes.
Q. Which ones?
A. [A list is given.]
Q. Did you talk to your associates before calling?
A. Yes.
Q. Who and about what?
A. [Another list.]
Q. When did you call?
A. Noon on June 12.
Q. Where were you?
A. At home.
Q. How long did the call last?
A. About an hour, I guess.

—Then the shift—

Q. How long have you worked in marketing?

Twenty or thirty minutes later, the questioner will get back to the phone call.

The theory behind this is that people can remember something well only once. The first time a topic comes up, the witness braces, ransacks his memory for the party line, gets it firmly in mind, and prepares to do battle. When you leave the topic without hitting the tough questions, the witness relaxes. He is relieved, and somewhat self-satisfied, figuring he has beaten you on the topic.

With many witnesses, an accompanying reaction is to throw preparation on the point covered in the trash can. When you return to the topic, the witness may be perplexed, and the fine edge he had the first time around may be gone.

There are other ways to pry at a witness you cannot charm. One is to seem—but only seem—like you are not paying attention. Look at him rarely. Look out the window. Act as if you do not understand or do not care about what he is saying. Such appearances—and they must be appearances only—can work wonders with egotistical witnesses. Though well prepared, such people want a stage and an attentive audience. If they are not getting it, they may try to attract attention by saying more, being cute, or acting professorial. When they do, their preparation cracks. Likely candidates for this are senior executives, Very Important People of all kinds, and those who fancy themselves superior to lawyers—experts especially.

Never underestimate the power of well-placed silence. It can interrogate better than any string of words:

Q. Did you see the accident?

A. Yes.

—a few seconds—

Q. Who was driving the red car?

A. I don't know.

—a few seconds—

Q. How far away were you?

A. About ten yards.

—a few seconds—

Q. And you didn't see the driver?

A. No.

—a longer pause; the questioner looks at the witness—

At least not very well.

Then the follow-up questions rain down.

This happens a lot. Silence makes many witnesses uncomfortable. At least when questions are being asked, they have something to think about. Silence offers witnesses no sounding board for the adequacy of their performance. Like a black hole, it sucks in nervous chatter. The beauty of this technique is that it will not show up on the transcript. Long or short, all pauses take up only a triple-spaced gap.

The value of silence can be generalized. Vary your pace. If you notice the witness is shortening the pause between question and answer that he has been coached to use, ask questions more quickly. His preparation is slipping a little, and the format should encourage the slippage. Conversely, if the witness seems bursting to tell his story, perhaps to disgorge well-practiced lines, slow down.

You might even consider standing up and walking around while you ask questions. Many lawyers act like they are required to stay glued in place while they ask deposition questions. It is true that some are; leaving the outline graven on their yellow legal pad would put them on the far side of the moon with no oxygen. Still, if you are able, consider taking a stroll. It will emphasize to the witness how confined he is—and that frustration may loosen his coaching.

In all of these things, use common sense and moderation. When I talk about silence, I do not mean a ten-minute staring match. Just pause a few beats longer than usual between questions. Walking around does not mean stalking the conference room as if you were delivering the summation in *Inherit the Wind*; merely stand up and stretch. A simple rule: If it is theatrical or obstructs the deposition, do not do it.

Witness on a Tightrope

A word on what might be called partial or concentrated preparation. In most depositions, there are three or four especially delicate spots for a witness. Testimony on these points must be gotten just right. The twin demands of truth and advocacy create a tightrope for the witness and his lawyer. What did you say at the merger negotiations? What did you mean by the phrase "we have full confidence in . . . ."? How much did you know about Fraudco's financial difficulties? In areas like these, the other side's lawyers have lavished special attention, drilling on question after question, trying to get the phrasing just right.

As you take a deposition, you can sometimes see this intensive preparation, written almost physically on the witness. An area comes up and demeanor changes. The answers come more slowly and the voice goes flat. Sometimes, the witness literally stiffens up. His lawyer starts taking notes furiously. Such signs will tell you where you must be persistent and creative to unlock the prepared script. Sometimes more valuable, these signs of concentrated preparation will tell you what the other side is worried about. It is a special education when a witness goes tense in an area you thought was innocuous.

The previous paragraph refers to creative persistence in unlocking a prepared witness. The concept is worth explaining. Sometimes trying to get key information is like winning a certain kind of video game. You may have seen—or even played—such amusements: You control a tiny hero armed with sword and shield who wanders a forbidding landscape, vanquishing fearsome creatures and accumulating greater strength and colorful trinkets. At some point in the electronic quest, the little hero comes to a dead end. You order him to try everything: sword, bombs, lasers, magic spells—but time and again you fail, and he dies. Finally, through ingenuity or dumb luck (or because your 11-year-old child tips you off), you determine that a peculiar combination of actions is the answer: If your electronic alter ego stands on a magic mushroom, jumps, and throws a gold coin in the air, lights will flash, music will play, and a giant door will crash open, revealing the mysteries within.

Asking deposition questions can be like that. You ask time and again about a subject and get nothing. Then you put the same question in a slightly different way, and the treasure is revealed. This is another symptom of deposition preparation. Suppose a witness has received an absolutely devastating document. White hot. A gun pouring out smoke. It is a handwritten memorandum from the witness's boss to Mr. Jones, a coworker, with a "cc" to the witness at the bottom. It has the word "draft" on the top. It says, "I don't care what the engineers say—those extra supporting beams cost too much;

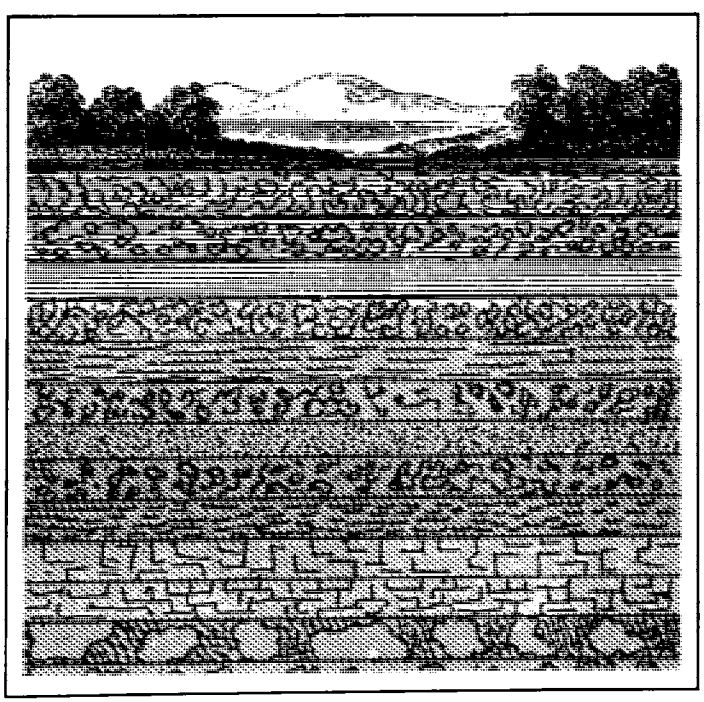
we should think about taking them out." Revelation of this tidbit in a roof collapse case would—to put it mildly—not help much.

The witness's lawyer does not want the document revealed, but counseling out-and-out perjury is not his specialty. Instead, he advises the narrow view. He tells the witness to remember that the document was *not* a letter, *was* a draft, was *not* a direct communication with anyone, was *not* addressed to the deponent, was *not* a final decision, and so on. The questioning—with the witness's interior dialogue in brackets—goes like this:

Q. Did anyone tell you to change the roof design?
A. No. [Not face to face; anyhow, it was directed to Jones.]
Q. Did you ever see any letters or plans discussing a design change?
A. No. [It was a draft *memo*, after all.]
Q. Did you ever see any other documents that directed the design to be changed?
A. I don't know. [The thing was a draft; who knows what the boss really wanted to direct? He just said we should "think about" the issue.]
Q. Were you sent any documents on the subject?
A. No. [It was supposed to be sent to *Jones*; I found the thing with the "cc" on it later.]
Q. Do you know whether anyone wanted the design changed?
A. No. [Drafts are tentative; maybe the boss changed his mind.]

This kind of hairsplitting can go on forever. I absolutely do not commend it to anyone. Some of the responses listed drift beyond the land of careful preparation into the netherworld of sharp practice, and the wilds of misconduct are not far away.

Nonetheless, as a deposition interrogator, you must know how to deal with such witnesses, because you will meet them. The answer is to remember all the noun variations and synonyms you learned in your interrogatory drafting days. Reflect on the escape routes provided by ambiguities in certain words, such as "you," "sent," or "see." Then patiently vary the questions until you hit the right combination. In the example, if the question was, "Have you ever seen any draft documents mentioning beams in the roof?" then—absent out-and-out lying—lights would flash, whistles would wail, and the monster of preparation would be vanquished.



Strategies for dealing with close-to-the-line preparation should include techniques for dealing with witnesses who claim they never did anything and, if they did, now remember nothing about it. Despite the honest efforts of their attorneys, some witnesses believe "I don't know" and claims of noninvolvement are answers to anything. They are not, of course, and sometimes they constitute perjury. But what is the approach with such a witness?

Not much works, but shame or implied ridicule can help. If the witness repeatedly denies responsibility for virtually anything in a company, ask her whether her job had any duties at all. Ask what duties she *did* have. Ask her whether she got performance evaluations and what they covered. If the answers are a string of "I don't knows" and "I don't remembers," ask whether the witness has memory defects. Ask why only the events connected to the lawsuit cause recollection problems. If none of this works, lock in the failed memory in as many ways and on as many details as possible. By getting a blank memory on everything, you can at least severely limit use of the witness at trial.

The notion of cracking preparation suggests another level of deposition play: witness evaluation. All the time you are listening to what the witness says, you should assess how he says it and the image he presents. Is he pompous or pleasant? Articulate or dull? Obnoxious or believable? You must try to come away from a deposition with not only what the witness knows but also who he is.

Some of the reasons for this may seem apparent but are worth stating. First, you want to get a sense of how the witness will play at trial. Will a jury or judge like this person and trust what he says? Equally important, consider whether the witness's personality makes sense in the larger context of the case. Can the meek accountant before you really have gotten into an abusive shouting match, as your client claims? Did the precise engineer being questioned really make the same subtraction error on three different occasions, as he contends? In short, does the witness, as a personality, fit the case?

Evaluating how the witness will react to trial questioning is also important. Here, care is important. You certainly do not want to run through your entire trial cross-examination (if you even know it) or engage in theatrical witness abuse. That way, the other side will learn more than you do.

The trick is to insinuate questioning variations. Pace changes have been mentioned. For a few minutes, see how the witness reacts to a fast stream of leading questions. Does she get caught in the current, as you want at trial, or (perhaps aided by incessant objections) does she keep the same measured pace? Consider also bringing a hard edge to the tone of your questions. This does not mean berating or bellowing at the witness, but, if your tone has been calm and folksy, put a bit more snap, a touch of sarcasm in three or four inquiries, and watch for the reaction. It may lead to nothing, but if you learn that the witness gets peevish or is easily angered, you have learned something valuable.

Witness assessment, in fact many aspects of multi-level depositions, can be hampered by a practical problem. Every

deposition questioner faces a hard task: He is being asked to do at least six things at once. He must ask questions, listen to answers, contend with objections, take notes for additional questions, keep track of documents, and remember whether he has covered everything he needs. Often this is complicated by an impending plane departure or the imminence of an afternoon hearing. Lost in the effort to keep many plates in the air without breakage is any opportunity for analysis or reflection. It sounds great to talk about evaluating the witness, but how do you have time to do it?

The answer is to bring in a second lawyer or a skilled paralegal or law clerk. Here again, my contrarian slip is showing. Many decry having more than one person at a deposition. Clients complain about overstaffing and courts sometimes refuse to award fees for an extra lawyer. The push to cut litigation costs may in this instance be shortsighted—at least for important depositions. A second set of eyes and ears needs to be there to watch reactions and demeanor. While one lawyer asks questions and evaluates answers, someone else needs to watch the match on other levels.

A final level of play is evaluation of the other side's lawyers. In many cases, this will be your first face-to-face meeting, and assessment begins immediately. Things like what issues are important to the other attorney and his relationship with his client have been mentioned. You also soon learn whether the lawyer will conduct the suit in a professional, correct way or will maintain the enforced abrasiveness that some believe is necessary to justify a fee or retain client loyalty.

There are other evaluative points. As with witnesses, a little gentle needling can be informative. You can also get a notion of how adroit and bright the lawyer is when she objects. Ask politely for an explanation of one or two objections. The reaction may be a refusal or only bluster; it may, however, be a careful description of the basis for the interjection. In exchanges like that, you can determine whether the lawyer knows what she is doing.

Something always interesting is who exactly the other side sends to the deposition. An experienced, adept litigator? A silver-haired senior partner who soothes the witness but has lost a step in the byplay of banter and interrogation? Or the law firm's fifth chair on the case—an associate a year out of law school? Each selection can tell you something about the opposition's view of the case and the witness.

Conducting a deposition on many levels is not easy and can be overdone. It is worth saying again: Your first goal is getting answers to appropriate inquiries. Do not let the game-playing potential of depositions—valuable though it is—dominate proceedings. This means making your questions clear and insisting on direct answers. It means remembering that the transcript can be used at trial or in motions. And it means knowing your case and what you need to discover.

If you go beyond this, and get information on other levels, care is still needed. Everything suggested here must be woven seamlessly into questions. No grandstanding. There is great freedom in the deposition process, but theatrics and extended quirkiness are not ways to use it. If the deposition is being videotaped, your tactics will be even more confined.

Part of the reason for observing such limits is that multi-level play can be conducted by both sides. The lawyer across the table is watching you. In fact, he has more time and freedom to observe you than you do to watch him. If you overplay your hand, get intense on the important points, become visibly frustrated when things do not go as you hoped, you will give to the other side what you want from them.

There are two antidotes. One is to be deadpan throughout. Become a mirror image of what the witness has been coached to be. This tactic will limit your ability to do some of the things described, but there is a second option: indirection. Seem indifferent when you are interested and intense when the topic is dull. Do not do it all the time, but throw in enough change-ups so the other side cannot get a line on what you are up to.

Do not get the impression that every deposition—or even most of them—can support an elaborate superstructure of game playing. If this article has created the impression that conducting a deposition is like running a triple agent in post-war Poland, I have overdone it. The truth is that many depositions are flat and uncomplicated. Everybody knows what is going on, and all the levels of play are mashed into one. Furthermore, playing the game may yield nothing. Still, the possibilities are usually there. You may not always play on many levels, but you must remember that you can.

This leads me to anticipate a criticism. Some readers may believe that, in its advocacy of "games," this article underscores what is wrong with litigation. Discovery, they would say, ought to be simple and straightforward; tricks and tactics are why lawsuits take so long, cost so much, and get nowhere.

On a couple of levels, I agree, but on a third—the level where we all live and work—I do not. First, as I have said, tactics can overwhelm legitimate discovery. They can be obnoxious, obstructive, and just plain wrong. In fact—and this is the second level—I agree it would be a better world if everyone came clean, witnesses did not quibble, and lawyers needed only to ask direct questions because they got only direct answers.

Unfortunately—now we are at the third level—we do not live in that better world. As often as not, the other side will coach its witnesses. Faced with that, a deposition lawyer has a choice. He can shun games, just ask questions, and go home with a bag full of "yes", "no," and "I don't know," secure in the belief that he has served a higher goal. Or, observing propriety and balance, he can represent his client effectively, engage in some gamesmanship, and maybe get some real information. I myself choose the second course, realizing it is not ideal, but without apology.

Finally, something about trial. Never lose sight of the fact that what you do in a deposition is subservient to your trial goals. You do not develop information, on any level, just as a curiosity. It all must be fit into a trial plan. That connection highlights an interesting contrast. Depositions and trials require related, but actually quite distinct, skills: In depositions, a lawyer must deal with the unknown and use his freedom creatively, keeping many lines of inquiry going and caring only a little for appearances. In trial, an attorney must wring persuasive, emotional force from thoroughly discovered facts while confined by rigid rules and formalisms and always worrying about appearance. Unfortunately, some lawyers do not understand the difference. Many of the problems of litigation stem from depositions being conducted like trials and trials being conducted by those who have only done depositions. □