

DEMONSTRATIONS OF ADVERSE LAY AND EXPERT WITNESS DEPOSITIONS¹

David A. Kimberley²
Cusimano, Keener, Roberts, Kimberley & Miles, P.C.
153 South Ninth Street
Gadsden, Alabama 35901
(256) 543-0400
DavidAKimberley@msn.com

I. Introduction

If you are contemplating taking the deposition of either lay and/or expert witnesses of the adverse party, then there are several ground rules to keep in mind. Of course, preparing an outline well in advance is essential. It maybe useful even to write out critical questions. You, however, should not be so attached to this outline as to fail to hear for openings for productive lines of inquiry that may need to be spontaneously developed in responses to answers given by the witness.

II. Think Through Your Approach

In determining the content of the questions for your outline, you should have thought through what you need to get from point A in your case to point B and how this particular witness will help you get there.

1. Fishing for facts

What do we want to find out that we do not already know or strongly suspect?
This is true discovery in its very essence.

2. Eliminate surprises

Eliminate surprises about the defendant's facts and theories. This is essential, especially in an expert witness deposition. This type of question is closely related to true fishing questions, although it can obviously be couched in terms of theories we know that the expert witness is using to approach his or her

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conclusions. Questions included in this category would be those where the broadly worded contention type inquiry is made. Fashioning these questions appropriately will give us a preview as to defense themes and theories that can be used to fashion an initial reproach and appropriate response.

3. Chapter Method

Generate chunks of questions and answers that will stand alone in an understandable manner for the purpose of later presenting to the jury, either by videotape or reading aloud, in order to hammer home important factual or legal points in your favor. These questions may resemble true trial cross-examination. In fashioning these questions, avoid pronouns. You should use proper names and dates in order to minimize confusion or doubt when the testimony is later presented.

You should also avoid questions that depend on full context for a complete understanding of the matters discussed earlier in the deposition. If the witness answers in such a way that reference to earlier material is necessary for understanding, immediate follow up should be asked to make this particular passage of testimony understandable on its own accord. This category of questions might best be left to the end of the deposition since it may be more confrontational in tone and have the effect of causing the witness to be less open or friendly and, thus, less accommodating for other purposes for which the deposition may be needed.

4. Fending off summary judgment motions

A motion for summary judgment is typically forthcoming from the defense. Use the opportunity of deposing adverse witnesses, lay and, particularly, experts as an offensive weapon for plugging legal holes in your own case. You can use favorable documents and favorable facts in questions that are framed in such a way that they are indisputable. These are roughly the broad reasons for deposing adverse and/or expert witnesses. Here are some considerations concerning your approach.

5. What to hold in check

There are always crucial nuggets of information or impeachment material that may not be known to the defense. You should give careful thought of how to approach the deposition in order to get maximum mileage out of these points with your witness.

You have to consider letting him or her climb out onto a limb. In deposition, you typically would not want to saw that limb off, but rather wait for trial.

However, there is the possibility that you may not get a chance to do it in a dramatic fashion again, because, by trial, the defense will typically have figured out what you may have been getting at with your line of questioning in the deposition. You may be able to generate a concise and understandable series of questions where you can demonstrate that the defendant witness spoke in the deposition with a forked tongue and then have testimony or a document that would prove the actual truth. This approach will likely be tactically superior if available to you.

III. Chapter Preparation

As referenced earlier, control the information in your deposition by chapters. Make sure that the deposition is taken in a manner that the jury will have an opportunity to process all the information you need to dispense about that chapter before moving on. Make sure your questions have one fact per question. Make a chapter out of the whole of the series of fact questions. From that, build the individual facts into a conclusion. If you prepare the questions correctly, by the time you get to the end of your chapter, the jurors will have beaten you to the conclusion of that particular issue conclusion and in the end, they are only looking to you for verification. What jurors grasp by themselves is retained much better than what you pitch them in closing.

At all costs on the one fact per question issue, avoid compound questions. If you have inserted compound questions in your questioning then attempt to fix the bad question by backing up to the safe facts isolating the dispute and eliminating the subjective portions of the issues.

It is always important, whenever possible, to eliminate any subjective matter from your questions to avoid the witness from sparring with you on that matter. For example, you may have inserted a subjective term in a question such as the following.

Q: The plaintiff lived with you for a good while didn't he?

A: I wouldn't say a good while.

If you have a witness who wants to spar with you on the issue of what "a good while" means, then you can seek to make his or her disagreement with you look silly. For example, you can continue that line of questioning after the witness's argument with you as to whether he or she would agree to your term "a good while" by the following.

Q: Well, was he living with you two years, two weeks, what?

A: About two and one-half years.

Keep in mind with your chapter planning that you are making a logical progression to a specific goal. We will not always keep a witness from reaching conclusions inconsistent with our version, but we can certainly make the witness's conclusions or disagreement

with our version more unbelievable. If the witness will not concede to the goal of the issue of the chapter, he or she will at least have conceded many supporting facts along the way making the goal of your chapter issue seem more credible than the conclusion of the witness.

Remember in the chapter method of deposing the adverse witness that aggressiveness is not a goal direction. The appropriate decision is what topics should be approached, keeping in mind that perception is individual to both the witness and to the fact finder. To that person, perception is indeed the reality, so the goal is to equal the perception of the fact finder that would match the goal of the chapter.

Therefore, before you begin a chapter you should first determine the issue that needs to be the topic of that chapter and then establish a goal or conclusion you want the witness to agree with you and, more importantly, the fact finder to achieve. From that, you can fashion a sequence of questions that are exhaustive of that particular topic. You need not ask the witness himself or herself to draw the inferences, just point to the inferences with the facts. If you have prepared your chapter properly, you have moved from the general to the specific in a way that would require your opponent in trying to undo the inference to attack all the facts above the point that the inference was made or conclusion was drawn.

On that basis, grouping facts will prove your goal. Keep in mind that facts have value only in relation to a theory that your case has. In that regard, not all facts have equal value, so focus on facts that are important to your theory.

Also, in preparing your chapters, keep in mind that experts are more vulnerable on collateral issues than on the central opinion to a case. When you get into detail on issues that bring their motivation and credibility into doubt, you will typically find they will be more insecure.

In grouping your chapter issues, keep in mind that you can use the chapters to validate the things with the expert such as medical or psychological testing that would help your client. Go through those chapters proving your points (such as testing that assisted your client's case was valid, that the testing is widely used and accepted in the profession, and so forth). If you have a series of issues involving things that the defendant may need to prove his or her case but that does not have in this particular case, then group questions in chapters to elicit a series of "no" answers from the witness. "No" should stand for zero, not a denial. So, for example, if your client was revealed as not malingering that the defense and/or expert did not investigate or perform testing that would be helpful, and so forth, then pair those in a chapter format from general to most specific that would elicit that information from the witness.

Sometimes you will have a witness, particularly seasoned expert witnesses, who will throw out bait to you in the hope that you will run after that bait information and be diverted from your very organized and concise chapter approach wherein you go from general to precise information on each topic.

In a deposition, you probably want to follow up on bait just to make sure that you have run down every rabbit trail the defense has for you in looking for anything that might be useful. However, before going after the bait, you must finish your chapter first. If you leave your chapter then the information you were trying to elicit from the chapter appears truncated, your sequence is ruined, and your context is lost. The chronological evaluation value with the fact finder will also be damaged.

IV. Exhaustion and Looping

When attempting to exhaust an important issue, consider looping multiple facts to that point to exhaust that issue and eliminate any hope of the defendant wiggling out of the importance of your conclusion.

For example, you may be discussing with the expert the importance of a physical test your client may have had that is very helpful to your position. You can approach exhausting with the fact finder the importance of that test and the expert's agreement with you that it is an important issue in the case in the following manner.

Do you recognize this particular functional capacity evaluation? Is it taught? Is it relied upon?

You can then loop back the significance of the expert's testimony in this issue with your particular client's situation with the following question, which loops all this information back.

The evaluation then that is taught, respected, and relied upon was indeed performed on the plaintiff?

Say you are taking the adverse expert who had conducted a physical exam on your client to draw some important conclusions concerning your client's medical condition. You can use the loop method to exhaust that issue in the following manner.

You understand the need in your profession to conduct a thorough exam?
You understand the need in your profession to conduct a complete exam?
You understand the need in your profession to conduct an unbiased exam?

These are questions that a medical expert would be hard-pressed to disagree with, certainly. You can loop back to the specific information dealing with your client in the following manner.

Yet, from the moment you met my client to the time you showed her the door was 35 minutes, correct? And of that total, the thorough, complete, and unbiased exam that you have testified as essential in this case took 20 minutes?

This is known as a juxtaposition of conflicting facts and is an effective loop to show the fact finder the absurdity of the expert's position.

Another effective loop back is to demonstrate the absurdity of an expert's conclusion such as an independent medical evaluator who tries to render the opinion that your client is just fine. A loop back method that would be particularly effective here is a double loop on inconsistencies, juxtaposing those inconsistencies. An example of this would be as follows.

Q: Doctor, you have said it is your opinion that the plaintiff is doing as well as can be expected?

A: Yes, he is doing quite well and has an excellent prognosis.

Q: Ray has a shattered tibia?

A: Yes.

Q: Ray has a steel rod in his femur?

A: Yes.

Q: So what you are telling me is Ray is doing as well as can be expected for someone with a shattered tibia and rod in his femur?

A: Yes.

Remember, always loop your questions to a safe undisputed fact.

You may hear the witness give phrases or statements that you can use in a loop approach that may be harmful to your opponent's case. Listen for those. Any answer other than "yes" or "no" may provide an opportunity for you. If you hear them, lift or extract the useful phrase word and use it in the body of the succeeding question or questions. Be sure, as always, to loop it to a safe and undisputed fact. A good example of where this could be useful is when adverse lay witnesses, as they tend to do, minimize problems or mistakes that may have been made.

How to Handle the “I Don’t Know” Witness

The “I don’t know” or the “Sergeant Schultz” witness is one of the more frustrating witnesses encountered and typically will be an adverse lay witness.

If you know before taking the deposition that the defense discovery strategy is to have the adverse lay witness feign ignorance, you can try to make maximum mileage out of the deposition by fashioning questions that hoist the defense on its petard. If the defense witness, for example, denies knowing anything about routine documents or other facts clearly within his or her knowledge or field of responsibility, you should craft questions that make the witness choose between abandoning this information denial stance or sounding incredibly stupid. From this approach it would be useful to commence the deposition with a few questions concerning the witness’s area of responsibility or knowledge. You may also include questions about the documents reviewed or persons talked with. These points will then be elaborated on or amplified as particular topics come up in which the witness starts claiming a lack of knowledge. In using this method, the fact finder will be able to see for himself or herself the disingenuous nature of the witness and/or the defense approach.

You can also determine if the witness never had the information, used to have the information, knew the information and now does not have it, and/or when he or she divulged himself or herself of that information or responsibility to know that information. This will allow you to determine whether to impeach that witness and/or target another person for impeachment if he or she identifies or references someone else.

Another way to handle the “I don’t know” or “I don’t remember” witness if he or she is trying to evade, particularly a lay witness, is to insert questions that have information that you would *want* him or her not to remember. Either he or she will stay consistent and give you what need or the jury can hear the witness going both ways with his or her selective memories, thus, adversely affecting credibility.

V. Conclusion

Preparation is essential in taking on any adverse witness. Please remember to organize your thoughts into bite-sized chapters and each question containing one bit of information. Determine ahead of time what you want from that particular witness and how to get it, fashioning your questions accordingly.