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## **Developing a Winning Case Strategy**

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# How to Develop a Winning Strategy<sup>1</sup>

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<sup>1</sup> The following excerpts are for one time use only and are copyrighted. The excerpts are from *Winning at Deposition* (Westway 2013), which won the Association of Continuing Legal Education's highest honor for professional excellence out of more than 300 entries and is a nationally best-selling textbook. For more information about this book or the author's upcoming book, *Turning Points at Trial*, go to [www.shaneread.com](http://www.shaneread.com).

## CHAPTER TWO

# Taking the Deposition

There are two possible outcomes: if the result confirms the hypothesis, then you've made a discovery. If the result is contrary to the hypothesis, then you've made a discovery.

— Enrico Fermi, Nobel Prize winner for Physics in 1938

**M**uch like a scientist who tests a hypothesis, you need to test the theory of your case. If you represent a plaintiff and your case becomes stronger, such a finding will obviously affect the lawsuit's value. If you uncover facts that undercut your theory, the value of the lawsuit will be less, but you may find a way to minimize the damage before trial. Generally, a deposition is the best way to determine your case's strengths and weaknesses, but there are occasions when it is not. Let's first look at the advantages and disadvantages of a deposition and then learn how to take one.

### 2.1 EIGHT REASONS TO TAKE A DEPOSITION

Cost is a significant consideration in your decision. Expenses for a court reporter can exceed \$1,000 for a half-day deposition. In addition, there is a significant burden on your time. Let's look in detail at a deposition's advantages and disadvantages.

Most lawyers see depositions as fact-finding exercises. While this is true, they have a larger purpose. Great trial lawyers use depositions to determine how credible a witness will be at trial. It is a unique situation where you can look the witness in the eye and assess his demeanor. This determination is critical to deciding the settlement

value of your case and whether you should go to trial.

Unfortunately, there may be times when you feel pressure from a client to save money by not taking

You can't rely on a colleague to frame and ask the question in the same manner as you would.

## 2.6 KNOW THE ELEMENTS OF YOUR CLAIMS OR DEFENSES

Knowing the elements of your claims or defenses is fundamental. If you are the plaintiff in a negligence case, make sure you know the elements you need to prove before you begin a deposition. Do you have to prove a breach of a duty? If yours is a medical malpractice case, do you need to prove that the doctors failed beyond a reasonable degree of medical "certainty" or just by a reasonable degree of medical "probability." Once you have researched the law, put that research in your outline so that it will be easily accessible during the deposition.

## 2.7 DETERMINE YOUR THEORY OF THE CASE

Webster's dictionary defines *theory* as "the analysis of a set of facts in their relation to one another." To arrive at a theory, you must successfully answer this question: "At the end of the trial, what conclusion must the jury be compelled to reach based on the law after hearing all the important good and bad facts?"

In the Simpson criminal trial,<sup>2</sup> O.J. had a powerful theory that the police had framed him. However, in the civil case, the plaintiffs turned this theory on its head. The plaintiffs maintained that the Los Angeles Police Department had no motive to frame O.J. Indeed, the facts overwhelmingly supported the theory that O.J. had a lot of friends at the police department and that, if anything, the police treated him more favorably than the average citizen.

### Example: Developing Theory (Simpson Deposition)

[Plaintiffs' attorney Dan Petrocelli] Q. Did members of the LAPD frequent your house from time to time?

[Simpson's attorney Robert Baker objects] That's pretty vague and ambiguous, too.

[Simpson] A Yeah, you'll have to be a little more specific because I can't answer that.

Q. Did they ever come to visit you?

A. Yes. . . . One individual [also] used my pool [and brought friends to play on my tennis court],

Q. Did you ever file any charge of harassment against the police at any time before June of 1994?

<sup>2</sup>For a summary of the criminal and civil trials, go to Appendix One.

Also available as part of the eCourse

[Ethics: Developing a Winning Case Strategy, Thinking Clearly at Trial and Preserving Error at Each Stage](#)

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