

PRESENTED AT

42nd Annual Page Keeton Civil Litigation Conference

November 8-9, 2018
Houston, TX

Better Depositions

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Depositions are the most powerful discovery tool. But depositions are simultaneously the most difficult discovery method to execute well. The feature that makes depositions so powerful – spontaneous interaction with a live witness – is the precise aspect that makes them so difficult. As a result, many of us could do more to capitalize on the deposition’s full potential. This short Essay provides litigators with some simple guidance on taking better depositions.

Many excellent volumes have been written on how to take a deposition.² Likewise, scholars have written law review articles on the topic,³ while lawyers have written many bar journal pieces aimed at practitioners.⁴ This Essay does not attempt to survey or criticize all the great writing on depositions, nor does it attempt to supplant it. Rather, it is a quick read by design, containing some easy-to-apply advice for time-pressed lawyers considering how to take a better deposition.

In light of its short length, I had to make some choices about what to include. An entire book, for instance, could be written on preparing and defending deponents. You won’t see that material here, but not because it is not critically important. Instead, this Essay focuses on advice and thoughts for the attorney taking the deposition. Likewise, entire articles have been written on deposing experts or corporate representatives.⁵ By contrast, this Essay focuses on lay witnesses, though some of its principles apply to expert or corporate representative depositions, too.

Many of us could improve our depositions in a few discreet ways. First, anyone taking a deposition needs to have a good grasp on the role of

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² See, e.g., D. Shane Read, *WINNING AT DEPOSITION* (Westway 2013); Bradley G. Clary et al., *SUCCESSFUL FIRST DEPOSITIONS* (West 2001); Henry L. Hecht, *EFFECTIVE DEPOSITIONS* (2d ed., ABA 2010); Sawnie A. McEntire, *MASTERING THE ART OF DEPOSITION* (ABA 2016); Stuart M. Israel, *TAKING AND DEFENDING DEPOSITIONS* (ALI-ABA 2004).

³ See, e.g., Mark D. McCurdy, *Obtaining Admissions in Depositions*, 74 *TEMP. L. REV.* 139 (2001); cf., e.g., Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 *Geo. J. Legal Ethics* 1 (1998); Henry H. Perritt, Jr., *Video Depositions, Transcripts and Trials*, 43 *EMORY L.J.* 1071, 1072 (1994); Eric B. Miller, *Lawyers Gone Wild: Are Depositions Still A "Civil" Procedure?*, 42 *CONN. L. REV.* 1527 (2010).

⁴ See, e.g., Neil J. Dilloff, *Deposition Tricks: The Dirty Dozen*, July/August 2009 *MD. B.J.* at 48 (2009); Adam Babich, *Develop Nuggets, Unpack Weasel Words & 8 More Deposition Suggestions to Minimize Frustration*, 65 *LA. B.J.* 92, 93 (2017); cf., e.g., Richard C. Fields & M. Allyn Dingel, Jr., *Deposition Ethics*, 49 *Advocate* 11 (2006).

⁵ Cf., e.g., James C. Winton, *Corporate Representative Depositions Revisited*, 65 *BAYLOR L. REV.* 938, 941 (2013).

deposition, including the theory and theme of the particular case. Second, a quality opening is critical. Third, the deposition should be well-organized around some simple, widely applicable principles. Fourth, the attorney taking the deposition should maximize his or her ability to listen to, and react to, the deponent. Fifth, a good deposition lays effective boundaries around witness knowledge. Let's take up each topic in turn.

Better Understanding of the Deposition's Role

In short, a deposition is an opportunity to discover, and possibly advance, the theory and themes of your case.⁶ A case theory is a concise, understandable story of what you contend happened. For example, the state's theory in the *People v. O.J. Simpson* was that O.J. killed his ex-wife and her lover in a jealous rage. The defense theory was that someone else killed Nicole Brown Simpson and Ron Goldman, and that the police framed O.J. for the crime.⁷ Themes are ideas that connect your case theory to the jury's own preconceived notions about how the world works.⁸

Deposition is perhaps the most powerful discovery tool, and is highly effective at uncovering information that helps to build or confirm theory and theme. Deposition puts attorneys face-to-face with witnesses, and those witnesses' answers are less filtered than the highly scripted answers to interrogatories or other written discovery. Additionally, depositions provide an opportunity to ask follow-up questions and design an interrogation around the structure of witness knowledge, instead of what attorneys suppose a witness might know.⁹

While attorneys glorify stinging cross-examination of opposing parties and adverse witnesses, cross is only one part – and in many cases, a less important part – of deposition. Indeed, the true power of deposition is previewing your opponent's direct examination, through your own questions, of a witness and discovering everything they might say to undermine your theory, or nullify your themes.¹⁰ As a corollary, a deposition is particularly powerful at turning up additional sources of proof (other witnesses, documents, and electronic information) to be explored after. And doubtless, seeking admissions, concessions, and impeachment

⁶ See, e.g., Read, *supra* note 2, at 33-36; McEntire, *supra* note 2, at 2-3.

⁷ See, e.g., Read, *supra* note 2, at 33.

⁸ Cf. *id.* at 35 (observing that lawyers should determine themes before embarking on discovery to know "what [the] case is all about").

⁹ Cf., e.g., Dickerson, *supra* note 3, at 1 ("Many attorneys prefer depositions over other discovery methods because depositions permit the lawyer to question a witness face-to-face, to judge the witness's demeanor, and to gather information that has not been unduly filtered by opposing counsel. Moreover, because of the question-and-answer format, an attorney can easily follow-up when a witness gives an unexpected or incomplete answer, or when the attorney realizes she has asked an inartful question.").

¹⁰ See, e.g., McCurdy, *supra* note 3, at 140 ("Better lawyers know that they must use the deposition to learn new information. Deposition questions seeking new information feature the open-ended style of questioning a reporter researching a story would use: who, what, where, when, how, and describe.").

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First appeared as part of the conference materials for the 42nd Annual Page Keeton Civil Litigation Conference session "How to Take a Better Deposition"