

Top Ten Points for Successfully Defending a Discovery Deposition

IT IS FREQUENTLY SAID THAT CASES ARE won and lost during discovery. And while many attorneys feel they can make decisive advances

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through an aggressive offensive strategy, wise counsel will give proper attention to preserving their position through a powerful defense. Thus, the role and responsibilities of the attorney defending a discovery deposition cannot be minimized. Although not a complete guide, the following ten points are important reminders for an attorney to consider when preparing for or defending an individual deposition. Corporate counsel may apply these guidelines as participants in the process, as well as to assess outside counsel's performance.

10. Don't Try To Win The Case.

Remember, the discovery deposition is the opposing side's discovery tool. It is not an opportunity to win your case by attempting to articulate your own theory. Answers that aim to "make points" are often transparently argumentative, may elicit further cross examination, and are sometimes awkwardly legal in nature—all of which will tend to take the typical deponent out of her "comfort zone." Such testimony rarely accomplishes anything, and a skilled examiner can sometimes lure a deponent into offering inaccurate, damaging admissions.

9. Stay Engaged.

As the defending attorney, you must do more than just occupy a chair—you must remain engaged and active in the process. This involves listening very closely, considering every question, lodging appropriate objections (including objections to questions that could potentially elicit privileged communications) and giving appropriate instructions not to answer particular questions. Sitting forward at the edge of your seat, elbows on the table and in close proximity to the deponent may help you to remain an active participant in the deposition. This will not only give the deponent needed comfort and confidence, but it will also signal to the opposing attorney

that you are carefully considering each question and any potential objections or instructions.

8. Instill Confidence.

Preparation is key to building confidence in your deponent and confidence is key to a successful deposition, particularly against a persistent, thorough and educated adversary. Anticipate the topics of inquiry beforehand and thoroughly practice questions and answers with the deponent. Be mindful that your own poise and perceived self-assurance, through careful preparation and a command of the information, will positively affect your deponent. At the same time, be wary of over-confidence. Warn the deponent not to become too lax, conversational or friendly with the opposition. As with the posture of the defending attorney, advising the deponent to simply sit up straight at the edge of her seat may help to keep the deponent vigilant.

7. Carefully Consider When to Refresh the Deponent's Recollection during Preparation.

Unlike a deposition of a corporate representative pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, the examiner in an individual deposition is only entitled to know what the deponent knows on the day of the deposition—not what the deponent once knew, should know or could know. A diligent employee may feel inadequate not knowing the answers to questions concerning topics that fall within the deponent's areas of responsibility, but it is incumbent upon the defending attorney to make the deponent feel secure as to the breadth of his knowledge, despite potential critical questioning from the examining attorney. The defending attorney must weigh carefully whether and the extent to which to refresh the deponent's recollection during preparation sessions.

6. Understand your Opponent's Case.

You must understand and anticipate the opponent's theory of its case and integrate this knowledge into the preparation sessions. For instance, in connection with point 7 above, if the opposition's strategy is to attempt to

diminish or undercut the deponent's perceived knowledge as to certain topics or involvement in certain activities, then you may wish to thoroughly prepare the deponent to answer questions relating to these areas of inquiry and to refresh the deponent's recollection when necessary.

5. Advise the Deponent to Listen Carefully.

It is critical that the deponent listen very carefully during the deposition. Instruct the deponent to listen to both what the examiner is asking, so as to only respond to the question that is posed, as well as to any objections by the defending attorney. By counseling the deponent to pause before answering a question, you not only create an opportunity to lodge an objection, but also encourage the deponent to digest the question and to provide a careful response. Advise the deponent that the give and take or flow of a typical conversation is not expected during a deposition.

4. Prepare the Deponent to Avoid Unsolicited Disclosures.

The deponent must provide complete and truthful answers to the questions that are posed by the examining attorney, but the deponent is only required to answer the question that was actually asked—not the question that should have been asked, that could have been asked or that the examining attorney meant to ask. The oft-cited example is that the “correct” deposition response to the question “Did you eat breakfast this morning?” is not “I had bacon and eggs,” but simply “Yes, I did.” It is the job of the examining attorney to ask the correct questions, and the deponent must be prepared to make the examining attorney do her job. Remind the deponent not to ramble or provide unsolicited information. Through preparation, the deponent can practice providing short, direct and correct responses.

3. Remind the Deponent to Avoid Speculation.

The examining attorney will inevitably test the boundaries of the deponent's knowledge and recollection. Prepare the deponent to consider whether a response that begins with “I think” should be replaced with an “I don't know.” Discuss with the deponent how to address information that is obvious to the examining attorney from a document, and don't allow your deponent to be lulled into providing testimony regarding a document of which he has no knowledge. Although you cannot instruct the deponent not to

answer a question calling for non-privileged, speculative information, be prepared to lodge an appropriate objection for the record.

2. Protect Privilege.

As the defending attorney, you must understand what categories of communications might be privileged. Analyze and determine your position as to these subjects well before the deposition and be prepared to support your position, particularly if the privilege asserted is subject to debate. Preliminary analysis before the deposition will prevent you from being improperly swayed by your opposition, allow for a cleaner record supporting your position and instill confidence in your deponent who you need to follow your instruction and refuse to answer.

1. Be Prepared.

Preparation is critical to a successful defensive deposition, and it is not simply the work of the deponent that counts. As the defending attorney, you must apply all of the above points and more. Indeed, you are likely the deponent's sole source of support and guidance. Accordingly, assess the scope of the examination early and do not assume that all preparation can be left to the day before the deposition. If there are voluminous or complex documents that are likely to be presented during the deposition, make sure they are presented to your deponent in a timely and coherent fashion. Rushed, disorganized, or hasty preparation will create anxieties in your deponent, erode confidence and provide cues to the other side as to areas where preparation is lacking, and may even divulge weaknesses in your case. Do not underestimate your role as the defending attorney. Your careful preparation, thoughtful analysis and hard work will make a demonstrable difference and pave the way for litigation success.

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