



For the Young Lawyer—The First Deposition: Themes and Variations

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“The deposition begins at 9:30, no 9:00—darn, I don’t remember. . . My exhibits are pre-marked, yes, I checked last night, Defendant’s A, B, and so on . . . all I have to say is I show you exhibit A for identification, then copies to the reporter, to the witness, to opposing counsel, one to make notes on, do I have enough copies? The only objections are as to form, okay, I remember that, but what is a form objection again . . . And then there are stips—what if the other side asks for the “usual stips”?—darn, I wrote them down too, I left my notes in the office, maybe I should just go back there right now, I should never have volunteered to take this darn deposition.”

The above passage captures some of the frenzied thoughts of a young lawyer preparing to take his first deposition—and illustrates a larger point. For it is frequently the case that much of the young lawyer’s energy and focus during the preparation stage is on procedural issues, the *how* of the deposition—marking exhibits, handling stipulations and the framing of questions—rather than on the *why* of the deposition, that is, the substance of the witness’ testimony. Yet, just as the young lawyer should have a game plan for procedural matters, he should also have one for substance. This article reviews four touchstones to consider in that regard.

Theory of the Case

How should the young lawyer prepare for the deposition? A good (and at times overlooked) starting point is to review the theory of the case, focusing on the specific claims plaintiff has asserted and the defenses relied on. This will assist in identifying and sharpening the areas for questioning. In a sense, then, the young lawyer should work “backward”: by thinking about arguments about specific claims or defenses that he will want to raise in summation, he will better understand the evidence he needs to develop at the deposition stage.

Let’s take the following hypothetical. AB Corp. (“AB”) is a manufacturer of household products. In 2001, AB entered into a written contract with YZ Inc. (“YZ”), a chain of retail stores, under which AB was to supply the products for two years (the “Original Term”). At the end of the Original Term, however, AB continued supplying products to YZ for four more months. YZ paid for some shipments, but not others. After four months, YZ sent a letter to AB, claiming that their entire relationship was terminated, and refusing to pay any outstanding amounts. AB sued YZ for breach of contract, claiming that it was entitled, *inter alia*, to full payments for all products shipped to YZ after the Original Term. Darrow, a young associate in the defendant’s law firm, has been assigned to take the deposition of Mr. Slade, AB’s vice president.



Suffused with eagerness (and just a little anxiety), Darrow will undoubtedly want to plunge into the marking of exhibits, drafting of questions, etc. But before doing so, it will be useful for him to review the theory of the case. He should begin with AB's complaint, outlining the specific facts alleged and causes of action pleaded. In this regard, it may well be useful for Darrow to consult pattern jury instructions or other aides that will cleanly set forth the elements of the breach of contract causes of action—elements that AB will ultimately have to prove to recover.

This review will lead to relevant deposition questions. For example, is AB claiming that, following the Original Term, the contract did not expire but was extended by the parties? If so, then Darrow will want to focus questions on what writings or oral communications allegedly support the claimed extension. Or is AB pursuing an alternate theory—that, following the Original Term, a new oral contract was created by the parties? If so, Darrow will want to focus on when AB claims the new contract was created, by whom, and its claimed terms.

Similarly, Darrow should focus on his client's defenses. He should review YZ's answer to determine if it fairly articulates those defenses, or needs to be amended in light of subsequent developments in the case. Once again, focus on the defense theories will lead to important lines of questioning. For example, is it YZ's position that following the Original Term, no new contract was created? Or, alternatively, is YZ conceding that a new contract was created, but claiming that AB sent low quality products and simply failed to perform? The different positions lead to different lines of questions.

In short, it is useful to think of the end of the case—what you will want to say on YZ's behalf at summary judgment or trial—as you prepare for the depositions.

Documents

Documents are critical evidence in business cases. This is because contemporaneous documents such as e-mails often provide key evidence of the parties' intentions and conduct *as events unfolded*—in contrast to whatever “official story” the litigant may have developed by the time the lawsuit is filed. Given their strategic importance, care must be taken in dealing with documents.

First, the young lawyer should ensure that the proper foundation is laid for use of the documents. Returning to the hypothetical, assume that, following the Original Term, Mr. Slade, AB's vice president, sent and received e-mails with his counterpart at YZ, which address their business relationship. Before these e-mails can be properly used, Darrow should ask questions designed to show that Mr. Slade in fact sent, received and read them. The last thing Darrow wants to hear at trial is that Mr. Slade did not routinely check his emails, or that he was out of town during the weeks in question and didn't have access to them. This can be anticipated and addressed—at the deposition.

Second, by focusing carefully on what the documents do (and do not) say, the young lawyer can “lock in” the witness’ story and foreclose alternate versions that might otherwise be advanced in future proceedings. For example, assume that in one of the e-mails, YZ’s manager, Ms. Wilson, stated “please get back to me to talk about the deal, etc.” Darrow may well want to argue that this e-mail shows that as far as Ms. Wilson was concerned there was no new contract following the Original Term, and she was simply negotiating with Mr. Slade about a future deal, which was never consummated. Darrow will want to elicit—and “lock in”—whatever alternate interpretation of the e-mail Mr. Slade has developed, so that it can be attacked and refuted; this will also prevent Mr. Slade from changing his position again in the future.

Prior Testimony

Another area the young lawyer should focus on is prior testimony. Generally, this material falls into two categories: prior testimony by the witness himself and prior testimony by *other witnesses* about him. The first category is straightforward—to prepare fully, the young lawyer should review any prior testimony by the witness in the case or any related proceeding. The prior testimony frequently will give a roadmap to the witness’ future testimony and identify those areas where he is already “locked in.”

The second category is sometimes overlooked, but equally important. The young lawyer should be conversant with what other witnesses have testified to regarding the witness’ participation in the case. Again, this review will provide an outline for the witness’ testimony, as well as identify additional lines of questioning. For example, in the hypothetical, suppose that YZ witnesses have testified that, following the Original Term, they had a meeting with several AB representatives, including Mr. Slade, where they stated that the contact had expired and would not be renewed. To be sure, at his deposition Mr. Slade is very likely to deny the substance of the meeting. But Darrow should nevertheless focus on drawing out the particulars which Mr. Slade will have to concede: that the meeting took place, it was at YZ’s offices, that the participants were the ones that prior YZ witnesses’ identified, that the agenda was set by the YZ executives. This will assist Darrow in later asserting that YZ’s version of the meeting—and not AB’s—is accurate. By the same token, Darrow should find out in the deposition whether Mr. Slade denies that the meeting took place and, if so, why.

Non-Party Witnesses

Another factor to be considered is the witness’ status as a party or non-party, which can have important practical effects. If the witness is a non-party and does not reside in the jurisdiction, it is very likely that his deposition will be the parties’ sole opportunity to obtain his testimony. Unlike a party, the non-party cannot be forced to return to court for trial; and, depending on local rules (and judicial discretion), the non-party may not be required to give a later deposition. *See generally* F.R.C.P. 45(b)(2). This limited window should be considered by the young lawyer in handling the deposition.



For example, let's now assume that Mr. Slade has left AB, and is a non-party witness residing outside the jurisdiction. During the deposition, he testifies about a conversation he claims took place with YZ's manager, Ms. Wilson. According to Mr. Slade, the manager told him "not to worry" about the contract's expiration, because AB would "be covered"—which Mr. Slade took to mean the contract was extended. Upon hearing this testimony, Darrow may be inclined to simply "take the answer"—which is potentially damaging to his client—and move onto other topics without probing any further. Yet, because of Mr. Slade's non-party status, if Darrow does not confront him right then about the answer, he may never be able to do so. The resulting transcript—which AB will submit in summary judgment and seek to have read to the jury at trial—will consist solely of Mr. Slade's statement, unchallenged by the defense. In light of this prospect, Darrow may well have to probe further into the claimed statement at the deposition.

Conclusion

In sum, the young lawyer is right to be concerned with the procedural issues involved in taking a deposition. But preparation should not stop there, since ultimately knowing what questions to ask is as important as knowing how to frame those questions.

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