



## Getting All You Can From a Deposition

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By Noelle C. Nelson

Depositions have a number of functions, only one of which is a fact-finding expedition. Lawyers too often fail to recognize the enormous value of depositions for other purposes, including: 1) testing the case-worthiness of a case theme and "story," 2) discovering witness flashpoints and 3) observing the style of opposing counsel.

### Testing the Worthiness of a Case Theme and Story

Deposition is an excellent time to test whether the available facts and testimony can prove your case theme. Testing your theme during deposition is far more efficient than waiting until trial where you may find yourself repeatedly shifting gears to fit the theme with the testimony.

Trial success can come much more easily when you are in charge of the situation rather than scrambling around after the fact.

Using a preliminary interpretation of the facts, construct a story that seems to fit for your client. Develop a number of questions that specifically allow you to test the story. Do not seek to be right. On the contrary, use depositions to see what is wrong with your story, where it does not seem to account for the facts of the case or where it fails to make sense.

Have two or three alternate versions ready. Keep using this approach as you depose witnesses, always redefining and refocusing your case theme and story with each deposition until your theme and story give a strong and believable interpretation of the facts.

Jurors will usually side with the lawyer that gives them the clearest, most believable explanation of case facts. Use depositions to gain the advantage in this critical area.

### Discovering Witness Flashpoints

Witness responses will often point to problems in the content of testimony. However, many lawyers overly focus on this aspect, forgetting that depositions can also tell much about the witnesses themselves. Depositions afford a terrific opportunity to observe how witnesses will react in court, and how to use those reactions to your advantage.

During depositions, deliberately try several questioning approaches to see how witnesses respond. Prepare these approaches before each deposition. Do not try to "wing it" during the depositions because you are likely to omit an important approach.

Observe how the witness responds to each type of questioning. When you are aggressive, does the witness become belligerent or cower? When you are cordial and friendly, does the witness get suspicious or start to volunteer information? When you are low key and ask questions in a thoughtful tone, does the witness give you more of what you need or get anxious and fearful?

Do not assume you know how "everybody" will react to a given way of questioning. Once you have observed how a witness responds to a specific way you ask questions, test your questioning technique a few more times to make sure the witness is showing a pattern, not a one-time response.

In one case, a lawyer was using the above questioning test in deposing a witness. The lawyer noticed that every time he repeated a question, (varying the content just a little), the witness got very anxious and would tend to "bolt," i.e., suddenly need to get some air or go to the bathroom.

The lawyer observed that this had nothing to do with how he asked the question. It did not seem to matter if he asked it in an assertive, friendly, or casual "off the cuff" way, the witness consistently got edgy and uncomfortable with the repetition itself. The lawyer used this knowledge in front of the jury by asking the witness certain questions repeatedly, but in a very pleasant way.

The witness appeared anxious and therefore not believable to the jurors on points where the lawyer wanted the witness to appear less than credible. The lawyer was able to obtain this reaction without appearing to "beat up" the witness or otherwise come across as unsympathetic to the jurors.

By using this technique, you will discover witnesses' "flashpoints" – what sets them off in a direction that could benefit to your case.

### **Observing Opposing Counsel's Style**

Lawyers are certainly aware of the value of deposition in revealing some of the opposing counsel's case, however, many lawyers only use depositions from this content point of view. You can also use depositions to scout out opposing counsel's style and approach.

For example, observe whether an opposing counsel barks out objections forcefully and often or takes a more thoughtful stance, objecting rarely but with considerable justification.

Does opposing counsel keep eyes focused primarily on the client and appear to be showing genuine interest, or is opposing counsel more focused on his or her notes? Does opposing counsel's presentation appear "folksy," cool and rational, practical, fussy or "nit-picking"?

Each of these approaches as well as many others have their strengths and weaknesses. All are variables to consider when thinking about how to present a case to the jurors.

For example, a lawyer observed that opposing counsel's approach was folksy, friendly and down to earth. She also noticed that opposing counsel did not object often, although when an objection was made, it was well thought out. The lawyer decided to try something: she began asking short, rapid-fire questions to the witness. Opposing counsel objected even less than usual, even when the lawyer thought objections were appropriate.

She realized that opposing counsel needed time to process questions and answers, and that by using a strategy of quick, shorter questions, opposing counsel could not quite keep up. Working out this strategy and testing it during deposition gave the lawyer a clear advantage when the case came to trial.

Depositions give you the chance to test case theories, make note of witness response characteristics and to size up opposing counsel strengths and weaknesses. It is a valuable opportunity that should not be missed.

**About the author:** Noelle C. Nelson, Ph.D., is a trial and business consultant who provides trial/jury strategy, witness preparation and focus groups for attorneys. She is the author of the booklet, "101 Winning Tips: How to Give a Good Deposition and Testify Well in Court." Her published books include "A Winning Case" (Prentice Hall), "Connecting With Your Client" (American Bar Association) and "The Power of Appreciation in Business" (MindLab Publishing). <http://www.dr.noellenelson.com>, e-mail: [nnelson@dr.noellenelson.com](mailto:nnelson@dr.noellenelson.com).