

THE AMERICAN COLLEGE OF TRIAL LAWYERS
Taking and Defending Depositions
Presented by the Teaching Trial and
Appellate Advocacy Committee

TABLE OF CONTENTS

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Table of Contents

- I. Introduction**
 - a. Sylvia Walbolt
 - b. Dennis Suplee and David Markowitz on Program

- II. Commentary**
 - A. Setting Up a Deposition / Pre-Deposition Procedures
 - B. Whether to Take a Deposition
 - C. Effect of Objectives on Questioning
 - D. Questioning Techniques

- III. Vignettes with Discussion**
 - A. Contacting an Unrepresented Witness to Arrange a Deposition and Dealing with the Witness's Request for Compensation
 - Vignette
 - Discussion
 - B. Beginning a Deposition, "Usual" Stipulations
 - Vignette
 - Discussion
 - C. Making a Clear Record
 - Vignette
 - Discussion
 - D. Exhausting the Witness's Knowledge
 - Vignette
 - Discussion
 - E. Dealing with the Talkative and Unresponsive Witness
 - Vignette
 - Discussion
 - F. Dealing with the Abusive Lawyer
 - Vignette
 - Discussion
 - G. Dealing with an Evasive Witness and Private Conversations Between the Deponent and Counsel During the Deposition
 - Vignette
 - Discussion
 - H. Preparing the Deponent to Testify
 - Discussion
 - I. Demonstration: Preparing the Deponent to Testify
 - Vignette
 - Discussion

IV. Commentary

- A. Video Depositions
- B. Use of Deposition at Trial

Detailed Table of Contents

I. Introduction

A. Sylvia Walbolt (Chair, Teaching of Trial & Appellate Advocacy Committee) (2:00 minutes)

B. Dennis Suplee and David Markowitz (7:42 minutes)

Importance of depositions to outcome of case; list of topics; target audience – lawyers in first years of practice; overview of practical realities of depositions; reference to "Depositions" book by Dennis Suplee and to DVDs by David Markowitz.

II. Commentary

Mr. Suplee and Mr. Markowitz discuss preliminary issues concerning arranging depositions, pre-deposition procedures, deciding whether to take a deposition of a witness, objectives and goals, and questioning techniques.

A. Setting Up a Deposition / Pre-Deposition Procedures (10:45 minutes)

- Importance of working cooperatively with opposing counsel
- Attempt to schedule depositions
- Need to try to avoid jousting
- Need to be aware of unwritten rules of practice in various jurisdictions

B. Whether to Take a Deposition (13:10 minutes)

- Reasons not to take a deposition – educate the witness and your opponent
- Cost
- Alternatives to depositions (documents, interviews, but note local rules if considering an interview of former employee of opponent, interrogatories, requests to admit, affidavits)
- Ability to cross-examine a witness without a deposition
- Reasons to take a deposition – lock in the witness to avoid surprise
- Learn what testimony to meet at trial; helpful admissions
- Ammunition for summary judgment and to undermine use of affidavits
- Preserve testimony that is crucial to case
- Provide an effective opportunity to evaluate credibility of opponent
- Can help to facilitate settlement

Key: think about whether to depose.

C. Effect of Objectives on Questioning (14:10 minutes)

- Techniques of open-ended and close-ended questions depending upon the objective
- Pacing of questions depending on objective
- Use of tone depending on objective
- Moving back and forth between open-ended and close-ended questioning to develop information and nail it down

D. Questioning Techniques (40:30 minutes)

- Discussion of order of questions (e.g., liability then damages, or vice-versa)
- How order affects answers
- Questioning to exhaust alternatives
- Suggestive questioning
- Assessing the witness's truthfulness, bias and framing leading questions accordingly
- Establishing the obvious; stating the deponent's position starkly
- Inviting the witness to take extreme and incredible positions
- Questioning the witness about collateral events that would be consistent or inconsistent with the position the witness is taking

III. Vignettes with Discussion

A. Vignette: Contacting an Unrepresented Witness to Arrange a Deposition and Dealing with the Witness's Request for Compensation

Vignette: Calling third-party witness to arrange a deposition. (3:47 minutes)
(Mary Lee Ratzel)

Discussion by John Aisenbrey and Mary Lee Ratzel (6:50 minutes)

- Engaging a reluctant third-party witness to agree to deposition
- Strategy re who should make the call
- Handling witness's question whether witness needs a lawyer (Ethical Rule 4:3)
- Whether deposing party can pay third-party fact witness for the time in the deposition
- Handling question by third-party witness asking how to respond to request for an interview by counsel for opposing party

B. Vignette: Beginning a Deposition, "Usual" Stipulations

Vignette: Beginning a deposition (5:42 minutes)
(Mary Lee Ratzel, Paul Redfearn)

Discussion by Dennis Suplee, Mary Lee Ratzel, Paul Redfearn (20:24 minutes)

- Discussion of positioning of witness and counsel
- Attendance by other witnesses (Rule 615 issue)
- Reading and signing transcript (FRCP rule change)
- Need to understand local rules
- "Usual" stipulations
- Whether to review deposition procedure and rules with witness
- Options for organization of questioning (biographical info first, then chronological v. starting with heart of matter)
- Obtaining specific answer for each instruction at beginning

C. Vignette: Making a Clear Record

In these two segments, George Robinson walks the witness through a photographic exhibit to identify certain areas of significance to the case. In the first vignette, Mr. Robinson simply has the witness point to areas on the exhibit without making a permanent record of what the witness identified. In the second segment, Mr. Robinson takes the witness through the same examination and makes a clear record of what the witness identified.

Vignette: Failing to make a clear, permanent record (4:14 minutes)
(George Robinson)

Vignette: Making a clear, permanent record using pre-marked exhibit (5:30 minutes)
(George Robinson)

Discussion by David Markowitz, Dennis Suplee and George Robinson (9:51 minutes)

- Benefits of getting permanent record of what the witness explained
- Use of pre-marked paper exhibits
- Benefits of consecutively numbering exhibits throughout depositions in the case, which can carry through to trial exhibits
- Importance of "seeing" the transcript as testimony progresses
- Technique of making examination notes on a work copy of the exhibit

D. Vignette: Exhausting Witness Knowledge

Vignette: Questioning that fails to develop details of meetings (1:05 minutes)
(Lonnie Williams, David Markowitz)

Discussion by Dennis Suplee, David Markowitz and Lonnie Williams (14 minutes)

- Discussion of defending lawyer letting ineffective questioning go without comment
- Problems with questioning, lack of a purpose
- Techniques on tying down specifics
- Techniques for exhausting knowledge
- Use of documents to exhaust
- Use of separate tout sheet of questions to ask about any meeting or conversation
- Closing the door on the witness's memory

E. Vignette: Talkative Witness and Unresponsive Witness

Vignette: Witness who runs on and on (4:24 minutes)
(George Robinson, Paul Redfearn)

Discussion by Dennis Suplee, Paul Redfearn and George Robinson (5:24 minutes)

- Deposing and defending lawyer dealing with the non-responsive witness
- Techniques to handle the witness.

F. Vignette: Dealing with Abusive Lawyer

Vignette: Examination interrupted by defending lawyer with offensive remarks, speaking objections, improper instructions not to answer, coaching comments. (8:42 minutes) (Lynn Johnson)

Discussion by Dennis Suplee, Lynn Johnson and George Robinson (21:36 minutes)

- Techniques for dealing with offensive comments and coaching
- Avoiding need for motion
- Dealing with instructions not to answer
- Need for verbal answer from witness
- Avoiding double negative questions and ambiguous answers

G. Vignette: Dealing with an Evasive Witness, Private Conversations Between Deponent and Counsel During the Deposition

Vignette: Witness evading questions, responding with nit-picking questions (5:10 minutes) (Lynn Johnson, Lonnie Williams).

Discussion by David Markowitz, Lonnie Williams and Lynn Johnson (21:55 minutes)

- Conferences between lawyer and witness at breaks or during questioning
- ABA Civil Discovery Guidelines
- Need to be aware of peculiar local rules as well as individual judge's practice
- Techniques for dealing with evasive or tight-lipped witnesses
- Use of Real Time transcription to ensure questions are precise and clear
- Use of video to control such witnesses
- Need to preserve at the time any objection to form of witness's answer (nonresponsive, etc.)

H. Preparing the Deponent to Testify

Commentary Dennis Suplee, David Markowitz and John Aisenbrey (40:20 minutes)

- Discussion of points to make with witness in preparation, explaining procedure and purpose of deposition
- "Rules of the road" for preparation; discussion of admonition against "volunteering"
- Preparing client or witness is like preparing client when called by opponent at trial
- Preparing client for videotaped deposition
- Identification of goals for the deposition which may be to prepare for trial or to help facilitate settlement by getting the story out
- Understanding the witness's predilections to either overstate or understate
- Preparing for the questioning technique of the deposing lawyer
- Preparing the witness to handle questions about the preparation for deposition
- Handling sensitive questions
- Techniques for practice questioning
- Determining if the witness has any particular concerns

I. Vignette: Demonstration of Preparing the Deponent to Testify

Introduction of the fact pattern and the problem of dealing with witness whose memory of the details of conversation with the insurance broker is not sharp. (3:16 minutes) (Dennis Suplee)

Vignette: Witness preparation regarding the issue of his conversation with the insurance broker. (4:48 minutes) (John Aisenbrey)

Commentary by Dennis Suplee, David Markowitz and John Aisenbrey (9:18 minutes)

- Discussion of dealing with witness's faulty memory, reconstruction of events without "creating" it; ethics of witness preparation.

IV. Commentary

Discussion of use of videotape depositions and use of depositions at trial.

A. Video Depositions

Commentary by Dennis Suplee, David Markowitz and John Aisenbrey (42:30 minutes)

- Videotaping friendly witnesses
- Videoing the scene of accident or event
- Checking the video display as the deposition progresses
- Use of exhibits with split screen or second screen
- Videoing adverse witnesses
- Use of sound bite, use of silence
- Editing video to organize by topic
- Use of video in closing and opening
- Importance of watching the edited version
- Use of video deposition at trial

B. Use of Deposition at Trial

Commentary by David Markowitz and Dennis Suplee (14:30 minutes)

- Bases of admissibility under federal rules
- Requirement to check state rules which can vary greatly from the federal rules and among the states
- Importance of keeping video clips short