

III. ADVANCED DISCOVERY TECHNIQUES

DEPOSITION STRATEGIES

A. START EARLY

The most important aspect of a successful trial lawyer's practice is thorough preparation. Even the most eloquent and ingenious lawyers have a hard time against an opponent who has a thorough understanding of a case based on exhaustive preparation. The best way to ensure adequate preparation for a case is to start early. Attorneys who wait until a few months before the discovery deadline to start discovery will find themselves at a disadvantage.

Except in the rarest cases, there is no reason for an attorney to file a lawsuit before having done a reasonable investigation into the facts and the law. (*See* CR 11.) Filing a lawsuit for a plaintiff in order to avoid the statute of limitations without such an investigation is a risky proposition at best. Based on an attorney's initial understanding of the case, Interrogatories and Requests for Production can be sent to defendants with a Complaint, or in response to a defendant's Answer. In the vast majority of cases, the information gathered through these discovery requests will be helpful in preparing for depositions. In designing requests it is better to be comprehensive than allow materials to slip through the cracks¹, but care should be taken to avoid shotgun requests that are unreasonably burdensome. Discovery is sometimes likened to a "fishing expedition," but like a good fisherman, a good lawyer should have an idea where the fish are.

In certain cases depositions should be set as soon as possible (30 days after filing in the case of a defendant) so that the deponent does not have time to gather information

¹ For example, in this era of electronic discovery, one's definition of "documents" should include formats that did not exist ten years ago:

The term "*document*" is intended to include without limitation the original and copy, regardless of origin or location, of all official and personal communications; reports; memoranda; notes; minutes; diaries; transcripts; working papers; telegrams; letters; e-mails and attachments; papers; charts; drawings; indexes; tapes; spread sheets; data bases; data processing cards or any other form of data entry stored on computer, personal digital assistant (PDA), cell phone or otherwise; graphs; photographs; publications; accounting materials; statements; and all other written, recorded, transcribed, printed, punched, taped, typed photographed, drawn or filmed materials, however produced or reproduced, to which you have or have had access at any time.

to prepare a theory or a defense to plaintiff's allegations. In some cases it is necessary to preserve the testimony of a witness who may disappear or is gravely ill. In these situations it is helpful to have as much background information as can be collected without discovery, such as police reports, medical records, statements of independent witnesses, etc.

B. MAKE A PLAN

If you have a theory of your case early on, understand the elements that must be proven and are familiar with the facts and the defenses that are being asserted, it can help you to plan out the discovery and schedule the order of your depositions. Certain questions should be addressed in formulating your discovery plan. What answers to your interrogatories and requests for production are incomplete and need to be followed up on? What new interrogatories and requests for production need to be sent out? What will you need to establish with one witness in order to tie down another? Are you taking a deposition to perpetuate the testimony, as a means of discovery, or both? Should any of the depositions be videotaped? What is needed for settlement, for summary judgment, for trial?

Is the deposition necessary, is the witness helpful and available, or perhaps it might be better to catch the witness off guard at trial (and you have enough information to allow you to do this)? What documents and materials should you obtain before the depositions? Where can these materials be obtained and how long will it take (a good reason to start early) to get them? What do you need to know about the deponents before their depositions and how can you find this? Can you stipulate with opposing counsel for a protective order regarding confidential materials?

As a discovery tool a deposition will allow you to ask the questions that you don't know the answers to—the dangerous questions you wouldn't ask at trial. It will allow you to learn the names of other witnesses and often open up new areas for exploration. As a method of preserving evidence, depositions can be used as evidence in trial, are helpful in obtaining statements against interest, and are crucial for setting up

impeachment. The depositions are also very helpful as a way of clarifying the matters really in issue.

C. PREPARATION OF MATERIALS

The type of materials that will help your preparation for a deposition depend on the type of witness you are examining. For an expert witness you should have the witness' resume; reports he/she has prepared for this case (and for other similar cases); depositions of this witness from other cases (this can be obtained in many cases though a list serve such as the WSTLA Eagles); and all the records/exhibits that the expert will be concerned with at trial. Prior to an expert's deposition, you should spend time familiarizing yourself with the subject matter through basic research into the field and then consultation with your own expert. Your consulting experts can often be helpful in framing some of the questions for a witness. You should review the definitive texts and publications in the field and obtain the relevant professional guidelines and bulletins.

When a deponent is an employee of the defendant you should obtain internal regulations, manuals and policies. If deponent is the defendant, it is useful to learn his/her prior litigation, disciplinary and criminal history, and review his/her responses to interrogatories and requests for admission. For any witness you should obtain prior statements and declarations. You should get to know the deponent as well as you can prior to the deposition.

D. KNOW THE RULES

1. Notice of Deposition and Subpoenas

CR 5(a) requires at least five days reasonable notice in writing for depositions of parties and that notice be served upon counsel. A Subpoena and a Subpoena Duces Tecum should be served pursuant to DR 45 to non-parties for attendance and the production of documents, but for parties a request for documents must be made pursuant to CR 34, which allows thirty (30) days for production. In other words, start early.

2. Privilege

If it appears during discovery that defendant or plaintiff will have concerns about the confidentiality of materials produced and information disclosed it would expedite

discovery to stipulate to or otherwise obtain a protective order. Such an order is attached as Attachment A.

CR 30(h)(3) allows attorneys to instruct a deponent not to answer only when the objection is

based upon privilege or pursuant to rule 30(d)[(bad faith questioning or for harassment)]. When a privilege is claimed the deponent shall nevertheless answer questions related to the existence, extent, or waiver of the privilege, such as the date of communication, identity of the declarant, and in whose presence the statement was made.

If it appears during preparation for your defense of a deposition that there are areas of privilege that need to be protected and are likely to be raised during a deposition, it is best to seek a protective order under CR 26(c) in advance. This will avoid the need for a CR 36(d) motion to terminate or limit a deposition and the need to reschedule a deposition. It will also avoid an award of attorney fees if your claim of privilege proves to be unfounded.

Attorneys are entitled to ask a witness what documents the witness reviewed in preparation for a deposition and to inspect the document for use in cross-examination at the deposition. ER 612. If your client is keeping a journal of dates, events and concerns in preparation for a case, it is advisable to have the client mark the pages of the journal with a notation like “Created to assist my attorneys with case preparation.” This will help a court see what your client’s expectations were regarding the confidentiality of his/her communications. *See Johnson v. Johnson*, 77 Wn.App. 603, 608, 893 P.2d 641 (1995).

3. Form

CR 30(h) (2) limits the use of objections at deposition to the following:

Only those objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition.

The only objections allowed in a deposition are related to privilege and the “form” of the question. The form of a question should be consistent with the rules of evidence at trial (i.e. foundation, leading questions to a non-adverse witness, multiple

questions) and, if improper, must be objected to during a deposition, or the objection is waived. The reason for this rule is that counsel must give opposing counsel an opportunity to correct a problem as to the form of a question during the course of a deposition, because it cannot be corrected later. In preparing for the deposition of a friendly witness counsel should be careful to lay the proper foundation for questions, and to consider the rules of evidence. If opposing counsel makes repeated objections in a deposition on the basis of “form” without being more specific about the objection, it makes sense to ask counsel to clarify the basis for the objection. If opposing counsel refuses to do so, it will be much harder for that attorney to convince a judge that you were put on notice and had an opportunity to rectify a problem.

D. PREPARATION OF QUESTIONS

Prior to the deposition it is helpful to prepare a deposition exhibit notebook with an index and Bates stamping to make it easy to locate exhibits. It is also helpful to at least prepare a detailed outline for questioning. The questions should, at first, be prepared in a logical order, so that you can plan what information you are trying to obtain, and how you want to get there. The questions should be short and easy to understand, so that it will pin down the answers. The questions should be thorough. Patience is a great virtue in taking depositions. Make sure all the areas that need to be covered are addressed.

If the deposition is being used for discovery, you can ask broad, open-ended questions, to allow the witness to give you a narrative. These questions can be followed up with more specific questions in various formats—chronological; going from the less sensitive questions to the more sensitive ones; or bouncing around to keep a witness off guard. There should be questions to obtain the good and the harmful information, and not all of this information need be admissible. Establish the who, what, when, and how, and ask the witness to explain and describe. Find out the sources of information. Relate questions to times and places. Use diagrams for illustrative purposes. Follow up on interrogatories and pleadings. Get the details about conversations including witnesses to

the conversation and where it took place. Wrap up your areas of inquiry by asking whether the deponent has told you everything they remember, and then try to summarize each area of inquiry. Make sure to allow yourself latitude for follow-up. Don't get stuck by just asking the written questions. It is very important to listen to the answers and expand your inquiries if appropriate.

E. CONDUCTING A DEPOSITION

At the beginning of a deposition it is useful to set the ground rules and to make it clear that the deponent completely understands the nature of the deposition and his or her role.

If the deposition is to be used at trial, the form of the questions should be prepared in anticipation of their use as testimony. If an objection as to form is made, the examiner should carefully consider whether the question should be rephrased. Letting an objection stand without rephrasing the question presents the risk of losing the answer at trial.

Questioning should be complete, and should not be confusing. If an answer is ambiguous, the deposition does not effectively pin down the testimony. Make sure that the documents used are properly identified during questioning and are incorporated in the record.

Every attorney develops a style for questioning. My experience has been that, in general, it is more effective to be friendly. If witnesses want you to like them, they are more effusive. Sometimes the use of silence can bring out answers that would otherwise go unspoken. Changing pace can be useful as well, to keep a witness off guard. If a witness has a big ego, use flattery to get the witness talking. If you see a witness being very resistant to a line of questioning, mislead the witness as to your intentions. Use your skills as a reader of personality to obtain information.

If an answer to a question is a good admission or a clearly false statement, leave it alone. Don't dwell on it, or it could give the deponent an opportunity for a correction. If

an answer is not responsive, don't let it go. Follow up until you get a responsive answer. Patience.

All objections must be concise, and must not suggest or coach answers. CR 30(h)(2). If a deponent refuses to answer a question, counsel has the right to suspend the deposition in order to obtain a court order, but it is usually better to go on to other areas of the deposition, finish the other areas, and reserve the right to continue the deposition. A court order can then be obtained if appropriate by using the transcript of the deposition.

In dealing with a difficult (abusive) opposing counsel it is helpful to make a good record spelling out his/her conduct, and cautioning him/her about the applicable rules. If this misconduct is the norm for counsel, get the next deposition on video, so the conduct (at least the audio) is recorded.