WINNING
at DEPOSITION

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CONTENTS

INTRODUCTION

It depends on what the meaning of the word "is" is.
—President Clinton explains to a grand jury an answer he gave in his deposition.

It was a deposition that led to one of the most famous statements ever made by a president. It also led to his impeachment by the House of Representatives. Clinton and the lawyers on both sides made so many critical mistakes that it is the perfect starting point to begin our journey to learn how to take winning depositions and successfully defend them. Unlike other books, this book will teach these skills not through hypothetical situations but by examining videos (see chapters nine and ten) and transcripts of actual depositions.

I believe strongly that it is only in the trenches that you can determine if techniques really work. You will see that many failures occurred because lawyers were following conventional wisdom's theories rather than proven strategies.

How would you take the deposition of a president of the United States, a genius, or a famous acquitted murderer? Sound intimidating? You won't feel that way at the end of this book. We will mainly analyze three famous depositions, those of 1) President Bill Clinton, 2) Bill Gates and 3) O.J. Simpson.[1] These witnesses are the smartest and most difficult you will ever find.

Let's take a close look at Clinton's statement above. More details about the case will be given later but, for now, all you need to know is that Clinton gave a deposition in a sexual harassment lawsuit filed by Paula Jones. Before Monica Lewinsky (a White House intern) became famous, Paula Jones' lawyer, James Fisher, asked Clinton about Lewinsky at his deposition. Fisher asked Clinton if he had ever been alone with Lewinsky in the private kitchen at the White House. Clinton's lawyer, Robert Bennett, objected to the innuendo, since Fisher had Lewinsky's affidavit.

Although Lewinsky later recanted, she swore in the affidavit that she had never had a sexual relationship with Clinton. Bennett reminded Fisher that it stated "there *is* absolutely no sex of any kind in any manner, shape or form, with President Clinton."

[1] Summaries of all three trials can be found in the Appendix.

Now, fast forward to the impeachment proceedings against Clinton. The federal grand jury was investigating whether Clinton had committed perjury in his deposition regarding several statements he made about his relationship with Lewinsky. Let's look at Clinton's famous explanation to the grand jury about the verb "is." Even if you did not know the context of the answer (discussed below), it is disingenuous on its face. First, Clinton's answer needlessly splits hairs. Moreover, it is obnoxiously clever. Does he really think people from Main Street (i.e. the grand jurors) believe there can be more than one definition of the simple verb "is"?

If your client is giving a deposition, it is your responsibility to get him prepared for every possible important question. This takes persistence because many witnesses do not feel the need to prepare thoroughly. With proper preparation, Clinton could have been taught to give a truthful answer that would not become ridiculed throughout the media.

What Clinton tried to tell the grand jury was that his lawyer was technically telling the truth because Bennett was speaking in the present tense when he said, "there is absolutely no sex . . . with President Clinton." However, this explanation did not help Clinton because it just showed that he thought it was acceptable for his lawyer to make a technically true statement that was misleading—since people hearing the statement would assume he had misspoken and meant to say that Lewinsky claimed in her affidavit that she had never had sex with Clinton.

Moreover, the truth—and the better answer—was what Clinton tried to say to the grand jury but which was lost against the backdrop of his grammar lesson answer. That is, Clinton told the grand jury that "I don't know what Mr. Bennett had in his mind. I don't know. I didn't pay attention to this colloquy that went on. I was waiting for my instructions as a witness to go forward. I was worried about my own testimony."

In witness preparation for the grand jury, Clinton's legal team should have emphasized the importance of staying on message: you weren't paying attention to what Bennett said at the deposition because you were focusing on your answers. If Clinton had stayed on message, there would have been no way for him to give an implausible answer that Bennett's statement could be true, depending on what the definition of "is" is. No matter how many times the prosecutor asked him about Bennett's statement, all Clinton had to do was to repeat that he did not know what Bennett was thinking because he was focused on his answers. In reality, the only person who could answer that question would be Bennett.

Bill Gates' deposition also provides a tremendous amount of insight. The Department of Justice (DOJ) and several states sued Microsoft for violating

federal antitrust laws. In particular, DOJ claimed that Microsoft used its dominance of the Windows operating system to prevent competition. DOJ also alleged that Microsoft made business arrangements with Internet service providers that restricted those providers from promoting Internet browsers not owned by Microsoft.

With this brief background, let's look at one of the most important rules in taking a deposition: gain the witness' respect. At the outset it is critical to show the witness that you are in control. One way to do that is to show a mastery of the subject matter the witness will be testifying about. If the witness senses that he knows more than you do, he can confidently testify inaccurately, knowing that you do not have the power to prove him wrong. On the other hand, if the witness respects you, he is more likely to answer a difficult question because he knows if he doesn't, you will prove him wrong.

This principle is particularly true when you are taking the deposition of an intelligent person who can outwit you. It is even truer when the witness is Bill Gates.

Unfortunately, at the very beginning of Gates' deposition, the attorney from the New York Attorney General's office failed to garner Gates' respect. As you can imagine, in this lawsuit, it was paramount to be well versed in computer terminology. See what happened.

Q. I'd like you to look at Exhibit 1, Mr. Gates, right here in front of you. This is a memorandum that purports to be from you to your executive staff dated May 22, 1996, and it attaches, for want of a better word, an essay entitled "The Internet PC" dated April 10, 1996. Do you recall writing that essay?

A. It looks like this is an e-mail, not a memorandum.

Q. Do you recall receiving this memorandum or e-mail?

A. E-mail, no.

Q. All right. I apologize for using my old-fashioned terminology.

Gates' tone of voice was incredulous. He was shocked that counsel could not recognize an e-mail. The exchange was one of many memorable ones posted on YouTube.[2] Such a bad question puts the lawyer on the defensive and gives the witness confidence that he, not the lawyer, can control the deposition.

Finally, we will examine O.J. Simpson's deposition in the civil lawsuit filed on behalf of the murdered victims after his acquittal. Fred Goldman's attorney, Dan Petrocelli, was thorough and organized. He explained his mindset as follows:

[2] See "Gates Deposition Greatest Hits" at www.youtube.com. The question is asked at the two minute seven second mark of the clip.

> If a lawyer starts objecting and pushing you around, and you let him, he will continue the manhandling to his benefit. Early on, I wanted both Baker [Simpson's attorney] and Simpson to realize that no amount of objecting, arguing, or evading would deter me from plugging away, that Simpson would have to answer all my questions, that I wasn't going to let him off the hook until I got my answers . . . .[3]

Let's look at one example where Petrocelli's persistence paid off. Petrocelli was asking Simpson about his illegal drug use. Many people had told Petrocelli that Simpson had used drugs, so much so that he had been given the nickname "Hoover" because he snorted so much cocaine.[4] It was important for Petrocelli to get Simpson to deny this so that he could prove through other witnesses that Simpson had lied under oath at his deposition. After Simpson denied smoking marijuana, the following took place.

Q. Were you a cocaine user in June of 1994?
A. [Baker (Simpson's lawyer)] Don't answer that.

A. [Simpson] No.
Q. The answer is you were not?
A. No.

Q. In May of 1994?
A. No.
[Baker] That's enough. Don't answer any more questions about that.

Q. Did you take cocaine at any time in the period January 1994 through June 12, 1994? [Petrocelli is not deterred by Baker's objections and continues to ask the questions he needs answers to until Simpson stops giving answers.]
A. No.
[Baker] I am instructing you not to—

Q. Did you take—
[Baker] Am I a potted plant?

Q. Did you take any kind of amphetamines during that period? [Petrocelli again ignores Simpson's attorney]
A. No.

Q. Did you use cocaine in the year 1993?
[Baker] Don't answer that!

A. No.

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[3] Daniel Petrocelli, *Triumph of Justice* 119 (Crown 1998).
[4] *Id.* at 139.

From these depositions, we have learned our first three lessons. The Clinton deposition demonstrated that an answer that is too clever won't be believed, the Gates deposition revealed an attorney must be well prepared to keep control of the deposition, and the Simpson deposition showed us how to keep our cool and continue asking needed questions despite an attorney's objections.

Remember

1. Getting a disingenuous answer is a success since it won't be believed.
2. To get information from a witness, you must gain his respect by being well-prepared.
3. You must stay calm and focused no matter what opposing counsel does.

In the following chapters we will look at the conventional wisdom and see if it makes any sense in light of the realities of human nature and actual depositions. What might sound good in theory often has little value in battle. Just one example comes from the American Bar Association's leading publication on depositions.[5] In the chapter on witness preparation, a witness is advised to follow 130 rules. Common sense tells us that it would be impossible for a witness to remember ten of these rules, let alone 130. Yet, many lawyers continue to inundate their witnesses with rules that simply overwhelm them. Witnesses become ineffective advocates because they are more worried about following a rule than defending their position during questioning.

Get ready to learn new techniques and strategies that will improve your deposition skills dramatically. If the court reporter will swear in the witness, we are ready to begin . . . .

[5] Priscilla Schwab and Lawrence Vilardo editors, *Depositions 65* (ABA 2006).

CHAPTER TWO

Taking the Deposition

> There are two possible outcomes: if the result confirms the hypothesis, then you've made a discovery. If the result is contrary to the hypothesis, then you've made a discovery.
>
> *—Enrico Fermi, Nobel Prize winner for Physics in 1938*

Much like a scientist who tests a hypothesis, you need to test the theory of your case. If you represent a plaintiff and your case becomes stronger, such a finding will obviously affect the lawsuit's value. If you uncover facts that undercut your theory, the value of the lawsuit will be less, but you may find a way to minimize the damage before trial. Generally, a deposition is the best way to determine your case's strengths and weaknesses, but there are occasions when it is not. Let's first look at the advantages and disadvantages of a deposition and then learn how to take one.

2.1 EIGHT REASONS TO TAKE A DEPOSITION

Cost is a significant consideration in your decision. Expenses for a court reporter can exceed $1,000 for a half-day deposition. In addition, there is a significant burden on your time. Let's look in detail at a deposition's advantages and disadvantages.

Most lawyers see depositions as fact-finding exercises. While this is true, they have a larger purpose. Great trial lawyers use depositions to determine how credible a witness will be at trial. It is a unique situation where you can look the witness in the eye and assess his demeanor. This determination is critical to deciding the settlement value of your case and whether you should go to trial.

> You can't rely on a colleague to frame and ask the question in the same manner as you would.

Unfortunately, there may be times when you feel pressure from a client to save money by not taking

a deposition or by having an associate with a lower billing rate take the deposition. But you are responsible for the ultimate outcome of the case and cannot delegate this task when there is a key witness. Only by seeing the witness in person and hearing his story can you accurately perceive his credibility. While a videotaped deposition by an associate would alleviate this problem to some extent, a face-to-face meeting is the only way to determine how the witness will react to your questions at trial.

Another important reason to take a deposition is to build a record of inconsistent statements from the witness that can later be used to impeach him at trial. For example, in a car wreck case, a plaintiff may testify in his deposition that after the accident the defendant was concerned about his injuries and was helpful in summoning an ambulance. However, at trial, the plaintiff may try to embellish his story and testify that the defendant was not helpful but rather belligerent and angry. If you had not taken the deposition, you would lack the one tool to discredit the plaintiff's trial testimony. Having taken the deposition, you will be able at trial to impeach the witness in the following way.

Example: Deposition Provides Inconsistent Statement

Q. You testified on direct that the defendant was belligerent and angry at the scene. The truth is that my client was concerned about your injuries and helped in calling for an ambulance.

A. No.

Q. Do you remember giving your deposition in this case.

A. Yes.

Q. You were under oath?

A. Yes.

Q. I would like you to read along silently as I read from page 17 line 2. Isn't it a fact, you were asked the following question? Was the defendant concerned . . . .

A third reason to take a witness' deposition is to discover the details of a party's claims or a witness' knowledge of events. In short, a deposition lets you confirm what you already know and find out answers to questions you don't know.

It is impossible from interrogatories to gather many details. Through a deposition, an attorney may explore at length the lawsuit's claims that cannot be done in any other way. For example, if a defendant supervisor in an employment discrimination lawsuit asserts in his answer filed with the court that he did not do anything sexually to harass the plaintiff because it was a consensual relationship, only through a deposition can the plaintiff's attorney discover the detailed answers regarding the claimed consent. A

deposition allows you to follow-up on answers that simply can't be done with interrogatories. Also, unlike interrogatories, you can get spontaneous answers that are not filtered by opposing counsel.

Likewise, a deposition will help you discover facts that hurt your case. The last thing you want is to be surprised at trial by a credible witness who knows facts that damage your case. If you learn about bad facts during discovery, you usually will have time to find witnesses or documents that can undermine the bad facts. If you find out about the bad facts at trial, it may be impossible to lessen the damage. Moreover, by hearing the witness' bad answers, you will know to avoid asking those questions at trial.

Depositions may also be used to find facts that will be helpful to your case. The other side is never going to volunteer helpful information but, through a deposition, you may find that although a witness has damaging testimony, he also has some helpful information for your side.

For example, in the employment discrimination lawsuit mentioned above, it may be that when you take the supervisor's deposition, he admits that the plaintiff had *always* received excellent performance reviews and that they only went down after the consensual relationship ended, although he denies that event had anything to do with the worse evaluations. Such information would corroborate the plaintiff's theory that her lower performance rating and failed promotion occurred not as coincidence with the ending "relationship" but rather at the end of harassment when the plaintiff finally said "no" to any further sexual contact.

Also, the need to prepare an effective summary judgment motion may require you to take a witness' deposition. It may be that you need to get certain admissions from an adverse witness in order to prove the point you are making in your motion.

Narrowing the issues for trial or mediation is another reason to take a deposition. Often a Complaint and Answer throw in the kitchen sink with allegations and denials. However, depositions of key witnesses often reveal that the alleged wrongdoing or defenses are narrower than they were alleged in court pleadings.

Sometimes you will take a deposition to force a settlement. You may be able to achieve this by showing the witness documents and asking questions that reveal your case's overwhelming strengths. For example, if a defendant hospital were claiming no medical malpractice, a videotaped deposition of the hospital's surgeon briefly showing remorse when confronted with documentation suggesting that there was a mistake may be the tipping point for a quick settlement. As discussed below, a video deposition would be critical to preserve such a reaction that would not show up in a transcript.

Finally, a deposition may be used to preserve a witness' testimony. An attorney may believe that a witness is neutral but might be persuaded to shade his testimony for the other side at a later date. Or, the witness may live outside the court's subpoena range for trial. In such situations, you will not be able to force testimony at trial, and a deposition can be substituted for trial testimony. Preservation may also be necessary if the attorney fears that the witness won't be available for trial due to health reasons. Obviously, there is the risk that if the witness provides hurtful testimony, the attorney has unintentionally preserved harmful testimony that would otherwise not be used at trial.

Deposition Advantages

1. Assess the witness' credibility.
2. Create inconsistent statements for use at trial.
3. Discover details of a party's claims or a witness' knowledge.
4. Gather helpful admissions.
5. Learn bad facts about your case.
6. Narrow the issues for trial.
7. Obtain settlement leverage.
8. Preserve helpful testimony.

Do not feel that you need to limit yourself to just one of the reasons above. For best effect, combine them. There is no reason you can't assess the witness' credibility, discover new leads, and box in the witness with helpful admissions.

2.2 FIVE REASONS NOT TO TAKE A DEPOSITION

Having said this, there are some serious disadvantages to taking a deposition. First, it can be expensive, as mentioned above. Besides the cost of the court reporter, the deposition takes a lot of your time to prepare and takes time away from other important things you could be doing. Is this deposition really worth your time? Moreover, is it really worth double your time? That is, there is a certain tit for tat between attorneys. If you decide to take a lot of depositions, be prepared for opposing counsel to return the favor and take just as many. It is fair to assume that for every deposition you take, you will have to spend the same amount of time defending one.

In addition, by taking depositions, you force the other side to spend time on your case and, therefore, to become better prepared for trial. This is a very significant drawback to taking a deposition. Through the witness' answers, you will inevitably educate the other side about details it might not have taken the time to learn except for the deposition. But for the important depositions, you need the information even if the downside is that the witness and opposing counsel get educated. A good guide, then, is to take only important depositions and not waste your time taking the less important ones.

Another downside to depositions is that you will necessarily reveal your trial strategy through your questions. Even if you are subtle about your theory of the case, the opposing attorney will at least get glimpses through the topics you cover in the deposition and by sensing from your mannerisms which topics seem important.

Moreover, while you are able to assess the witness' credibility, the witness is also assessing your demeanor and strategy. Consequently, the witness will be less surprised at trial, since it won't be the first time he has been confronted by you.

These facts aside, none of the disadvantages should carry the day by themselves except for the most important one: by taking a deposition, you remind the other side to take the depositions of your witnesses. You may inadvertently expose the weaknesses in your witnesses that opposing counsel may not have otherwise discovered if he had not taken their depositions.

Deposition Disadvantages

1. Expensive.
2. Reminds opposing counsel to take depositions of your witnesses.
3. Forces opposing counsel to come to trial much better prepared.
4. Your questions reveal your trial strategy.
5. The witness can assess your demeanor and strategy prior to trial.

2.3 ORDER OF DEPOSITIONS

First, you need to decide the order. Do you want to develop your case from the ground up, or from the top down? Most attorneys start at the bottom and work up, but there is no one right way that applies to all cases.

For example, if you are a plaintiff in a medical malpractice case, you may start by taking the depositions of the nurses and then work your way up to the doctors. This would give you the chance to build the theory of your case with lower level fact witnesses before you question the doctor.

But such an approach alerts the doctor to the questions to expect, since his counsel will have briefed him not only on the questions you have asked but the answers that have been given. It also gives the doctor time to prepare for the moment of truth. By contrast, if you start with the doctor, you may not know all the details of the case, but you will be able to lock down the doctor's testimony before he has time to learn from others' testimony and modify his responses.

There is a definite advantage in taking the deposition of a main witness before that witness has had time to prepare by reviewing documents or learning from other depositions. You can catch the witness off guard because opposing counsel will be hearing the specific areas of your questions for the first time and won't be able to warn the witness ahead of time.

In contrast, working from the ground up is particularly helpful when you don't know who the decision-maker is who took the action which hurt your client. You may need to build your case by getting details from witnesses low in the food chain so you will know what questions to ask the decision-maker when you determine who that is.

The key is to be creative and not approach every case the same. While in most cases, you probably will start with low-level witnesses, don't be afraid to go after the key witness first when you know what questions to ask him.

2.4 TYPES OF DEPOSITIONS

There are various depositions and, whichever type you use, the opposing side cannot object as long as your choice comports with the Rules.

1. Video v. Oral Depositions

In an ideal world, your depositions would be videoed, and your opponent's would not. The reason is that you would have the advantage of using video clips at trial to show how your opponent's witnesses got angry, were arrogant, or paused for a long time before answering a simple question (showing that his answer was disingenuous).

Example: Gates Deposition (*U.S. v. Microsoft*)[1]

In this example, the lawyer asks Gates whether he had a conversation with Microsoft's vice-president Paul Maritz about winning market share for Microsoft's browser. The government had accused Microsoft of using its powers to create a monopoly in this area.

[1] For a summary of *U.S. v. Microsoft*, see the Appendix.

Q. Now, did you ever tell Mr. Maritz that browser share was not the company's number one goal?
A. No.

> You only get one shot at deposing a witness, so you need to make it count. If possible, always use video.

This exchange seems very normal, and Gates appears to have told the truth. However, the video shows Gates pausing uncomfortably for almost a minute before answering this simple question. When the video was played at trial, it caused laughter in the courtroom. This is a perfect example showing that video can capture a crucial moment in a deposition that the written transcript cannot.

Likewise, if your witness did any of these things during an oral deposition, your opponent would not be able to take advantage of these mistakes at trial because the deposition of your witnesses would only be taken by a court reporter. Moreover, ideally, you would have infinite financial resources to pay for the added cost of a videographer to video the depositions (i.e. many videographers charge $100/hr. with a four hour minimum).

One more reason to take a video deposition is if you are concerned about opposing counsel's behavior. With the video rolling, you will force opposing counsel to be polite or risk being seen as a jerk by the jury when the deposition is played at trial or seen by the judge in a motion for sanctions for unacceptable behavior.

On the other hand, a video deposition has the disadvantage of preserving your tone of voice and the manner of your questions as well. If you pause a lot between questions, seem disorganized, become angry, or appear nervous, the jury will see this, and your credibility will be diminished.

2. Oral Depositions v. Deposition by Written Questions

While not very common, taking a deposition by written questions can be very useful. Rule 31 provides guidance. The party seeking to take the deposition sends notice to the other side along with questions that are sought to be asked. The opposing party has fourteen days after being served to respond with questions it wants to ask and must serve those on the originating party. The parties have seven days each to serve redirect and recross questions if desired.

You must object to a question that you have been served with within the time for serving responsive questions (14 days) or, if the question is a recross question, within 7 days after being served. (Rule 32(d)(3)(C)).

After all questions have been served, the party who noticed the deposition must then send a court reporter the notice and all the questions that have been submitted. The court reporter then must promptly take the deposition

of the deponent by reading him the questions and transcribing the answers, as would be the case in a typical deposition.

There are many disadvantages to a deposition by written questions. If the witness is confused by the question, there is no way for you to rephrase it. Moreover, if the witness gives a vague or limited answer, you cannot follow up. There is also nothing to be done if the witness dodges the question and gives an evasive answer. You will also give the other side the opportunity to draft questions carefully in response to yours.

Nonetheless, this type of deposition is useful in getting business records admitted at trial. For example, you could issue a Notice of Deposition By Written Questions with a subpoena duces tecum (a request for documents to be produced at the deposition) to a custodian of records at a company. The questions you would ask would be those to qualify the documents as business records so that they could be admissible at trial under the business record exception to the hearsay rule. You could also instruct the witness to sign a declaration to the same effect. Then, instead of calling the witness at trial, you could offer the deposition as substitute testimony or the accompanying declaration and documents under Federal Rule of Evidence 902(11) by providing notice of your intent prior to trial.

3. Telephone or Video Conferencing Depositions

You may take a deposition by telephone or video conference if the parties agree or with the court's permission (Rule 30(b)(4)). If the parties do not agree, the court will often permit the deposition unless the opposing party can show a particular reason why she would be prejudiced.

These remote depositions are often done so that attorneys can save the time and expense of traveling where the deponent resides. The only logistical concern is finding a court reporter (and/or videographer) to be present in the deponent's town. The downside to taking a telephone deposition is that you can't see the witness' reactions to your questions and judge how credible she will be before a jury. It can also be hard to question the witness about documents (even if you have mailed them to the court reporter beforehand), since it can be cumbersome to show the witness exactly what paragraph or sentence you want the witness to explain. However, for testimony that is expected not to be very controversial, a telephone deposition is an efficient way to obtain discovery and is very easy to arrange. The video conference allows you visually to assess the credibility of the witness but has the disadvantages of expense and difficult logistics of arranging for video equipment and video streaming.

CHECKLIST

Pros of Deposition

1. Assess witness' credibility.
2. Create inconsistent statements for trial.
3. Discover important details.
4. Gather helpful admisions.
5. Learn bad facts about your case.
6. Narrow issues for trial.
7. Obtain settlement leverage if your witness is good or opponent is bad.
8. Preserve testimony.

Cons of Deposition

1. Increases expenses.
2. Reminds opponent to take depositions of your witnesses.
3. Forces opponent to prepare for trial sooner.
4. Reveals your trial strategy.
5. Causes witness to be more comfortable on cross at trial.

Order

1. It's usually better to start with most important witness to catch him off guard.
2. Start with low-level witnesses if you are unsure of the important facts in your case, and you need to gather information.

Video, Oral or Written Questions

1. Video is always better if you can afford it.
2. Deposition by written question is inexpensive way to authenticate business records for trial.

Getting Ready to Take Deposition

1. Review client's documents.
2. Send interrogatories to opponent.
3. Request documents from opponent.
4. Interview main witnesses.
5. Know legal elements of claims and defenses.
6. Uncover theory of case for both sides.
7. Determine themes of case for both sides.
8. Be skeptical of client's story.
9. Prepare outline.

Contents of Deposition Outline

1. Goal is to find out how witness can hurt you (bad facts) and how you can undercut testimony if necessary (good facts).
2. In addition to learning bad facts, adverse witness can be questioned on at least one of five areas (CLIPS):
   —**c**redibility
   —**l**ack of information
   —**i**mplausible statements
   —**p**rior inconsistent statements
   —**s**upport of your case
3. Ask questions that will support your case before you ask antagonistic questions.
4. Focus on no more than three or four topics.
5. Put legal elements of claims and defenses in outline for easy review.

Sample Outline

I. Witness notification about oath
II. Confirmation of witness' competency to give testimony
III. Elements of cause of action and defenses (for your reference only)
IV. Discover bad facts about your case
V. Helpful admissions (the "S" of CLIPS)
VI. Other areas of CLIPS
VII. Miscellaneous questions regarding background

Taking the Deposition

1. Don't waste time on background questions.
2. A good beginning simply confirms that witness understands oath.
3. A short organized deposition is best.
4. Be confident, calm, and show respect.
5. Build rapport with witness.
6. Listening is most important skill.
   —show empathy toward witness to encourage witness to talk
   —determine if witness is believable by critical listening
7. Primarily use questions with who, what, when, why, where and how.
8. Use inverted pyramid to start with broad questions and then more specific ones.
9. Choose topics carefully since time is valuable.
10. Use focused (closed) questions to pin witness down when necessary.
11. Pause after witness answers to see if he will volunteer.

12. Repeat question if witness avoids answering it.
13. Ask most important question immediately after break.

Most Common Mistakes New Attorneys Make

1. Lecturing witness about rules of deposition instead of building rapport.
2. Spending too much time on background questions.
3. Looking at notes to formulate next question instead of making eye contact with witness and listening to answer.
4. Moving on to next question instead of realizing that witness has not answered pending question.
5. Exploring ten topics when only three are necessary.
6. Letting objections interrupt flow of questions.

Challenging Situations

1. If witness misspeaks and the statement is to your advantage, don't follow up since you will alert the witness and her attorney to the mistake.
2. If witness exaggerates, get details to highlight the exaggeration.
3. If witness reviews documents prior to deposition that refresh her memory, many courts will require her to produce them to the examining attorney.
4. If a witness refers to a document during an answer that the examining attorney has not seen, the attorney often will ask the witness to produce the document to him at a later date. Even if the witness says "yes," the courts are split as to whether this agreement is binding.
5. If opposing counsel instructs his witness not to answer a question, confirm with the witness that she is going to follow her attorney's advice.

CHAPTER SIX

Problems at Deposition

> An eye for an eye only ends up making the whole world go blind.
>
> —*Mohandas Gandhi*

Gandhi's advice could not be more sound for dealing with difficult opposing counsel and witnesses. If you fight back in the same way that you are being attacked, nothing will be accomplished. However, Gandhi did not simply preach passive resistance at all costs. He also declared, "All compromise is based on give and take, but there can be no give and take on fundamentals. Any compromise on mere fundamentals is a surrender. For it is all give and no take." You need to strike a balance. Compromise only as long as you can still gather the information you need from the witness and protect your witness' fundamental rights (if you are defending the deposition).

Let's look at some common situations you are likely to encounter and how to handle them. First, we will look at problems caused by difficult witnesses and then those caused by attorneys.

6.1 ATTORNEY CONVERSATIONS WITH EXPERT WITNESS

A very important change to the federal rules occurred in December 2010 regarding the disclosure of communications between an attorney and his designated expert witness. Rule 26(b)(4)(C) is a significant departure from the old rule and the current practice in many states. A designated expert is a witness who can testify at trial. Under the old rule, if the witness had been designated as an expert and thus not a consulting expert (a witness who could not testify at trial but could give confidential advice to an attorney), any communication between the attorney and that expert was discoverable. Let's look at an example from the Microsoft case under the old rule.

Example: Cross of Weadock (*U.S. v. Microsoft*)

Weadock was an expert hired by the Department of Justice. Here, he is

being questioned at trial by Microsoft's attorney.

Q. Over the last year, has any Department of Justice lawyer ever expressed appreciation for your willingness to conform your views to those of the Department of Justice's? [seeks communication not protected under old rule]

A. Quite the contrary, Mr. Pepperman. As a matter of fact, I made it very clear as a condition of employment when we were having these discussions in —I believe it was October—early October of last year—that if they were to hire me as a consultant, that I would not be bound by any preconceptions and that I would be free to call things as I see them. And, in fact, it's—it's my opinion as a businessman and as a consultant, that that's the greatest value a consultant has to a client, is to call things as they see them. They said, "that's all we want you to do." And they hired me on that basis.

The Microsoft attorney should have expected such an answer. It should not be surprising that an expert who is being paid a lot of money by one side is not going to help the other side with an answer that hurts his client. The following example (not from the Microsoft case) is another scenario that often took place under the old rule.

Example: Attorney Conversations with Expert Under Old Rule (Hypothetical Case)

Q. Did you meet with Mr. Dodge [defense attorney] this morning prior to the deposition?
A. Yes.

Q. What did you discuss?
A. We discussed my expert report and the expert report from the other side.

Q. Did Mr. Dodge mention to you any concerns he had about your report?
A. No.

Q. Describe in more detail what you talked about.
A. We essentially discussed my report in brief, and I reaffirmed what I said in it.

Q. Did you and Mr. Dodge discuss what questions I might ask you?
A. None that I remember. He just said that I would get asked some questions about my report and plaintiff's report, and he told me to tell the truth.

While under the old federal rule and many current state rules, these scenarios occurred often, the new federal rule specifically protects from disclosure communications between an attorney and his expert witness unless it relates to 1) the expert's compensation, 2) facts or data the attorney provided which were considered by the expert, and 3) assumptions the attorney provided that the expert relied on.[1]

[1] Rule 26(b)(4)(C).

Even under the old rule, experts rarely revealed any communications despite the fact that the old rule required such disclosure. Now, the rule protects many of those disclosures. But be aware that an opposing attorney may still discover communications such as facts and assumptions supplied to the expert. Although it is highly unlikely that your expert would reveal these facts under the new rule (see practices under the old rule above), you would still have a duty to correct the record if the witness lied at a deposition. This is not a position you want to be in. So, be careful what facts or data you supply to your expert.

Remember

Take advantage of the Rule Amendments that now protect from disclosure most communications between you and your expert.

6.2 WITNESS GIVES IMPLAUSIBLE ANSWER

There is nothing you can do when a witness gives an implausible answer. This is one of the most common—and frustrating—occurrences in a deposition. Many attorneys become exasperated when this happens. Instead, you should realize that you have achieved victory when you get such an answer. The reason is that it does not matter what the witness says, only if a jury will ultimately believe what was said. Consequently, a jury will see an implausible answer for what it is: an attempt by the witness to deceive. When this answer is shown to the jury, it is as helpful to you as the admission you were trying to get. Let's look at a few examples from the Gates deposition.

Example: (Gates Deposition)

In this example, Boies is showing Gates an e-mail he wrote to a subordinate on Jan. 5, 1996. The Justice Department was accusing Microsoft of attempting to monopolize the market for Internet browsing.

Q. And the first line of this is, "Winning Internet browser share is a very very important goal for us." Do you see that?
A. I do.

Q. Do you remember writing that, sir?
A. Not specifically.

Q. Now, when you were referring there to Internet browser share, what were the companies who were included in that?
A. There were no companies included in that.

Q. Well, if you're winning browser share, that must mean that some other company is producing browsers and you're comparing your share of browsers with somebody else's share of browsers; is that not so, sir?

A. You asked me if there are any companies included in that and now—I'm very confused about what you're asking.

Q. Allright, sir, let me see if I can try to clarify. You say here "Winning Internet browser share is a very very important goal for us." What companies were supplying browsers whose share you were talking about?

A. It doesn't appear I'm talking about any other companies in that sentence.

Gates' answer that there were no companies referenced in the e-mail does not pass the laugh test. Gates is afraid to admit that Microsoft wanted to win the browser share market from Netscape. As Boies pointed out, Microsoft had to be trying to win browser share from *some* company. Gates' refusal to answer a simple question would hurt him later at trial. When this deposition excerpt and others were played by videotape at the trial, the judge—who in this case was the trier of fact as well since there was no jury—shook his head and laughed.[2]

Example: Cont'd (Gates Deposition)

In this example, Boies confronts Gates with a document sent to him by Brad Chase, Microsoft's vice-president.

Q1. Let me go down to the third paragraph of the document and the fifth sentence that says "Browser share needs to remain a key priority for our field and marketing efforts." Do you see that?

A. In the third paragraph?

Q2. Yes.

A. Okay, the third sentence, the third paragraph. Yeah.

Q3. Were you told in or about March of 1997 that people within Microsoft believed that browser share needed to remain a key priority for your field and marketing efforts?

A. I don't remember being told that, but I wouldn't be surprised to hear that people were saying that.

Q4. Immediately before that sentence there is a statement that Microsoft needs to continue its jihad next year. Do you see that?

A. No.

Q5. The sentence that says "Browser share needs to remain a key priority for our field and marketing efforts," the sentence right before that says "we need to continue our jihad next year. That's the way it ends. Do you see that?

A. Now I see—it doesn't say Microsoft.

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[2] **http://www.cnn.com/TECH/computing/9811/17/judgelaugh.ms.idg/index.html**. *Gates Deposition Makes Judge Laugh in Court*. (accessed March 20, 2011.)

Q6. Well, when it says "we" there, do you understand that means something other than Microsoft, sir?

A. It could mean Brad Chase's group. [Boies gets frustrated with this implausible answer, refuses to accept it and tries to challenge Gates because he is so exasperated with the answer. His efforts go unrewarded.]

Q7. Well, this is a message from Brad Chase to you, Brad Silverberg, Paul Maritz and Steve Ballmer [management at Microsoft] correct?

A. As I say, it's strange that. this—if this was a normal piece of e-mail, it wouldn't print like that. I'm not aware of any way—maybe there is some way that e-mail ends up looking like this when you print it out. [Gates now tries to dodge the question completely by questioning the document's authenticity]

Q8. I wasn't the one that was asserting it was an e-mail. I don't know whether it is an e-mail or memo or what it is. All I know is it was produced to us by Microsoft. And the first line of it says "To" and the first name there is "Bradsi." Do you see that?

A. Uh-huh.

[Boies then asks several questions to get Gates to admit that all the names on the address line work for Microsoft.]

Q9. And it says it's from "Bradc" and do you believe that is Brad Chase?

A. Yes.

Q10. Now, when Brad Chase writes to you and the others "we need to continue our jihad next year," do you understand that he is referring to Microsoft when he uses the word "we"?

A. No.

Q11. What do you think he means when he uses the word "we"?

A. I'm not sure.

Q12. Do you know what he means by jihad?

A. I think he is referring to our vigorous efforts to make a superior product and to market that product.

> When a witness is backed into a corner, he still won't confess, but you have won because he will be forced to give an answer that won't be believed.

It is understandable why Boise spent the time to ask more questions in order to get Gates to change his implausible answer to Q6. Who would not have done the same in the heat of the moment? How can Gates possibly deny that "we" does not mean Microsoft? Once Gates declares that "we" does not refer to Microsoft, he is not going to change his answer and thereby look even more foolish than after he gave his original answer.

6.3 WITNESS HEDGES HIS BETS

Some lawyers instruct witnesses to give evasive and ambiguous answers. The goal is to limit the details given so that they can surprise opposing counsel at trial with new facts. The following is such a scenario.

Q. Who witnessed the harassment you suffered at work?
A. All I can remember now is Jonathan.

Here, the evasive witness lies at the deposition by testifying that Jonathan is the *only* witness she remembers when she knows there are really two witnesses. At trial, the witness hopes to surprise opposing counsel by saying, "Now I remember that there was another witness."

However, coaching your witness in such a manner is not only unethical, but it is also impractical. The evasive answer can easily be cured by asking this follow up: "Would anything help you remember if there were other witnesses?" If the witness says "No," then you are done. At trial, you can impeach the witness' sudden recollection of another witness by showing her the deposition transcript which shows "nothing" could refresh her memory.[3]

If you get the opposite answer, simply follow up with the questions that will determine what would help the witness remember. Then refresh the witness' memory with a particular document—if you have it—or follow up with another witness if the deponent suggests that if she were to speak with someone, then that would refresh her memory.

6.4 WITNESS PRETENDS NOT TO UNDERSTAND QUESTION

Perhaps the most frustrating thing in a deposition occurs when a witness pretends to be confused by a simple question. There are four steps to solve this problem every time. Boies provides the perfect demonstration below, and he had to do it quite often with Gates. Below, Boies asks Gates about an e-mail he wrote in January 1996. See if you can identify the four steps in the transcript below.

Q. What were the non-Microsoft browsers that you were concerned about in January of 1996?
A. What's the question? You're trying to get me to recall what other browsers I was thinking about when I wrote that sentence?

Q. No, because you've told me that you don't know what you were thinking about when you wrote that sentence. Right? What I'm trying to do is get you to tell me what non-Microsoft browsers you were concerned about in January of 1996.

[3] Moreover, such coaching is self-defeating since the Rules require a party to disclose the names of witnesses that will support its claim (Rule 26(a)(1)(A)(i)). A judge would not allow the undisclosed witness to testify at trial.

A. If it had been only one, I probably would have used the name of it. Instead I seem to be using the term non-Microsoft browsers. [Boise did not ask Gates "how many," but Gates tries to avoid the question by not answering it, so, Boies repeats the question.]

Q. My question is what non-Microsoft browsers were you concerned about in January of 1996?

A. I'm sure —what's the question? Is it—are you asking me about when I wrote this e-mail or what are you asking me about?

Q. I'm asking you about January of 1996.

A. That month?

Q. Yes, sir.

A. And what about it? [Gates is in full dodging mode.]

Q. What non-Microsoft browsers were you concerned about in January of 1996? [This is the third time Boies has asked the exact same question. Look how Gates dodges the question a third time.]

A. I don't know what you mean "concerned."

Q. What is it about the word "concerned" that you don't understand? [Step one to take when a witness claims he does not understand a word]

A. I'm not sure what you mean by it. Is there a document where I use that term?

Q. Is the term "concerned" a term that you're familiar with in the English language? [Step two]

A. Yes.

Q. Does it have a meaning that you're familiar with? [**Step three**]

A. Yes.

Q. Using the word "concerned" consistent with the normal meaning that it has in the English language, what Microsoft—or what non-Microsoft browsers were you concerned about in "January of 1996? [Step four (Repeat the question). This is also the fourth time the question is asked]

A. Well, I think I would have been concerned about Internet Explorer, what was going on with it. We would have been looking at other browsers that were in use at the time. Certainly Navigator was one of those. And I don't know which browser AOL was using at the time, but it was another browser. [Here, Boies gets his answer but notices that Gates may be qualifying his answer because he says he was concerned about Internet Explorer but was "looking" at others. Boies follows up with many more questions that Gates dodges. A few of them follow.]

Q. What I'm asking, Mr. Gates, is what other browsers or what non-Microsoft browsers were you concerned about in January of 1996? I'm not asking what you were looking at, although that may be part of the answer, and I don't mean to exclude it, but what non-Microsoft browsers were you concerned about in January of 1996? [The fifth time the question is asked.]

A. Well, our concern was to provide the best Internet support, among other

things, in Windows. And in dealing with that concern, I'm sure we looked at competitive products, including the ones I mentioned.

Steps to Take When Witness Pretends Not to Understand a Word in the Question

1. Ask the witness what he does not understand about the word (i.e. concerned).
2. Ask if witness is familiar with that word as it is used in the English language.
3. Ask the witness if he is familiar with the *meaning* of that word.
4. Ask witness your original question beginning with this phrase: "Using the word "[i.e. concerned]" consistent with the normal meaning that it has in the English language, what non-Microsoft browsers were you concerned about . . . ?

In the next exchange, Gates does not give Boies the perfect answer because he still qualifies it a bit by saying that he "looked" at certain products. It can be maddening when a witness doesn't answer a question directly, particularly a witness like Gates who failed to do so throughout the deposition. You need to choose your battles carefully. Here, Boies continues to battle. Although, he never gets the perfect answer he wants, he wins the battle as will be discussed below.

Q. Let me try to use your words and see if we can move this along. What competitive products did you look at in January of 1996 in terms of browsers? [A variant of the original question that has been asked six times.]

A. I don't remember looking at any specific products during that month.

Q. Were there specific competitive products that in January of 1996 you wanted to increase Microsoft's share with respect to those products? [The seventh time]

[Gates' attorney]: Objection.

Q. Do you understand the question, Mr. Gates?

A. I'm pausing to see if I can understand it.

Q. If you don't understand it, I'd be happy to rephrase it.

A. Go ahead and rephrase it. I probably could have understood it if I thought about it, but go ahead.