

Chapter 7 Understanding and Defeating Counsel's Deposition Tactics

7.1 Introduction and Executive Summary

To excel at your deposition, you will need a full understanding of the tactics opposing counsel may use and the effective methods of dealing with these tactics. Many of these tactics are summarized below and are discussed in further detail later in this chapter.

- Beginning the deposition with a pointed, challenging question in an attempt to rattle you.
 - Be mentally prepared to address key issues or direct challenges at the outset.
- Requesting that you waive reading and signing of the deposition transcript.
 - Do not agree to waive reading and signing.
- Making the deposition physically uncomfortable for you (temperature, chair, stuffy room, no hydration, etc.).
 - Inform retaining counsel if you are uncomfortable so she can address the situation.
- Conducting a lengthy deposition in an attempt to wear you down.
 - Ask retaining counsel to enforce time limits and insist on a 10-minute break every 60 minutes.
 - Prepare yourself for a battle of attrition and be well rested.
- Questioning on notes taken by you at deposition.
 - Do not take notes at the deposition.
 - Bring neither a pen nor note paper to the deposition.
- Jumping to different topics.
 - Concentrate on the question at hand and do not try to out-think counsel.
- Asking about your notes.
 - Answer honestly and transparently.
 - Remember that answering questions about why you underlined something should be relatively easy. For example, you thought it might be important.
- Asking if anything has been removed from your file.
 - Answer honestly and transparently. The cover up is often worse than the crime.
 - Do not sanitize your file and do not testify dishonestly.
- Intimidating you with an unfriendly demeanor.
 - Try not to show fear.
 - Remain cool, calm, and collected.
- Asking about conversations you had with retaining counsel during the break.
 - Don't discuss the case with retaining counsel during breaks.
- Trying to get an answer that contradicts your report, declaration, or the retaining party's answers to interrogatories.
 - Do your homework and know your report, declaration, and the answers to interrogatories cold.
- Trying to lock you down on how critical a factual assumption is.
 - The most truthful response to such a question might contain a hedge.

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- Be willing to consider new information/facts.
- This new information might or might not change your opinions.
- You may need time to consider new information prior to expressing an opinion.
- Questioning about newly presented documents.
 - Insist on time to review the new document before answering any questions.
- Attempting to get you to unwittingly attest to the authenticity of a document.
 - Listen carefully to the questions and carefully phrase your responses. For example, you could state, “It purports to be. . . .”
- Asking about key names and dates.
 - Do your homework and know this information cold.
- Trying to get you to lose your cool.
 - The best way to make this tactic boomerang is to stay calm.
- Asking unintelligible questions in an effort to get you to volunteer information.
 - Only answer questions you understand.
- Remaining silent after you finish answering a question to try to elicit more information.
 - Remain silent after finishing your reply.
 - Only speak in response to questions. It’s an interrogation, not a conversation.
- Getting you in a rhythm.
 - Listen carefully before answering questions.
 - If the truthful answer to a long series of questions is “I don’t know,” so be it.
- Asking convoluted questions.
 - Only answer questions you understand. If you don’t understand a question, say so.
 - Listen carefully to objections retaining counsel may have regarding the improper form of a convoluted, unintelligible question.
- Asking “catchall” questions to limit future testimony.
 - The most truthful answer will often leave some wiggle room. For instance, stating, “Not that I can recall at this time” instead of “No.”
- Using your office against you.
 - Make sure the deposition is not in your office.
- Bringing the opposing party to the deposition.
 - Mentally prepare yourself for this contingency.
- Counsel asking if you have anything else to add.
 - You can state, “If you would like to ask any further questions, I would be happy to answer them.”
- Using abusive conduct.
 - It is best to stay calm and just answer the questions posed.
 - If counsel crosses a line and the conduct continues, consider warning counsel on the record and, if necessary, terminating the deposition and immediately having retaining counsel or your personal counsel file for a protective order.
- Counsel playing the “wide-eyed student” in an effort to get you talking.
 - Answer each question fully and truthfully, but do not volunteer beyond the scope of the question.
- Using hypothetical questions designed to turn you against retaining counsel’s case.

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- It is OK to not come up with instant opinions on the fly unless you feel comfortable doing so. Many issues properly require study and reflection to put the new hypothetical facts into context.
- You might also need additional information before you could begin to form a new opinion.
- Trying to get you thrown off the case.
 - This is the most serious tactic because it can result in you being excluded and your client's case being lost.
 - Be very well prepared to explain why (preferably in bullet-point fashion) you are qualified and why your methodology is reliable.
- Questioning "magic word" legal standards.
 - Make sure you understand the definitions of all legal terms likely to come up and that you can explain these terms in your own words.
- Scheduling a deposition over multiple days to get you to contradict yourself.
 - Ask retaining counsel to protect you from this.
 - Schedule depositions for early in the morning and set time limits (either by agreement or court order) prior to the deposition.
- Getting you to criticize co-defendants.
 - If you do not have an opinion or haven't looked into an issue, you should say so.
- Mischaracterizing your testimony or opinion.
 - Actively listen and do not agree to opposing counsel's characterization unless it is 100% accurate.
 - Picture the question as though it were written on a white board.
- Getting you to agree that a text is "authoritative."
 - Depending on the circumstances, you may hedge a response and state that, although you may use the book and agree with some or many things in the book, you do not necessarily agree with all of it.
 - Most professionals would never substitute a book for their professional judgment.
 - Most books are out of date the day they are published.
 - Many books have multiple authors.
- Asking if you turned in a colleague you were critical of for professional discipline.
 - Carefully word any criticism about colleagues.
- Insisting on a "yes" or "no" answer.
 - If you can answer truthfully and completely with "yes" or "no," do so.
 - If you can't answer truthfully or completely with a "yes" or "no" without being misleading or incomplete, say so.
 - You can also consider providing a reply that is just shy of an unequivocal "yes" or "no" by carefully leaving yourself some wiggle room.
- Repeating the same question over and over again.
 - Answer the question truthfully and completely each time, which means your answer should be the same each time.
 - Do not object, appear frustrated, or complain.
- Cutting off your answer.
 - Politely but firmly finish your first answer.

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7.2 Deposition Tactics of Opposing Counsel

Tactic 1: Starting off with a pointed, challenging question

This tactic is designed to catch you off guard before you are warmed up and ready for difficult questions. To excel at deposition you need to be mentally prepared from the get-go for difficult questions.

Example 7.21: Pointed question at outset of deposition

Q: You do not know what caused the failure of the 750KVA transformer. Isn't that true, sir?

Practice Pointer: This tactic is defeated by preparation and by being mentally ready to address the key issues in the case (or pointed credibility attacks) at the very outset of the deposition. Never assume that the deposition will start slowly or proceed in a logical order. Your interrogator need not proceed in a logical order because his questioning of you is for his own benefit in gathering information to use later. His questioning is not directly geared toward making an impression on the jury as would be the case at trial.

Example 7.22: Starting with pointed questions to keep expert off guard

Q: Good morning, Mr. Mason. As you know, my name is Bruce Stein. I represent Vijay Khan with regard to this motor vehicle collision. It's my understanding that it's your opinion that the speed change of Mr. Khan's car was no more than 6.1 miles per hour; is that correct?

A: That is correct.

Q: As a result of that change of speed, the average forward acceleration of Mr. Khan's car was no more than 2.8 g's for a duration of approximately 100 milliseconds; is that correct?

A: That is correct.

Q: You used the term "average acceleration." What was the peak acceleration for Mr. Khan's car?

A: Well, I don't technically compute that; however, you would expect it to be approximately two point two times the 2.8, or 5.6g's.

Q: Did you calculate the average or peak g's that were applied to Mr. Khan's neck or head?

A: No.

Q: Why did you not do that?

A: I'm working on the car rather than the person.

Q: Could you calculate the peak or average g's that were applied to Mr. Khan's head?

A: That's normally done by the biomechanist, in these cases, and not by me. And to be perfectly—I, you know, if somebody gave me the equation, yes, I could punch them in the calculator and compute them. But, no, I don't normally do that and I don't normally know those code equations.

Practice Pointer: You need to be prepared for pointed questions at the outset of the deposition. The following are samples of what you need to prepare for.

Q: What additional work/research/analysis could you have done in this case that you did not do?

Q: Is this an example of your best work?

Q: What are your three biggest professional failures?

Q: What were the last three lies you told?

Q: Tell me all the information you wish you had but did not have access to prior to forming your opinion in this case.

Q: How certain are you that your opinions in this case are correct?

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Q: How much money gross in the aggregate has your expert witness practice generated in the last 10 years?

Q: Why do you feel better qualified to give an opinion in this case than the opposing expert?

Q: When was the last time you admitted a mistake?

Tactic 2: Asking you to waive reading and signing of the deposition transcript

You are typically allowed to waive your right to read and correct the deposition transcript. This may be ill-advised because the transcript can often contain errors and reviewing the transcript is an excellent learning tool. In addition, in some jurisdictions, not only can you correct transcription errors, but you can, when appropriate, correct substantive mistakes that you may have made.

The defense to this tactic is simple. Firmly but politely refuse to waive your right to read and sign the transcript.

Example 7.23: Asking the witness to waive reading and signing

Q: Good morning, Mr. Borgas. It has been my experience that it's pretty much standard that most experts do not read and sign the deposition transcript. Do you agree to waive reading and signing?

A: No, I do not.

Practice Pointer: Note how counsel attempted to subtly imply that the expert would be out in left field if he did not waive reading and signing. This expert recognized the tactic for what it was and soundly defeated it by simply refusing to waive reading and signing.

Tactic 3: Providing an uncomfortable deposition environment

Opposing counsel may make the deposition room uncomfortable (too hot, too cold, or too bright), the chair hard, or provide inadequate space or a desk or table for you to spread out your file. This is done to make you consciously or subconsciously want to get out of the room as quickly as possible. This tactic is defeated by asking your retaining counsel to object to the uncomfortable environment and demand a reasonably comfortable setting.

Tactic 4: Conducting a lengthy deposition

The goal of this tactic is to wear you down. Opposing counsel expects that the more tired you become, the more likely you will be to misspeak, make a mistake, get angry, or become frustrated.

Deal with this tactic by being well rested for your deposition and mentally prepared to go the distance in a marathon battle of attrition. Additionally, ask retaining counsel to enforce any time limits set by the rules¹ or agreement between counsel. Additionally, ask retaining counsel to arrange and insist on a 10-minute break every 60 minutes, as well as a strictly enforced lunch break at midday. The above will help protect you from getting worn down.

Tactic 5: Questioning on the notes you take at the deposition

This tactic is defeated by not taking any notes at the deposition. You can help ensure this by bringing neither paper nor pen to your deposition.

¹ Many jurisdictions set limits on how many days/hours a deposition can go. Note, however, that these limits can usually be modified by agreement of the parties or permission from the judge.

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Tactic 6: Jumping around to various topics

This tactic is designed to confuse you and to make it difficult for you to anticipate where opposing counsel is going.

You can defend against this line of attack by taking your time, answering each question truthfully, and not trying to outguess counsel. The more you try to anticipate the next question, the less focused you will be on the question at hand. Concentrate intently on the question at hand and answer each question truthfully. Do not concern yourself with the order of questions.

Example 7.24: Jumping from topic to topic

Q: You have a second degree of Bachelor of Science in agronomy?

A: That's correct.

Q: It says you were focused on plant protection chemistry?

A: Yes.

Q: How does glyphosate work? How does it cause symptoms in any target species?

A: Well, it depends on whether it's a sensitive plant or not.

Q: When you say you're certified, that's the CPAg?

A: Yes.

Practice Pointer: This expert handled the jumping around to various topics very well. The expert concentrated on each question and answered each truthfully.

Tactic 7: Asking about notes made to documents in your subpoenaed file

Opposing counsel will invariably ask you about any and all notes you have made on the documents produced as well as free-standing notes you may have taken.

It is not difficult to beat this tactic. Do not put anything dumb, inflammatory, or that you wouldn't want seen by a jury in your notes. Notes should be factual and not contain opinions, theories, or the mental impressions of retaining counsel. When asked about your notes at deposition, answer simply, truthfully, non-defensively, and to the best of your ability.

There are two ways this tactic should *not* be defeated. First, this tactic should not be dealt with by hiding, misplacing, or "losing" your notes. Such dishonest gamesmanship is unethical and can easily destroy your credibility. Second, you should not fail to take notes for the sole reason of not wanting to later produce these notes through discovery. Note taking is often a critical part of working up a case and you shouldn't compromise your investigation and conclusions by an irrational fear of being questioned about your innocuous and factual notes. In other words, don't let the discovery tail wag the opinion dog.

Example 7.25: Expert's notes

Q: Showing you what's been marked as Deposition Exhibit No. 6, for identification purposes, do you recognize that document, sir?

A: I do.

Q: At the top it says "Plaintiff, Jim"?

A: Yes.

Q: That is your handwriting?

A: It's my handwriting.

Q: These are your notes?

A: Yes.

Q: When did you create this?

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A: Sometime before the last deposition.

Q: Okay. And the purpose of this document was what?

A: Looking at the other side of the coin from what we had discussed just a moment ago.

Q: So this is looking at it from Jim's point of view?

A: Right.

Example 7.26: Highlighting/underlining

Q: I noticed you highlighted portions of Deposition Exhibit Number 7 for identification.

A: Yes, that is correct.

Q: In addition to highlighting, sometimes you also underlined portions of Exhibit Number 7.

A: Yes.

Q: You highlighted or underlined these passages because you felt they had some special significance to you?

A: Yes.

Q: Let's go over each highlighted or underlined passage so you can explain what special significance each one had for you.

Practice Pointer: Expect opposing counsel to ask you to read and explain some or all of your handwritten notes. These notes can be on the records themselves (typically in margins), on separate pieces of paper, or on small Post-it notes. In these deposition exchanges, counsel is looking for inconsistencies, mistakes, improper influence of retaining counsel, changes of opinion, and creating a timeline for cross-examination purposes. As an expert, you should welcome the chance to earn hundreds of dollars an hour by giving truthful answers (such as, "I found it interesting" or "I thought it might be important") to a question of "Why did you underline that?"

Tactic 8: Asking point-blank whether you or anyone else removed anything from the file prior to it being produced

In response to a subpoena, counsel may try and determine if you have brought your entire file with you to the deposition. This tactic is designed to unsettle you.

Squelch this tactic by transparently responding to the subpoena and not surreptitiously ditching material from your file. Be careful when filing and do not misfile any unrelated documents into the case file. Never "sanitize" your file. Remember that the cover up is often worse than the crime.

Example 7.27: "Is this your entire file?"

Q: Is this your entire file, sir?

A: Yes, it is.

Q: Where are your billing records?

A: Well, I keep the billing records in a separate file. I didn't know. . .

Practice Pointer: Counsel immediately put the non-compliant expert on the defensive, which affected the expert's credibility and confidence. Not only will counsel listen closely to your answer to this question, she will also observe your body language carefully. Opposing counsel will try to see if you appear to be hiding something.

Example 7.28: Expert produces complete file

Q: The court reporter has just marked as Exhibit 215—it's a deposition subpoena for the personal appearance, and production of documents and things, directly to you. Please take a look at the . . . Exhibit 215, please.

A: (Complying.)