THE CURIOUS WORK OF DEPOSITIONS

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I. INTRODUCTION

There is an old saying that goes something like this: "Success is 10% inspiration and 90% perspiration". That is certainly a fair enough description of the formula for a successful outcome in civil litigation. It's plain hard work. The purpose of this paper is to help the reader obtain the desired outcome in a deposition without sweating more than necessary.

Actually, many depositions are pretty easy, you show up, ask a few questions, get a few answers, and go home. Not much sweat involved at all. Sometimes the deposition was genuinely easy. But sometimes we don't sweat depositions because we simply didn't work hard enough to make the deposition as successful as it should have, and could have, been. This paper is written to provide the reader with some hints that hopefully will assist in improving the likelihood of a successful deposition while reducing the sweat that necessarily accompanies work that is harder than it needs to be.

Keep in mind that discovery is meaningless unless conducted as part of a trial preparation strategy. Generally, the important parts of a trial include jury selection, opening statements, evidence, closing arguments and the jury charge. Of these, the most important is the evidence. Evidence is where the truth about the case will be found. Evidence must come in through witnesses. The primary complicating factor in the search for the truth that is a jury trial is the use of these witnesses. Lawyers have complete and total control over the opening and the closing arguments, some control over jury selection and the jury charges, but, at best, can only control half of the process of presenting evidence at trial through witnesses. All lawyers can do is ask questions. Unfortunately, we often have to rely on nervous, amateurish, confused, and inarticulate witnesses to answer these questions and provide the facts that constitute evidence. How we go about getting the facts from the psyches of the witnesses to be effectively understood

by the fact finders - jurors who are also nervous and confused - determines whether success or failure will be achieved. Depositions are an important, if not vital, part of that process

Do not take depositions willy-nilly. Depositions are expensive and much of the information that is obtainable in depositions can be obtained in statements which are cheaper, and have the added advantage of keeping your opponent in the dark. (However, be careful about contacting adverse witnesses who are represented by counsel.) Remember that much of discovery serves the purpose of making the other side prepare when it otherwise would not. Nothing frightens a defendant more than not knowing how his witness will react to questions. If we don't take depositions we can foster a great deal of fear.

i. Use 30(b)(6) Depositions

When suing a corporation the best way to pin it down is with corporate depositions.[1] Start all such depositions by establishing that the deponent is the person authorized to testify about the identified subjects. Make sure there is no doubt about the qualification of the witness. In fact, it is good practice to end the deposition by again asking the witness to state or admit that as to the matters discussed in the deposition that he is the best person in the company to have spoken about them.

One of the great advantages of taking 30(b)(6) depositions is the thought process that goes into preparing the questions. The sweat is done weeks before the deposition when the questions/topics are written, making the deposition itself pretty easy. The trick is to make sure that the topic list is detailed and broad at the same time.

ii. Use Video Depositions

If the deposition is worth taking, more times than not it is worth recording on video. We prefer that the output be on DVD for ease of editing. While an order is not required in Georgia, in state cases the notice must specify that video will be used.

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[1] Fed. R. Civ. P. Rule 30(b)(6); O.C.G.A. §9-11-30(b)(6).

Arranging to have a videographer present (actually a third party is not technically required, but it sure makes it easier) is not enough. Care must be taken to insure that the equipment is adequate for the task at hand, that the location of the camera will produce the desired impact, and that the videographer actually shoots the desired images. Usually this means placing yourself under the camera so that the witness will look at the camera when he or she answers. However, sometimes a side view with no eye contact might be more effective.

Additionally, when using exhibits and photographs have the witness show them to the camera. Have the witness demonstrate distances if this can be done with fingers or arms. If the video is to be used at trial keep it as lively as possible with changes of images to keep the jury awake.

Depositions conducted via video tele-conferencing can really make life easier. Instead of a three hour deposition in California being a three day ordeal. Through the use of video tele-conferencing one simply goes to a video center and sits in front of a real time image of the deponent. We have been very pleased with this process, finding it very economical and almost every bit as effective as being at the deposition in person.

iii. Interview When Possible

It is amazing how lawyers believe that the only way to talk to a witness after a case starts is by deposition. This is ridiculous! The use of a deposition to interview a witness guarantees that the other side will be there and learn what the noticing party learns. Instead, consider having the witness come to your office and take a detailed statement, before a court reporter, without even inviting the other side. Additionally, while you must be concerned about contacting a witness represented by counsel, you should also know that just because a witness used to work for the defendant does not mean the defendant has the only access to the witness. In fact, a

lawyer may interview former employees of a represented corporate opponent so long as the former employee consents after the lawyer fully explains the lawyer's purpose.[2]

> DR 7-104(A)(1) and Proposed Rule 4.2 are not intended to protect a corporate party from the revelation of prejudicial facts but rather to preclude interviewing those corporate employees who have the authority to bind the corporation. [Instead, the] clear purpose is to foster and protect the attorney-client relationship and not to provide protection to a party in civil litigation nor to place a limit on discoverable material. The comment language[3] . . . allows for communications with an agent or employee who has his/her own attorney without notice to the organization, corporate entity, or its attorney. This language defeats the purpose advanced by defendant . . . .[4]

This interpretation is consistent with State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) which interprets Georgia's rules of conduct. "The Code of Professional Responsibility, like a statute, should be construed so as to carry into effect the intent of the governing body which enacted it. The construction given should be in harmony with the policy of the law and must square with common sense and sound reasoning."[5]

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[2] Formal Advisory Opinion Board of the State Bar of Georgia, 94-3; Opinion 87-6; Standard 47; Rule 4-102; ABA Rule 4.2 (9/9/94).

[3] The comment language referred to is the official comment to Proposed Rule 4.2. That language is as follows: "If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule." This comment was quoted in the State Bar of Georgia Formal Advisory Opinion No. 87-6 (870R2).

[4] *DiOssi v. Edison*, 583 A2d 1343, 1345, 1346 (Del. 1990) (footnote added).

[5] *In the Matter of Dowdy*, 247 Ga. 487, 492 (1981) (citations omitted).

State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) cites with approval ABA Informal Opinion 1410 (1978). That opinion answers the question of whether a plaintiff can interview employees of a corporate defendant to see what facts they know which would shed light on the plaintiff's claims. The opinion provides that:

> ***[g]enerally*** *a lawyer may properly interview witnesses or prospective witnesses for opposing sides in any civil . . . action* ***without the prior consent of opposing counsel*** *- unless such person is a party . . .* [and] no communication with an officer or employee of a corporation with the power to commit the corporation in the particular situation may be made by opposing counsel unless he has prior consent . . . .

(emphasis added). Thus, the general rule is one allowing communications with the employees of a corporate defendant. It is acceptable to interview the ex-employees of a corporate defendant.[6]

This general rule of allowing communications makes a great deal of sense from a number of prospectives. In *Vega v. Bloomsburgh*, 427 F. Supp. 593 (D. Mass. 1977), the court, in reaching the conclusion that the plaintiff could interview state employees who were responsible for implementing a program which was the subject of the action being litigated, recognized that a defendant who seeks to limit access should show that the employees are represented by counsel, or that their interests are adverse to the plaintiff's or defendant's. The court recognized these practical requirements because of the advantages and importance of the informal discovery

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[6] The Formal Advisory Opinion Board of the State Bar of Georgia has opined at 94-3 9/9/94 that a lawyer may interview former employees of a represented corporate opponent so long as the former employee consents after the lawyer fully explains the lawyer's purpose. Opinion 87-6; Standard 47; Rule 4-102; ABA Rule 4.2.

process as something which must be considered when limiting a party's right to interview a corporate defendant's employees. Other courts have also recognized the value of informal investigation as an essential method of promoting the expeditious resolution of disputes in an inexpensive manner.[7]

Thus, when deciding whether an *ex parte* communication should be restricted, the court should look at all of the circumstances on a case by case basis while keeping in mind the purpose of the rules, which is to protect attorney client relationships of *parties* to a lawsuit.[8] The court must do this while remembering that while a corporate employee may be a client for purposes of the attorney client privilege,[9] that same corporate employee is not necessarily a *party* for purpose of the rules.[10] That is especially true where the employee did not cause the injury at issue.

Further discussion of the differences between the rule prohibiting efforts to discover privileged information and efforts to discover facts is found in a most liberal view of the rule as discussed by the Supreme Court of Washington State in *Wright v. Group Health Hospital*.[11] *Wright* was a medical malpractice action in which the plaintiff sought to interview nurses who had treated and cared for him while at the defendant hospital. The defendant hospital objected, claiming that the rules prohibited any such *ex parte* communications. In rejecting defendant's narrow interpretation of the rules, an unanimous court held that the rules only restrict informal access to those who are managers/speakers for the corporation. The court indicated that even

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7 *E.g., Niesig v. Team 1*, 559 N.Y.2d 639 modifying NYS 2d 153 (1989).

8 *E.g., State (N.J.) v. CIBA-GEIGY Corp.*, NJ Super Ct. App. Div., No. A2289-90TIF (4/10/91 released 4/23/91).

9 See *Upjohn v. U.S.*, 449 U.S. 883 (1981).

10 *Niesig v. Team 1*, 559 N.Y.S.2d 639 modifying 545 NYS 2d 153 (1989).

those employees who caused the incident at issue could be interviewed so long as they were not managers or speakers for the corporation. The court further distinguished *Upjohn v. U.S., supra*., and similar cases relating to attorney client privilege, reasoning that only the communication between the attorney and the client are privileged - not the facts known by the witness.[12]

The interpretation of the rules discussed above, which distinguish fact witnesses from witnesses who committed the wrong at issue, or who can bind the corporation, is one that should be followed in Georgia. It is consistent with State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) and the vast majority of interpretations by other courts and ethics panels.[13]

DR 7-104(A)(1) and Proposed Rule 4.2 only prohibit an attorney from interviewing employees of a corporate opponent, when the corporate opponent is represented by counsel, *if* the persons sought to be contacted are members of one of the following two groups:

(1) an officer, director, or other employee with authority to bind the corporation; or

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11 103 Wash. 2d 192, 691 P2d 564, 569 (1984).

12 *See, e.g., Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc*., 128 Ill. App. 3d 763, 471 NE2d 554, 569 (1984).

13 LA Cy. Bar Ass'n Op. 369 (1977) digested at O. Maru, *1980 Suppl. to the Digest of Bar Assoc. Ethics Opinions* 75-76 (1982); Ariz. St. Bar Ass'n. Op 203 (1966) digested at (Maru, *1970 Suppl. to the Digest of Bar Assoc. Ethics Opinions* 127 (1972); Idaho State Bar Ass'n Op. 21 (1960) digested at O. Maru, *Digest of Bar Assoc. Ethics Opinions* 105 (1970); Texas State Bar Ass'n Op. 342 (1968) digested at O. Maru, *1970 Suppl. to the Digest of Bar Assoc. Ethics Opinions* 297 (1972); La. State Bar Op. 326 (1968) digested at O. Maru, *1970 Suppl. to the Digest of Bar Assoc. Ethics Opinions* 225 (1972); LA Cy. Bar Op. 234 (1956) digested at O. Maru, *Digest of Bar Assoc. Ethics Opinions* 66 (1970).

(2) an employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case.

For a person to be bound by the tortious conduct of his agents and servants, there must be tortious conduct by them.[14] If the servant or employee is not responsible for any tortious conduct, neither will be the principal unless it has independent tortious acts.[15]

To conclude, there is no prohibition against communicating with ex-employees even if they can bind the corporation. This is true even if the corporation is represented by a lawyer. Formal Advisory Opinion Number 94-3 provides that "[a] lawyer may properly contact and interview former employees of an organization that is represented by counsel to obtain non-privileged information relevant to the litigation against that organization provided that: (1) the lawyer makes full disclosure as to the identity of his/her client; and (2) the former employee consents."

Not only is there an advisory opinion, there is also a controlling opinion of the Georgia Court of Appeals. In *Sanifill of Georgia, Inc. v. Roberts*[16], the court was faced with the following:

> The question presented is whether a plaintiff who has filed suit against a corporate defendant may conduct ex parte communications with a former employee of the defendant where the plaintiff is seeking to establish liability by imputing to the defendant the acts of omissions of the former employee."

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14 *See*, O.C.G.A. §51-2-2.

15 *E.g., Townsend v. Brantley*, 163 Ga. App. 899 (1982).

16 232 Ga. App. 510, 502 SE2d 343 (1998)

Id. at 510. The court recognized the ethical opinion discussed above and held that "a former employee who is not represented by a lawyer simply does not fall within the wording of the rule," and no ethical violation occurs when they are contacted. *Id*. at 512.

iv. Depositions are not Trial Testimony . . . yet.

On too many occasions, during a deposition noticed by the deposer for use at trial, it will be discovered that the deponent is going to be hostile or adverse. Often this is not realized until well into the deposition when it is too late to simply cancel the deposition and go home. When this occurs, stop using direct questions which allow the hostile witness to harm your client and start leading! Of course the other side will begin objecting, but ignore him and just keep leading. You are not going to use the deposition in your case in chief and thus are not required to use direct questions and are, instead, allowed to cross examine.

Just because a deposition is noticed for preservation of evidence and use at trial, particularly a doctor's deposition, this does not mean that the party noticing the deposition is stuck with the witness. Until called at trial, a witness belongs to no one.[17] When the other side starts his examination, he will naturally begin using leading questions - object to all of them. Then, during the trial when you have not read the hostile witness's testimony in your case in chief, the opposition will attempt to do so in its case in chief. Unfortunately for him, you had been preparing for trial when you took the deposition and in anticipation of his reading the transcript in his case in chief had made the appropriate objections. If you objected properly, he will have only a few direct questions and you will have a blistering cross examination. All this is true because:

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[17] O.C.G.A. §9-11-32(c).

> A deponent's testimony obtained through discovery, does not belong to or bind either party until such testimony is introduced in evidence at the trial of the case, whereupon the party introducing it adopts the testimony and is bound by it.[18]
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> What constituted the direct examination of a witness whose testimony was initially taken for discovery, could not be determined until the trial, when one of the parties elected to use the testimony on his behalf. At that time, the rules governing direct and cross examination would apply.[19]

v. Prepare the Deponent

In almost every instance, it is important to meet with the witness before the deposition. It is really an obligation to do so if the witness is available. Deposition testimony can be used at trial and thus is unquestionably part of trial evidence – accordingly, we cannot prepare for it any differently than in preparing for trial. This is especially true where the witness is a treating medical doctor - this saves the embarrassment of asking questions which lead to bad answers.

There are ethical boundaries on how far one can go in preparing a witness for deposition and for trial testimony.

> As a general rule of good trial practice, a witness should not be put on the stand unless the attorney has first had an opportunity to interview the individual. Knowledge, memory, sincerity, demeanor, and skills of expression should all be probed and observed beforehand to avoid unpleasant surprises at trial, to minimize testimony or weaknesses, and, if there is a realistic choice, to determine whether or not to use a particular witness. These are legitimate tactics and

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18 *Travis Meat Seafood Co., Inv. v. Ashworth*, 127 Ga. App. 284, 286 (1972).

19 Id. at 287.

essential to adequate trial preparation. But it is not proper to prepare a witness by putting words in his mouth or by inducing him to commit perjury.[20]

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The line between unethical coaching and proper preparation is not a bright one.[21]

With respect to telling witnesses or clients the law before they tell you the facts, one must consider the limits provided by the rules of ethics. In short, it is not allowable to tell a witness or client the law so that they will tailor their recollection to match the law, but it is ethical to advise them of the applicable law so that they will understand the importance of the facts as the facts relate to the case.

> [T]he lawyer's conduct is improper only if the advice or information on the applicable law is given under circumstances that show the lawyer intended or anticipated that the client would create a story or situation which the client knew was contrary to the facts. In other words, it is permissible, and strongly advisable, for the lawyer, in light of the applicable law, to methodically probe the client's memory, to make sure important points are not overlooked, have the client to organize, effectively verbalize, and tailor his anticipated testimony to relevant facts helpful to his cause, and to even rehearse the testimony and probable cause examination. The ethical line is crossed, however, if the lawyer counsels or assists a witness to testify falsely, or participates in the creation of evidence which the lawyer knows is false.[22]

vi. Fix Bad Questions

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[20] Aronson & Weckstein, Professional Responsibility 315, Second Edition, West Publishing (2nd ed. 1991).

[21] Id.

[22] Id. at 317, RPC 3.4(b), Code of Professional Responsibility, Disciplinary Rule 7-102(a)(6).

The number one rule governing objections at a deposition is that an objection must be made if the problem could be cured at the deposition. It is the objector's responsibility to object in order to allow the other side to fix his questions before trial. This is why the standard stipulations used almost universally provide that "all objections except as to the form of the question and responsiveness thereto shall be reserved until such time as the transcript is used." Despite this almost universal admonition at the beginning of depositions, it is simply amazing how often an objection as to form, i.e. "leading," is made without the questioning attorney taking any effort to fix the bad question. Fix bad questions at the deposition. This is essential in trial preparation as it is too late to fix the question on the Sunday before trial.

vii. Take Notes

When defending depositions, do not just sit there and read the paper or work a crossword puzzle. Take notes about the questions and answers, what needs to be fixed, and what should be the subject of a motion in limine. Make sure the witness and the attorney are on the same subject. Lawyers who are not paying attention allow inquiry into illegal areas and are not earning their keep.

More important than taking notes when asking questions is listening to the questions and the answers. Too often lawyers take copious notes and really do not listen to the answers. They are wedded to a check list and are too interested in completing the checklist which was prepared by some senior partner at their firm ten years earlier. This blind allegiance to a check list causes the questioner to fail to ask questions in follow up and to fail to really understand the witness. Be curious without being nosy.

Do not allow counsel to use a deposition to abuse a witness. Impose objections and direct the witness not to answer when the purpose of the deposition appears to be to cause the

witness unnecessary trouble and expense and harassment.[23] Read the discovery and medical records before the deposition and do not waste a bunch of time on facts which are already known. Lawyers who waste time at depositions with stupid questions are either stupid, or they are milking the file for additional fees and are thus unethical as fees must be reasonable.[24]

vii. Use Depositions to Practice Trial Skills

At trial we are required to ask good questions, questions that are understandable, that lead when they should and don't lead when they shouldn't. Asking good questions is a learned art form. Depositions are a great place to practice particularly during depositions of people who are likely to be at trial and whose depositions are taken to discover facts more so than preserve evidence for use at trial.

This testimony which constitutes the evidence must be obtained from witnesses through the use of direct examination of our own witnesses and cross-examination of opposing, often hostile, witnesses. This questioning of witnesses, whether on direct or cross examination, is an art that can only be mastered through a combination of preparation, practice, and good luck. "Direct examination disdained by text writers and ignored by students, is the orphan of trial strategy. Cross-examination, celebrated and glorified, is the favorite of trial seminars. The cross

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[23] A witness is entitled to be protected against harsh and insulting questioning. O.C.G.A. § 24-9-62. Discovery should not be used oppressively. *See, e.g., American Oil Co. v. Manpower, Inc.*, 124 Ga. App. 79 (1971).

[24] No matter what type of fee is selected or billing method is employed, one standard always applies: "[A]n attorney's fee must be reasonable." "Lawyers are subject to professional discipline if they charge or collect a fee that is 'illegal or clearly excessive' (under the model code) or is not 'reasonable' (under the model rules)." Lawyers' Manual on Professional Conduct, American Bar Association, Bureau of National Affairs, Inc., 41:301.

examination is the art of destruction, direct is the art of construction."[25] Use depositions to hone these skills.

viii. Be Prepared

There is no substitute for knowing the case inside and out. Witnesses, even experts, rarely know the entire case - they just know their part. As a result, the attorney who knows the entire case and what every witness knows, or should know, has a real edge at a deposition. Equally important to knowing the facts of the case is to know the witnesses and what they can or cannot do for your case. Prior to depositions of important witnesses, read everything you can about the witness. Read old depositions of the witnesses. Read their publications. Know the purpose of the witness from the other side's point of view and know whether, and how, the witness fits in with your own case.

ix. Use Depositions to Learn About the Witness

Use a deposition to discover how the witness is gong to react at trial. Discover his hot buttons. You must be familiar with witnesses who are going to be deposed if possible. Discover how they will react to cross examination and what their strengths and weaknesses are. This can be accomplished in a variety of ways. In addition to formal depositions, don't overlook other ways such as interviews, the use of deposition libraries and data bases, and old fashioned calling around to other attorneys and experts who may have retained, deposed, or testified against them.

x. Think

There are several goals which are relevant to discovery depositions. However, when all is said and done, there are only three basic goals in cross examination - (1) to determine what the witness knows so you can prepare your case; (2) to gather information to impeach the witness; or (3) have the witness help your case. Sometimes all three are relevant to a single witness.

If you depose a witness, think about what you are doing before you so thoroughly tip your hand that there is little surprise left for cross-examination. Impeaching an expert during his

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[25] Henry G. Miller of the New York Bar

deposition will certainly take away any possibility for surprise at trial. Instead, focus on what they know, their sources of information, and if they are an expert, their methods of formulating their opinions. For goodness sake, let them talk. Encourage them to talk and talk and talk and talk. There is nothing most experts like to hear more than their own voices. Usually, they will say something helpful. Encourage them to tell you how smart they are and how stupid you, the lawyer, are.

Be quiet and just wait for the witness to talk. Its amazing how some people have an agenda. Better to know now than at trial. If a witness wants to fill the space between questions with his own voice, let him.

Additionally, particularly in cases involving expert scientific testimony, determine the methodology used by the expert in the formulation of his or her opinion. If all experts agree on the methodology, then regardless of the difference of opinions reached, you can use this agreement as to methodology to insure that your expert will at least meet the threshold requirements to testifying required in Federal Court and recently required in Georgia state courts.

xi. Know the law

Know the limits of how far you can go. If a question is objected to, make the other side tell you what is wrong with it so you can fix it. If they prohibit an answer ask for authority. If they can't be reasoned with call the judge – just the threat works most of the time. Of course if you have the judge's number handy that works all the better. The scope of discovery is pretty broad.
out."

xii. Use an Outline.

Writing out specific questions is both good an bad. Some questions, such as those that track a statute or standard of care can be effectively written, but too many written questions weds the examiner to his notes and results in depositions that fail to "discover" that which should be discovered. Written questions often make us readers instead of listeners.

xiii. Use the Trial Theme and Jury Charge.

An effective trial theme that will be used throughout the trial should be developed in the discovery phase too. Having the deposed witnesses use words used in the trial theme is incredibly effective. Incorporate the theme into the questions and get the witnesses to agree to its relevance. The theme can be considered the mantra of your discovery and your trial. It should be repeated, referenced, illustrated, and expanded upon at every turn. This continually repeated theme will, if used throughout the discovery and trial will "echo in the Jury's mind when they retire" to decide your client's fate.[26]

When possible, ask the witness questions that incorporate buzzwords contained in your anticipated jury charges. This will make another connection for the jury when they deliberate the witnesses' testimony as it relates to the jury charges.

xiv. Control the witness

Do not allow the witness to take control of the deposition. Insist on answers. While it is important to control the witness and keep him focused on the question, do not be bullying and do not be rude. Instead, gently remind the witness that the process is one of questions and answers and that the lawyers are required to ask the questions and the witnesses to give the answers. Let the witness make all the speeches he wants to – but insist on answers eventually Get the witness to agree to answer yes or no to "yes or no" type questions.

xv. Be Curious

More important than anything else is to be curious. I like to say be curious without being nosey. Ask for definitions of words you don't know. Don't be embarrassed to look stupid.

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[26] Lake Rumsey, *Master Advocates' Handbook*, p.4.

Better to look like an idiot in a conference room than in a courtroom. A good dose of curiosity will go a long way in making sure depositions actually discover something worth learning about.