Best Practices in Depositions

Charles F. Scanlon - Judge Samuel H. Bell Inn of Court
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Jacquenette S. Corgan joined the Summit County Prosecutor's Office in its Appellate Division in early January 2018. Before she began writing appellate briefs and responses to post-conviction motions on behalf of the State of Ohio, she was a solo practitioner who focused on appellate advocacy, civil rights litigation (including First Amendment matters), and general civil litigation.

After graduating with honors from the University of Akron School of Law in 2000, Corgan became an Attorney Editor for West Publishing in Cleveland, where she edited major portions of the *Baldwin's Ohio Practice* and *Baldwin's Ohio Handbook* series of treatises. She left West in early 2002 to become an Associate with the plaintiff's-side boutique employment firm of Thompson & Bishop in Akron, and in 2005 became an Associate in The Law Office of Warner Mendenhall, Inc. Corgan began practicing on her own in the fall of 2009.

She has been licensed in Ohio since 2000. Corgan has also been admitted to practice before the U.S. District Courts for the Northern and Southern districts of Ohio, the U.S. Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States. She is a member of the Akron Bar Association and the Charles F. Scanlon - Judge Samuel H. Bell Inn of Court, where she serves as Secretary and President-Elect.

The law is Corgan's second career. For nearly 10 years, Corgan was a daily newspaper reporter and editor, serving as a staff writer for the *Buffalo News,* the *Medina County Gazette*, and the *Warren Tribune Chronicle* before becoming a masthead-level editor at the *New Philadelphia Times-Reporter*.

She holds a Bachelor of Arts degree in Mass Media Communication from the University of Akron and a Master of Arts in Journalism from Kent State University. She has also taught newswriting to University of Akron and Walsh University undergraduates, and media law to Walsh University undergraduates and to Kent State graduate and undergraduate students.

She is married to fellow Akron attorney William H. Corgan, III.

Best Practices in Depositions

I. Taking a deposition

A. Preparation

1. The key is to understand your case, and your opponent's!
   a) Get organized from the outset!
   b) Know the elements you and your opponent must prove
      (1) Tailor <u>all</u> of your discovery to those elements
      (2) A note about "pattern discovery"
         (a) DO NOT use it as a substitute for well-crafted discovery!
         (b) Use it to make sure that you haven't missed or forgotten anything of value to the case

2. Begins at the first meeting with your client
   a) This is where you begin gathering information about your case
   b) Get the preliminary five Ws and an H
      (1) Who, What, Where, When, Why, and How
      (2) Examples, from a workers compensation retaliation case:
         (a) Who was present at the meeting when you were fired?
         (b) What does your employee handbook say about workers comp claims?
         (c) Where did the meeting take place? Right there at the job site, or at the ER where you were being treated?
         (d) When were you fired, in relation to your injury?
         (e) Why did they say you were fired? and
         (f) How did your boss find out you were injured?
   c) This is also a preparation point for your client
      (1) Understanding the deposition process
      (2) Understanding everyone's roles -- and the demands of professionalism that are on *you*
      (3) Managing unreasonable expectations

3. Crafting your deposition questions
   a) Use the responses to your written discovery as a base! SO - Do the written discovery <u>first!</u>
      (1) The answers to interrogatories and requests for admissions can narrow down your questions on certain topics, and can simultaneously open up new avenues of inquiry.
      (2) Ex: "You denied that the documents you produced are all true and accurate copies of the originals. Please explain that."
      (3) The written discovery should help you understand which deponents will have the different pieces of your informational puzzle
   b) Ask innocuous questions first!
      (1) Identifying information: Name, current job title, home address

(a) Note that to some people, age is not a harmless question. So, only ask it if it's relevant.
(b) Don't ask for a Social Security number unless you have a darned good reason why you need it.

(2) Educational background information, tailored to what's relevant
(a) For example, you don't need to ask a doctor where she went to high school. Does it *really* matter that a brain surgeon went to Field?
(b) But <u>do</u> ask about training outside the traditional high school-college-graduate-professional scheme.

(3) Employment history - again, where it's relevant

(4) Asking the innocuous questions first does a few things:
(a) They establish a more relaxed and productive rapport between you and the deponent;
(b) They get you at least *some* information before there is any danger of your opponent shutting you down.

c) ALWAYS ask at the beginning:

(1) Whether the person's been deposed or been a witness before. If they haven't, or it's been a while, tell them how the process will work.
(a) It's not the Spanish Inquisition. They're hopefully in a comfy chair, and nobody's going to put them on the rack.
(b) They can take breaks, but ask them to please answer a pending question first.
i) See the Ohio Supreme Court's Dos and Don'ts!
(c) Remind them that this is <u>their</u> testimony, not their lawyer's, their employer's, or anyone else's.
i) Toward that end, it's often helpful to ask them how the prepared for the deposition, and if they spoke to anyone about it.
(1) Note that if they say they spoke to their lawyer, it often avoids a lot of trouble and engenders goodwill (thus avoiding some trouble and nonsense) to tell them you don't want them to tell you about the substance of their communications with their attorney.
(d) Ask them to ask you to rephrase a question if they don't understand it.
(e) Remind them that they have to respond out loud for the court reporter, *even if they're testifying remotely or on videotape!*

(2) Whether the person is suffering from any medical (or mental) condition or is taking (or is under the influence of) any medication or substance:
(a) that would affect their ability to hear the questions, recall information, or answer questions, or
(b) that you need to consider for breaks or anything else
i) Ex: people with back problems may have to stand from time to time

ii) People with diabetes may have to drink/eat/use the restroom more frequently

d) Tailor your questions to your *case*, not someone else's "pattern" questions
   (1) Use pattern discovery as a *helpful list of hints only!*
   (2) Know the *elements* you need to prove and disprove
      (a) Construct your questions accordingly
      (b) Never forget the Evidence Rules or Rules of Procedure!
         i) Civ.R. 26 - your question is *proper discovery* if it is reasonably calculated to lead to the discovery of admissible evidence.
         ii) Evid.R. 401 - your question is *relevant* if it makes a fact of consequence more or less likely

e) Impose a structure on your questions
   (1) In other words, **MAKE AN OUTLINE!**
   (2) Use a structure that fits your case
      (a) Examples:
         i) Topic by topic - in news, we called it the "string of pearls."
            (1) Exhaust all your questions and use all your exhibits concerning a particular topic before you move on to another.
            (2) Ex: Discuss your opponent's hiring policies in general before you move on to discuss the process by which the Selection Committee chooses new employees from the applicant pool.
         ii) Chronological order
         iii) You don't have to impose a square-hole structure on a round-peg case; the only requirement is that you have a logical structure for your questions.
   (3) Plan to use "header" questions
      (a) Gives the deponent a clue
         i) Ex: "Now, let's talk about your company's sexual harassment policies."
      (b) Also, it gives the eventual reader more tools
   (4) Understand how you're going to use this deposition
      (a) Always keep the eventual reader in mind!
      (b) Discovery deposition
         i) Less formal; generally not video recorded
         ii) Probably won't be used in trial, except for impeachment or if the witness is unavailable under the Rules
         iii) May be your only chance to question a particular witness if your case will turn on a summary judgment motion
         iv) Your choice of open-ended versus leading questions will depend on the situation and the witness
      (c) Trial deposition
         i) More formal, because this *will* very likely be played at trial.
         ii) More critical that you pay close attention to the Rules of Evidence for laying a foundation and making objections

(5) Despite your structure, be flexible enough to stray from the structure *and* to be prepared to ask follow-up questions
(6) About exhibits…
(a) Assemble them *while* you are preparing your deposition outline
(b) For each exhibit, plan to introduce it at the appropriate place in your line(s) of questioning, rather than as a big batch at the end.
i) Ex: If you're talking about a particular injury that happened on a certain date, this is the time to introduce and review the medical records related to that injury.
ii) Or, if you're discussing your client's job performance history, that's a good time to introduce and discuss your client's performance evaluations.
(c) Pre-mark them
i) It's a good practice when each exhibit bears the same number across all your depositions
ii) It makes it easier for you, and for the judge, if "Exhibit X" refers to the same document in each deposition, if you have to rely on multiple depositions for any type of motion.
iii) The court reporter will bless your name forever.
(d) Make sure you have adequate and clean copies!
i) The original - You will use this when the deponent testifies, and it will go to the court reporter to be included in the official version of the deposition.
ii) Copies - make sure you have enough for every other lawyer at the table
iii) Put <u>your</u> copies in a binder
(1) You can annotate, highlight, flag, fold, spindle, and mutilate your personal copy to your heart's content
iv) If you're doing the deposition remotely, work out beforehand:
(1) How you're going to supply the exhibits to counsel and the witness
(2) Whether you'll be able to share an image of the exhibit on your screen via Zoom or other teleconferencing software
(a) Practice this beforehand!

B. Execution
1. Delivery
a) Be measured, even, and courteous
b) Make eye contact with the deponent
c) Word your questions so that they are as simple and straightforward as possible
(1) One subject - avoid compound questions
(a) Especially if they assume facts that are not in evidence, or are imposing an unfair "spin" or a legal conclusion

(b) Ex: "So, when did you stop beating your wife?"
(c) Ex: "Wouldn't you agree with me that you were fired on July 24, 2012, because you took money from the company?" (despite that the deponent has testified that they were falsely accused).

(2) One question at a time!

2. For God's sake, DON'T:
   a) Use jargon without explaining it!
   b) Accept a jargon-filled answer without follow-up questions asking the witness to define the jargon.
      (1) Ex: A: "I'm a facilitator." Q: "What does that mean?" A: "I facilitate meetings." Q: "Let me try this: When you 'facilitate,' what do you actually *do*?"
   c) Ask a lay witness to come to a legal conclusion about anything!

3. BE AWARE OF YOUR RECORD!
   a) Unless you are video recording the deposition, NONE of this information will be preserved:
      (1) Your demeanor, as reflected in your voice and inflections;
      (2) Opposing counsel's demeanor;
      (3) The deponent's demeanor;
      (4) The meanings of directions and indications such as "here," and "there."
         (a) Ex: You show the deponent the floor plan of the factory production line. He testifies, "My work space is here." Unless you have the witness *mark the exhibit* and use the exhibit *as marked*, nobody will know from the record where the work space was located.
         (b) Ex: You show the deponent a map of the accident scene. Unless you take pains to *name streets and directions*, all you may get in the written record is this: "I was sitting at the stop sign here, waiting for traffic, when this dude comes up behind me too fast, and rear-ends me. The impact shoved my car to here."
   b) If you ask more than one question at a time, in a row, it will <u>not</u> necessarily be clear in the record which question was answered.
      (1) Ex: Q: "Did you talk to my client about her breasts? Did you talk about what would happen to them during her pregnancy? Did you ask what her due date was?" A: "Yes." Which question did the deponent answer?

4. This is your chance to preview how the witness may perform on the stand during trial

5. Other tips
   a) Make sure your client understands that they have a right to attend each deposition, and that you would like them to do so.

(1) If they do, give them a notepad
(a) Tell them these are notes they are taking to give only to *you*.
(b) They can also pass you sticky notes
(2) Before closing the deposition, always confer with your client as to whether there are any other topics that you ought to cover
(a) Sometimes, the testimony will remind your client of important information

b) Make sure to tell your client that you are <u>not</u> going to behave like the "barracuda" lawyers on TV

C. Professionalism

1. Know the rules!
a) Rules of Practice
(1) Ex: Fed.R.Civ.P. 30 limits the duration of any deposition to one day of seven hours, unless there's a stipulation or order of the court allowing more time, *and* limits the number of depositions you can take!
(2) Ohio's Civ.R. 26 defines what's *discoverable*
b) Rules of Evidence
(1) Evid.R. 401 defines what's *relevant*
c) Local Rules
d) Professionalism rules
(1) For tips, see the Ohio Supreme Court's "best practices" sheets

2. Scheduling
a) Cooperate with opposing counsel in scheduling depositions
b) Don't fight over who goes first, or where you're going to take the deposition.
(1) Does it really matter? *Really?*
(2) Don't end up being ordered to play "rock-paper-scissors" on the courthouse steps to figure this out.

3. Your comportment counts!
a) How you behave will affect how well or easily you get the information you need from the deponent
(1) "Zealous representation" of your client does <u>not</u> excuse asininity, arrogance, or bullying.
(2) Generally, the more contempt that you show toward the deponent or the deponent's attorney, the more likely you are to:
(a) Waste your time and your client's money, doing battle over things that are petty and insignificant;
(b) Harden your opponent's position against you, thereby decreasing the chance of settlement;
(c) Lessen your chances of having any courtesy extended to you by your opponent.

4. This is your opponent's chance to preview how you may perform in court during trial

5. Dealing with the problem deponent
   a) DO NOT lose your temper. If you are getting close to the boiling point, take a break and get control of yourself.
      (1) Patience. Patience. Patience.
   b) Take a break and discuss the situation with opposing counsel.
   c) Note the deponent's behavior on the record.
      (1) Ex: "Sir, during the break, there was a particular name you called me out in the hallway. I'm going to put that into the record at this time. I believe you called me a [deleted.]"
      (2) You do not have to ask the deponent to confirm or deny the behavior. If he wasn't calling you a [deleted], his counsel will object.
   d) Recognize that there is a difference between not answering your question, and not giving you the answer you want
      (1) It is legitimate to try to ask the deponent the question in a different way if they simply do not answer your question
      (2) It is badgering and <u>not</u> legitimate to ask the deponent essentially the same question over and over and over again, or to come back at a later point in the deposition and surprise them with the same question again, simply because they refused to give you the answer you wanted.
   e) DO NOT be frustrated if the deponent answers "I don't recall" to every question except "What is your name?" "What is your quest?" and "What is your favorite color?"
      (1) The witness is either scared to death, or has been coached.
      (2) If you suspect the witness is terrified, take a break, talk to the opposing counsel, and ask them to reassure their client that you aren't going to bite them or put them on the rack.
      (3) If you suspect the witness has been coached:
         (a) If the witness participated in answering your written discovery (such as the interrogatories), is it legitimate for you to use the discovery responses as an exhibit, and ask something like this: "You participated in answering these Interrogatories, correct? And you signed the affidavit verifying that the answers are correct, right? That means you remembered this information about a month ago when you answered the interrogatories. Isn't that true? But you don't remember today?"
         (b) After a line of questioning like that, the deponent will either experience a miraculous regeneration of his memory, or you will find out that the lawyer answered the interrogatories, and the client just signed off on them.
   f) If the witness suffers from the Bill Clinton problem, and doesn't understand what you mean by basic English words, either

(1) Ask the witness how *they* define the term, and use that definition through the rest of the deposition; or
(2) Grab a dictionary, read them the definition, ask if they understood it, and repeat your original question.

6. Dealing with the problem lawyer
   a) The Rules do not prohibit you from demanding to know, on the record, the grounds for the objection. Rarely is the obstreperous objector actually able to articulate why he objected.
   b) Have the judge's number handy.
   c) Understand that there are ways to get the fact that your opponent's being a jerk without becoming one yourself.

II. Defending a deposition

A. Preparation
   1. Understand your case, and your opponent's
   2. Begins at the first meeting with your client
      a) Understand how your client approaches and solves problems (or not), and advise them accordingly
         (1) Is your client psychologically capable of making a decision?
         (2) Is your client highly suggestible, emotionally fragile, or easily intimidated?
         (3) Or, is your client testy, irritable, or arrogant?
         (4) Can your client tell a coherent story on their own?
            (a) Sit down with them and tease out a timeline of events
            (b) Also, identify all the players in their story
      b) Get a sense of your client's relative IQ and learning style
         (1) How they learn will make a difference in how you help them prepare for their deposition
         (2) Ex: some people *cannot* learn by reading. You must talk to them.
      c) Understand your client's speech patterns
         (1) Are they concise?
         (2) Or do they go on and on, rambling in a circular pattern, or like they were a verbal bubble machine?
   3. Preparing your client
      a) You must help them understand how to give the most truthful *and* accurate answers possible.
         (1) Ex: "Don't know" versus "Don't recall."
         (2) Ask them some of the most difficult questions about their case that you can anticipate.
         (3) Remind them that this is *their testimony*, and that they *cannot* agree to something that isn't 100 percent true.
         (4) Written and/or videotaped preparation materials help.
      b) Explain to them how the process will work
         (1) Again, your preparation materials will help them.

(2) BUT, anything they bring to the deposition that is not attorney-client privileged is fair game for your opponent to see and use in the deposition.
(a) Tell them NOT to bring anything to the deposition that you have not reviewed beforehand, <u>especially</u> any materials from you!
(3) The following are absolutely forbidden:
(a) Appearing at the deposition under the influence of drugs (legal or not) or alcohol, or hung over;
(b) Looking to you for approval for their answers, or asking you to give them the "right" answer;
(c) Discussing with you, during breaks, how they are to answer questions.

c) Tell them how to dress and behave.
(1) Remind them that they are being assessed as witnesses by opposing counsel.
(2) They don't have to dress as formally as they would in court, but the minimum is "business casual."
(3) If they lose their temper, they lose their case!

d) Prepare them to be exhausted by the end

e) Tell them what you will <u>not</u> do:
(1) Object vociferously, as in "Law and Order."
(2) Fight with opposing counsel
(3) Nudge, kick, or give other cues to the witness to stop them when they're "answering wrong" or rambling

f) Manage their verbal quirks

B. Execution

1. Objections

a) Discovery: No speaking objections, except:
(1) Form of the question;
(2) Privilege; or
(3) Some other legitimate reason why you would advise the client not to answer, such as claiming Fifth Amendment privileges.

b) Trial: OBJECT as if you are in trial.

2. "The usual stipulations apply."

a) There aren't any "usual stipulations." Don't agree to any stipulation unless you know what it is.

b) Don't be afraid to ask what the attorney's talking about.

3. Notes and exhibits

a) Take <u>extensive</u> notes, especially if you haven't decided yet whether to order a copy of the deposition.

b) Mark the back of each exhibit with the exhibit number or letter; the deponent's name, and the date of the deposition. DO NOT write on the face of the exhibit!

4. "Read or waive?"
    a) This refers to your client's option to either read the deposition and have the ability to correct transcription errors before it becomes the official record in the case, or to waive that opportunity.
    b) Long before your client's deposition
        (1) Explain this to your client
        (2) Think about whether you will advise the client to read or waive
            (a) Most of the time, tell them they should read it.
            (b) UNLESS there is some quirk in their personality or cognitive style that would make their reading the deposition useless.
                i) Ex: They can't meet a deadline to save their lives, or
                ii) They honestly cannot spell well enough to assist the court reporter.

C. Professionalism
1. Dealing with the problem lawyer
    a) Object. Object. Object. And object again.
    b) Have the judge's number handy.
    c) Remember the limitations of the written record, and try as best you can to civilly and calmly get the record to reflect what's going on.
2. When your client leaves the reservation…
    a) You can't tell him/her what to say
    b) Take a break, and…
        (1) DO remind them of their preparation
        (2) DO remind them how to tell the most accurate truth
        (3) DO tell them to stop fighting the other lawyer and *answer the question!*
        (4) Hopefully, a trip to the proverbial woodshed will not be necessary, but if one is, take a break to do it.

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