SEVEN QUICK-HIT TIPS FOR DEPOSING CORPORATE REPRESENTATIVES IN PRODUCT LIABILITY CASES
(HOW TO MAKE EVERY DEPOSITION A WINNER)

2015 NATIONAL TRIAL LAWYERS SUMMIT
SOUTH BEACH, MIAMI, FLORIDA
JANUARY 18-21, 2015

By: JOHN F. ROMANO
ROMANO LAW GROUP
EcoCentre, the Living Building
1005 Lake Avenue
Lake Worth, Florida 33460
Mailing Address:
Post Office Box 21349
West Palm Beach, Florida 33416-1349
Tel: (561) 533-6700
Fax: (561) 533-1285
Cell: (561) 346-5090
E-mail Address: john@romanolawgroup.com
Internet Web Site: www.romanolawgroup.com

John F. Romano is a senior partner in the West Palm Beach, Florida, law firm of Romano Law Group, an "a./v." rated law firm. He is a former President of both the Academy of Florida Trial Lawyers and the Southern Trial Lawyers Association. Mr. Romano is a Fellow of the International Academy of Trial Lawyers. He was chosen to Florida Trend Magazine’s 2006 and 2007 “Legal Elite” naming Florida’s top one percent of lawyers in various specialty areas; named one of Florida’s 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, and 2014 “Super Lawyers.” He has served as former Chairman of the National College of Advocacy and former Chairman of the AAJ Criminal Law Section. He is board certified by both the Florida Bar and the National Board of Trial Advocacy as a civil trial advocate. He has lectured and authored extensively on trial advocacy, litigation techniques, demonstrative evidence, and more. He has authored several books, including the textbook Strategic Use of Circumstantial Evidence; The Deposition Field Manual, published in 2002 by PESI Law Publications; and Opening Statement: Winning the Jury, published in 2004 by PESI Law Publications. Recently handled or currently pending cases include the following: orthopedic medical malpractice, plastic surgery medical malpractice, vehicular rollover product liability, trucking collision wrongful death, automobile neck injury-back injury, white collar criminal fraud, security negligent premises liability, business litigation fraud and breach of contract, business litigation attacking medical peer review system, toxic tort and pollution litigation. Additionally, Mr. Romano has received numerous awards, including recently the Al J. Cone Lifetime Achievement Award presented by the Florida Justice Association, the Tommy Malone Golden Eagle Award presented by the Southern Trial Lawyers Association, and the Annual Clarence Darrow Award presented by Mass Torts Made Perfect. He received the prestigious Perry Nichols Award presented by the Academy of Florida Trial Lawyers (FJA) (as its highest honor) in 1997. John Romano previously served as a Captain in the United States Marine Corps. John Romano lives in West Palm Beach, Florida, with his wife, Nancy. Nancy and John have four children and ten grandchildren. John and Nancy are the co-founders of Vive Verde, Inc., the entity which owns and developed the “world’s first living office building” – an environmental wonderland office building in South Florida which is “green” and “LEED-certified” and “living” (water purification systems).
SEVEN QUICK-HIT TIPS FOR
DEPOSING CORPORATE REPRESENTATIVES
IN PRODUCT LIABILITY CASES
(HOW TO MAKE EVERY DEPOSITION A WINNER)

I. INTRODUCTION

A deposition is trial! When a deposition is taken, the trial advocate must ask each and every question as if victory or defeat in the case hinges upon either that particular question and answer (or upon that series of questions and answers) - (knowing full well that some areas of inquiry take time to adequately develop). Remember also that there are three component parts to your “primary audience” when deposing a witness: (1) the trial judge; (2) the jury; and (3) the appellate court panel. Similarly, there are two components to your “secondary audience” when deposing a witness: (1) defense counsel; and (2) the insurance adjuster or defendant corporate representative personnel (who are the decision-makers). Accordingly, a deposition should never be taken by approaching it conceptually by thinking “we will cross that bridge when we get to it”; or “let’s just ask questions and see what happens”; or “let’s just play it by ear” (as these are all phrases of a non-preparer)!

Some corporate representative depositions in product liability cases are truly more in the nature of information-gathering depositions such as where the person is providing documents or explanations of documents, or where the person is identifying witnesses and personnel, etc. However, the trial advocate needs to know and understand clearly that in virtually every aspect of every deposition - especially including depositions of corporate representatives in product liability cases - depositions are not really for “discovery,” but they are more accurately for the purpose of winning issues and winning positions and winning arguments and winning at trial!

II. SEVEN QUICK-HIT TIPS FOR DEPOSING CORPORATE REPRESENTATIVES IN PRODUCT LIABILITY CASES

1. Admin and supply musts: The corporate representative deposition must be a videotape deposition! The notice must include a duces tecum request which is thorough and complete and strategically thought through in every respect! The lawyer taking the deposition must be at the deposition “in person,” as a telephone videotape deposition or a videoconference deposition will generally be insufficient when deposing the corporate rep in a product liability case!

2. Jump right out of the starting block with important and hard-hitting and dynamic questions going right to the meat and substance of the case! For example, in a case involving an explosive fire gel starting product sold to consumers and which caused horrible injuries to a child, initial questions might include: You knew the product was highly flammable; you knew the product was highly explosive; you knew the product would be purchased by consumers like the plaintiffs; you knew the product would be used on wood fires indoors; you knew the product had a low flashpoint of approximately 56 degrees Fahrenheit; you knew the
product was combustible; you knew the product needed ventilation; you knew the product was being sold cheaply; etc.

3. **Must establish this particular witness is indeed a legitimate and properly identified and properly authorized “corporate representative,” as it is necessary for this witness to be someone who can bind the company with his/her answers throughout the deposition.**

4. **Obtain this witness’ specific knowledge about the particular incident and have him/her provide a detailed explanation as to the source of everything upon which he/she has relied in order to gain an understanding of the incident.** Who has the witness talked to, or met with, or discussed the case with? What documents or videos or studies or tests or animations or simulations has the witness reviewed to give the witness an understanding of the facts of the incident itself? Why was it necessary for this witness to have an understanding of the facts of the case itself? When the witness learned about how the incident occurred, what did this particular witness do as a follow-up?

5. **Establish that marketing and sales acted as the driver for getting the product to market, and pushing sales of the product once it was on the market and marketing was a far superior priority to that of safety.**

6. **Establish that this witness is not aware of any evidence re: comparative fault (or, at a minimum, find out everything this witness knows about any evidence whatsoever that may bear upon comparative fault or contributory negligence).**

7. **Prepare - prepare - prepare for this corporate representative’s deposition!** It is highly recommended that you prepare a specific “deposition notebook” for this deposition. The notebook must contain, among other things, a detailed “witness deposition outline.” [If you are interested in sample outlines of corporate representatives, simply e-mail me at john@romanolawgroup.com and request a copy of a sample corporate representative deposition outline and we will send it to you.]

**III. PRIMARY GUIDING PRINCIPLE FOR EXAMINING WITNESSES IN DEPOSITIONS**

The primary guiding principle for deposing witnesses in depositions is as follows:

“**EXAMINE EACH WITNESS IN A DEPOSITION AS IF THERE ARE NO OPTIONS AVAILABLE OTHER THAN TO WIN YOUR CASE THROUGH THE EXAMINATION OF THIS PARTICULAR WITNESS IN THIS PARTICULAR DEPOSITION!**”

**IV. DEPOSITION PREPARATION PRINCIPLES**

Your preparation for a deposition must – in every instance – be:
V. “THREE-PRONGED FORK IN THE ROAD STRATEGY”

In cross-examining witnesses, whether it be in depositions or at trial, always be cognizant of the “three-pronged fork in the road strategy.” This strategy or philosophy goes basically as follows: In every deposition, it is 100% predictable that a given witness will answer only in any one of three ways on important points, namely:

Answer Option #1 – “YES!”
Answer Option #2 – “NO!”
Answer Option #3 – “I DON’T KNOW” or “I NEED MORE INFORMATION” or a response with some kind of a qualifier.

This means that you, as a trial advocate, can always prepare for these particular responses, knowing in advance you are going to get one of them. So as you prepare your outline for the deposition, always be ready with your follow-up questions if there is a “yes,” or a “no,” or one of the qualified responses. Your deposition question outline should include a mapping out of your strategy depending on what happens when you get one of the three responses.

VI. “O.S.P.A.” EXERCISE

In every case and as to all issues and all phases of the case, you must complete your O.S.P.A. or “Opposition Strategy Prediction Assessment.” This is where you simply do an in-depth analysis or “legal autopsy” as to what your opponent will do, or what his or her strategy will be, as to a given issue, point, phase of the trial, or strategy. When you do it right and you do this analysis the way it needs to be done and with the proper intensity, you can virtually predict the entire strategy of your opponent.

VII. INCORPORATE THE CONCEPT OF “COACHING” INTO YOUR EXAMINATION OF WITNESSES IN DEPOSITIONS

Unfortunately, many trial advocates start taking depositions via a particular method or system and continue to do that throughout their entire career. The problem is that these systems or methods tend to be minimally flexible, minimally adaptable, and often wrong, antiquated, ineffective, and inefficient. It can generally be said that if you are taking a deposition today the same way that you took a deposition five years ago, then shame on you! As we move forward in
our careers, we need to progress and get better and learn how to be more effective and efficient in the things that we do. Certainly, this includes the manner in which we prepare for and take and utilize depositions.

The concept of “coaching” deals with these changes or adjustments in our methodology. Just like a coach teaches an athlete how to improve his or her technique or method, so, too, we must coach ourselves and coach one another to improve upon the way we prepare for and take depositions.

As you coach yourself and your partners and others, make sure that you always depose witnesses to gain information that will:

a. support your theme;
b. support your theory;
c. support your momentum;
d. support your case/client image;
e. support your attack on the opponent’s case or witnesses.

VIII. INTRODUCTION - HOW TO MAKE EVERY DEPOSITION A WINNER

Depositions form the basis and foundation as to what ultimately occurs as a “result” or “outcome” in virtually all tort cases. The information derived in depositions, more often than not, determines whether a case will settle and, if so, the amount. The quality of the deposition determines the strength of your evidentiary presentation at trial, whether it be through the direct presentation of evidence or through cross-examination. Although the deposition is only one of the various means of discovery available to the trial advocate, it is generally the most vital and crucial in terms of the organization, structure and “brick laying” of your case. Strong, methodical, well-prepared, and good quality depositions generally lead to an excellent settlement or an excellent result in the courtroom, while poor quality or “poor result” depositions generally lead to an unsatisfactory settlement or resolution of the case, or, most often, a negative and unsatisfactory jury or nonjury verdict. Therefore, it is absolutely essential that the trial advocate place a mega-emphasis on depositions in each case, including determinations as to who to depose, preparation, organization, questioning and more. A simple axiom to follow is this: “Take every deposition as if it is your first deposition and your last deposition in both the case and in your legal career.” Follow that axiom and you will have a superlative level of success in your depositions.

As you begin the preparations for any given deposition, keep in mind the following deposition objectives or functions/purposes of depositions:

(1) Obtaining admissions or concessions from a witness;
(2) Preserving favorable or important testimony;
(3) Exposing inconsistencies either in the opposition’s theory or with respect to the particular witness;
(4) Weakening the deponent as a trial witness;

(5) Eliminating the deponent as a trial witness;

(6) Obtaining support on your own behalf for a motion, or a theory or a given issue;

(7) Other/miscellaneous (i.e., establishing authenticity of documents, concessions on behalf of the corporation, filling in gaps and elements of proof, and much more);

(8) Assessing the witness’s demeanor, credibility, and effectiveness as a witness at trial;

(9) Preserving testimony of an expert, out-of-state witness, or terminally-ill client for trial;

(10) Assessing the deponent’s effectiveness as a witness at trial.

Never set or take a deposition unless:

(1) It is necessary.

(2) It will help your case in the short run or long run (or if you are unaware of whether it will help you, you need to at least clarify the position of a given witness or party - even though that witness or party may ultimately hurt you, thus, at least giving you knowledge of the potential harm so that you can prepare against it).

(3) You have clear goals for the deposition.

(4) You have a clear strategy for that particular deposition.

(5) You are totally and absolutely prepared to take the deposition.

Many cases are lost due to a lawyer inadequately preparing for, or ineptly or carelessly taking, a deposition. I have often heard lawyers, as they ready to take a deposition, say such things as: “Well, let’s just see how it goes”; or “We’ll get over there and play it by ear”; or “Well, let’s cross that bridge when we get to it”; and so on and so forth. Each of these sayings is of someone who is unprepared and without a clear strategy and clear set of goals in mind for the preparation and taking of the deposition. Don’t ever let it happen to you. Remember: There is no such thing as a “routine” deposition or a “run-of-the-mill” deposition. And, oftentimes, that deposition that once seemed to be of very little importance or significance to your case can become determinative in the outcome of your case later.

**IX. THE TWELVE-STEP METHOD OF ASSURING THAT EVERY DEPOSITION YOU TAKE IS ALWAYS A WINNER**

*Step #1 - Have a clear understanding of the seven cardinal sins of discovery.*
(1) **S.O.B. Dilemma**

S.O.B. = “Short of Breath.” This is the sin of laziness. It deals with a lawyer’s failure to prepare with intensity. Some lawyers push on and on and on regarding a given point in a deposition, while others simply give up almost immediately before getting to the crux of the matter. Don’t ever give up. Don’t let a witness get away with giving you a vague answer. Make the witness be specific. Never give up. If the witness is vague or tries to avoid giving you the information you want, keep asking questions until you have extracted every piece of information you can from the witness. For example, to a witness who responds, “I don’t know,” follow up with these questions: “Did you once know?” “Did you write it down when you knew?” “When did you know?” “If you had to find out the answer today, whom would you ask?” “Is there anything I can show that will assist you in remembering?”

Proper and adequate discovery requires tremendous work, effort and preparation. This work, effort and preparation comes most often in the form of being in great “condition” in terms of your mental readiness, much the same as a marathon runner must be in great condition. The marathon runner who quickly becomes “short of breath” is really no marathon runner at all.

(2) **L.M.P.D.I. Syndrome**

L.M.P.D.I. = “Let My Paralegal Do It.” Delegation is good. It is important. It is necessary. Tragically, some lawyers want to delegate virtually everything just because others may be available to do it. Paralegals and lawyers have their places and their responsibilities. Never give a lawyerly responsibility to a paralegal just because you do not want to do it yourself.

For example, a paralegal should not be the one to prepare a witness for testimony at trial - that is the duty and responsibility of the lawyer. A paralegal should not prepare a witness for deposition, as that is the duty and responsibility of the lawyer. Don’t assign a paralegal to go with your expert to “the scene” and conduct activities there - go yourself and be there with the expert. Too many lawyers are falling into the trap of turning over so many of their responsibilities and duties to others.

Improper delegation is a trap you are setting for yourself. Be careful!

(3) **Goal Depletion**

This is the failure to set goals. Every case in litigation should have specific and clear goals set, and every case in litigation should have a specific, detailed and written “discovery plan.” You are wasting your time and your client’s money if you take a deposition without setting goals or objectives for where that deponent’s testimony fits in your overall case theme and theories.

(4) **Fanticipation**

Fanticipation is what I refer to as “fantasy anticipation.” It is where a lawyer sits back during the discovery phase of litigation and anticipates that things are just going to “fall into place.”
Reality dictates that it probably won’t happen that way and that it is totally inappropriate for a quality trial lawyer to so anticipate.

- Never anticipate luck.
- Never anticipate favorable discovery or evidentiary rulings.
- Never anticipate a weak opposition.
- Never anticipate that anything in litigation will go your way without your first giving it a 110% effort.
- Never anticipate a deponent’s expected testimony.
- Never anticipate....

(5) Arena Teloscopy

This deadly sin, also known as tunnel-vision, involves failing to think ahead about where you will ultimately travel to in your case. All too often, lawyers ask questions and get answers during depositions that may look nice and sound nice to the lawyer, but which won’t make one darn bit of difference to a judge or a jury at any time in the future.

This is akin to the college basketball coach that spends her team’s practice time ensuring that the offensive and defensive schemes are in place to run smoothly, but leaves no time for free-throw practice or physical conditioning.

Remember during the discovery phase of your case that your ultimate goal is to prepare everything with a view towards winning your case at trial.

(6) Holstering

Gunslingers in the Wild West all seemed to wear their holsters in a different way and prepare for their duels differently. History has taught us that most of them were so caught up with their own egos that they simply got into the habit of “winging it” at the time of battle. Sadly, some of them lost their duels because of their complacency. Others merely “got by” temporarily.

“Winging it” is a sin. Although all great trial lawyers must know how to improvise and argue extemporaneously, these great trial lawyers also must be thoroughly prepared on every point and be able to foresee everything wrong that might happen so as to be able to avoid the problem or at least combat or preempt that problem or confront that issue if and when it arises.

“Holstering” has to do not only with position, placement, style and detail of the holster, but also with the product that will fit into the holster - namely, a weapon - and how the Wild West gunslinger might utilize that weapon. When you think of “holstering,” think of it in terms of your preparation with focus, intensity, and attention to detail on every single issue in your case.
(7) L.O.C.S.

L.O.C.S. = “Long Organization/Cerebration Short.” Don’t be long on organization and short on cerebration.

Some lawyers go into discovery and ultimately into trial with tremendous organization and administrative skills, yet they have not done the proper “cerebration” on all of the issues in the case. Although that lawyer’s case may “look great” and “sound great” and “feel great,” it may not “mean great” to the trier of fact and, therefore, you lose - and that ain’t great!

To avoid this, brainstorm on every issue with your partners, colleagues, experts and others. Play the devil’s advocate on the issues. Cerebrate, cerebrate, cerebrate!

Step #2 - Take all depositions as videotape depositions (unless there is a strategic or logical reason not to do so).

Virtually all depositions in all tort cases should be taken as videotape depositions. There are but few exceptions, such as the taking of the deposition of an administrative witness, a medical records custodian, or perhaps a witness who is favorable to you and whom you believe will make a “poor witness” on video.

Save for these few exceptions, it is strongly recommended that you take all of your depositions as videotape depositions. This includes both favorable and unfavorable fact and other liability witnesses, as well as your damages witnesses. In addition, it is recommended that you always consider filing a “cross-notice of taking videotape deposition” with respect to witnesses whose depositions are set by the opposition.

You never know when you might get that evidentiary or impeachment “gem” during a deposition. Don’t ever leave yourself stating, “I wish I had that on videotape.”

Obviously, the expense to you and your client when taking depositions by videotape is increased; however, the effectiveness you get from having videotaped depositions for use at trial or hearings is well worth the expense. Most of you also know and understand from your own trial experiences how boring and tedious it can be for jurors when they are forced to listen to the lawyers read deposition transcripts, especially when the deposition testimony of that particular deponent may be a key to your case.

Factors to Consider:

(1) Accurate Preservation of Testimony - The videotape deposition truly and accurately preserves the testimony of the witness. Unfortunately, testimony of a witness in a non-videotape deposition is often not “preserved” at all. The regular deposition does not indicate much of anything with respect to mannerisms, tone of voice, attitude, demeanor, poise of the witness, hesitation when responding, and much, much more.
(2) **Accurate Prediction of Trial Testimony** - The videotape deposition gives the trial advocate a very accurate prediction as to how the witness will testify and act at trial. What you see and hear on a videotape deposition is what you will most likely see and hear at trial. On the other hand, the non-videotape deposition is not an accurate predictor at all. In fact, what we often see in a witness at a non-videotape deposition is totally the opposite of what we actually see and hear from that witness at trial. The difference is like day and night.

(3) **Vague and Obscure Answers Generally Eliminated** - Videotape depositions ordinarily eliminate most of the “I don’t know’s” and the “I don’t remember’s.” The reason is simple: The witness believes that he or she, in looking into the camera, is actually speaking to a judge or jury, and the witness is more inclined to give straightforward answers in a videotape deposition as opposed to fudging and hedging and doing the old “soft shoe” or the “proverbial tap dance.” When this happens in the regular deposition, the witness more often than not gives you little or nothing that can be of assistance and then is a well-prepared and problematic witness for you at trial.

Obviously, there are some witnesses whom you would just as soon have demonstrate things that they “don’t know” and “don’t remember.” This, of course, is one reason why there are certain exceptions to the taking of videotape depositions. However, we have generally found it is better to find out what the real trial testimony is likely to be with an accurate prediction via the videotape deposition.

(4) **Shenanigans Eliminated** - The videotape deposition eliminates virtually all of the shenanigans and games played by some attorneys in depositions. The hand and arm signals decrease. The witness does not look to the lawyer for answers as in the regular deposition. Lawyers behave themselves in videotape depositions - and if they don’t - they’re on camera with their misbehaviors.

(5) **Judge and Juror Appreciation** - Judges and jurors tend to believe that the reading of a lengthy deposition at trial is ridiculous and stupid and boring. They know that in this day and age there simply must be a better way. And there is. This “better way” comes in the form of the videotape deposition. Judges and jurors appreciate watching a deposition on video much more than having it read to them in whole or in part. Obviously, it is up to counsel to make the videotape deposition interesting and to the point. Remember, the long and drawn-out videotape deposition can prove to be almost as bad as the reading of a regular deposition by transcript.

(6) **Impeachment Intensity Increased** - All courts have the discretion or authority to allow counsel the right to impeach prior deposition testimony by actually playing certain excerpts from the videotape deposition. Most judges will allow this in civil and criminal cases. It is far more effective and it significantly increases the intensity regarding the impeachment.
Witnesses’ Activities Captured - In many depositions, witnesses are asked to point to certain areas on their bodies. Sometimes they are asked to give demonstrations. In other instances, witnesses in deposition are asked to draw sketches of scenes. The list goes on and on. All of these activities are preserved completely in the videotape deposition. Unfortunately, they are only “described” by lawyers in the regular deposition, and sometimes there is nothing in the record about these activities at all.

Demonstrative Evidence Utilization - Demonstrative evidence is very effectively utilized in the videotape deposition. This includes having witnesses describe or “demonstrate” with medical illustrations, video and computer animations and reconstructions, anatomical drawings, models, and more.

Point Made - Lawyers and witnesses tend to “get to the point” in videotape depositions far more effectively and efficiently than in regular depositions. There is less time wasted and very little use of “filler questions” in videotape depositions.

Lawyer Preparation Enhanced - Lawyers get better prepared for videotape depositions than for regular depositions. This is simply a fact. This better preparation increases the likelihood of the sides either settling the case earlier or learning at an earlier point that the case will have to be tried - which we believe is advantageous to your case.

Opposition Attention-Getter - Your opposition knows you are serious about the litigation and trial of your case when you start taking depositions by videotape. The opposition knows that you are putting in an all-out effort in terms of time and money in order to move forward with the preparation of your case. Setting depositions by videotape is a significant attention-getter for the opposition, whether it be in a civil or criminal case.

Atmospheric Change - The atmosphere within which a videotape deposition is taken is ordinarily far different from the atmosphere of a regular deposition. The atmosphere in the videotape deposition setting is generally more formal, more intense, more serious, and more like the atmosphere in an actual courtroom where a judge and jury will be present.

All of the above factors should be considered in your decision-making process regarding the setting of a deposition as a videotape deposition or a regular deposition. Obviously, some of the above considerations may well persuade you that a videotape deposition would be an incorrect strategy. Our recommendation is that you simply never fail to consider taking a given deposition as a videotape deposition (and this holds true with the filing of a “cross-notice” of a deposition taken by another party, as you may well want it videotaped).

Step #3 - Prepare and utilize a deposition notebook.

There are three vital keys to the successful taking and completion of a deposition:
(1) intense preparation;

(2) brainstorming/analysis/playing devil’s advocate; and

(3) organization.

Most depositions do not turn out nearly as well as they could for a given party. Generally, it is a result of one or more of the following flaws in the litigator’s approach:

(1) having the deposition assigned to you at the last minute because a “senior partner has a conflict” and can’t make it;

(2) winging it;

(3) treating it as a “routine” or “run-of-the-mill” depo;

(4) somehow thinking that a particular depo is less important than some of the other “more important” depositions in the case.

The trial advocate must always consider every deposition to be critical and vital to the case. This is true even when the deposition is that of either a records custodian or someone who must merely be deposed to lay a foundation for a single piece of evidence.

We strongly urge and recommend that you consider putting together various “deposition notebooks” in your cases. Some deposition notebooks are to be prepared specifically for a given witness, such as an expert, the investigating officer, or an opposing party. Other deposition notebooks can be prepared in a more “generic” sense, such as one that can be used either for a given category of fact witnesses or a category such as co-employees in a sexual harassment case.

Contents of the Deposition Notebook

The deposition notebook is not some fancy, computerized volume that is to be put together by staff working on behalf of the lawyer. Rather, it should be assembled by the lawyer himself or herself. The following sections should be included in the deposition notebook (and they should be tabbed and indexed):

Section 1 - Statement of Goals. This is simply a statement in the form of some brief notes as to what you hope to accomplish in this deposition. For example, in an intersection collision case, your main objective with a given witness may be to merely establish that she was not physically positioned so as to be able to see the color of the traffic light. In most instances, you will have a number of things you want to accomplish, but never lose sight of your overall goals or objectives in the deposition; all too often, lawyers get bogged down in minutiae.

Section 2 - The Deposition Outline. This section should contain a detailed outline of every item you need to cover in the deposition. In some instances, we have had outlines
exceeding 100 pages, such as in the case of an expert engineer’s deposition in a product liability matter. Also, the outline must contain cross-references so you will know which exhibit to refer to when you are covering a particular area of questioning, etc.

Section 3 - Copies of Documents Relating to Witness’ Testimony. This would include such things as the witness’ curriculum vitae, correspondence authored by the witness, memos, “smoking gun” documents and more.

Section 4 - Copies of Transcripts of the Witness’ Testimony From Other Proceedings, Including Other Depositions.

Section 5 - Legal Research/Law. More often than not, counsel can anticipate certain types of objections that will arise during a deposition. Do the research in advance and have the applicable statute, case law decision, or other materials in the deposition notebook so that you will be able to refer to them if and when necessary, and so that you will be able to cite them into the record if and when necessary.

Section 6 - Miscellaneous.

It is absolutely impossible to overprepare for a deposition. We have found year in and year out that the deposition notebook is of great assistance in helping the lawyer prepare, analyze and organize for the deposition. In addition, the deposition notebook, when viewed by your opposition from across the table, lets that lawyer know something about your high level of motivation and desire to eagerly represent your client. Use of the deposition notebook is only limited by the amount of creativity and innovation that you put into its assembly.

In 1988, Dennis Suplee and Diana Donaldson authored *The Deposition Handbook*, published by John Wiley & Sons, Inc. In the preface to the text, they put it so aptly when they state: “Depositions are the most important of the pretrial discovery tools, but their role in the pretrial process is sometimes taken for granted....Someone needs to speak up for depositions.” They further state that:

“...Of all the pretrial discovery tools, depositions require the greatest technical skills and can make the biggest difference in the outcome of a case. In evaluating the strength of a case for settlement purposes, litigators accord great weight to the performance during depositions of both their own and their opponent’s witnesses. And, if a case should go to trial, the deposition transcripts will usually be the lawyer’s most important resource for cross-examination.”

The preparation and assembly of your deposition notebooks from this point forward will greatly assist you in taking these depositions, and it will enhance the result you obtain for your clients in all further discovery and litigation.

**Step #4** - Seek victory in a deposition for your client and not for yourself.
All too often, lawyers go to a deposition with the belief that they must prove to the opposition that they are either smarter, or tougher, or stronger, or more aggressive than the opposition. The lawyer often lets his or her ego get in the way, forgetting about the real function and purpose of the particular deposition. I have often reviewed transcripts or learned about depositions where the lawyer taking the deposition actually “lost” a lot of ground in the deposition in terms of the value the deposition would have to the case and yet the same lawyer felt relatively good about the deposition because he was able to demonstrate to the other side - seemingly - that he was either more intimidating or more intellectually superior to the opposition. Yet the opponent in the deposition is the one who “won” in terms of the overall value the deposition had to the case. Never lose sight of the fact that the taking of a deposition is meant to help the client and the case.

Now, let me give you some specific examples:

a. Handle any objections you make in an ethical and professional manner, and in accordance with the law and the Rules of Civil Procedure. Make your objection by stating it clearly and then stop talking.

b. When the opposition makes an objection to one of your questions, move on after he or she has made the objection by either having the witness answer the question or by asking your next question. Don’t let the opposition get you off track by getting you into some lengthy debate or argument. Often, opposition objections are meant simply to distract you and to get you frazzled and rattled.

c. Work methodically with your questions in order to seek the information you need (even if it may appear that you are not the most brilliant attorney in the world).

d. Don’t ever let a witness get away with not responding directly to your question. Follow up relentlessly until your question has been answered.

e. Ask clear and concise questions and not questions with all kinds of double negatives or innuendos, etc.

f. Don’t give away or tip off your entire strategy to the other side merely to let them know how smart you are and what a great case you have.

**Step #5 -** Make sure that you have a specific and well-organized plan regarding the flow of the deposition. Getting yourself organized for the deposition is vital. Make sure that your plan is well thought out and in order. Here are some helpful hints:

a. As a part of your deposition outline, set forth the documents you intend to use and at which point in time you intend to use them. Make sure your documentary evidence for the deposition is prepared and that you have sufficient copies so as to be able to refer to them yourself and have the appropriate number of copies available for other people to refer to or have available to them.
b. Make sure that your demonstrative evidence is well prepared and ready to go and that you have a plan as to precisely when you will use it and in what manner at the deposition.

c. Give due consideration for the court reporter and consider breaks for him or her at reasonable intervals.

d. Organize and plan for general breaks (during a lengthy deposition).

e. If there are preliminary matters that need to be discussed such as “stipulations,” make sure that this is handled at the beginning of the deposition.

Step #6 - Don’t be predictable. Most lawyers take depositions in a similar fashion as other lawyers. In personal injury and wrongful death cases, both defense lawyers and plaintiff’s lawyers tend to ask questions of particular types of witnesses in the same order and in the same general manner (and seemingly with the same strategy in mind). Your depositions will be of a higher quality and more helpful to your case if you stop being so predictable.

Let us assume that you are the plaintiff’s lawyer in a personal injury/automobile collision case. You are preparing to take the deposition of the doctor who has performed a defense exam at the request of defense counsel (or the insurance company). Typically, the plaintiff’s lawyer starts out in these depositions by covering areas in the following order: first, the doctor’s qualifications; second, how the IME got set up; third, well - you get the point! Consider the next time you depose the doctor who has done the defense exam by beginning with some questions perhaps in this order:

First question: Please state your full name for the record.

Second question: Isn’t it true, doctor, that in the last calendar year, you earned in excess of $800,000 performing defense exams?

Third question: Isn’t it true that approximately 65% of your practice now involves conducting defense exams?

Although it obviously is important for you to figure out what questions need to go in which particular order, it is simply a good strategy to not be predictable. Don’t ask questions in the same order and in the same way that all the other lawyers seem to day in and day out.

Step #7 - Get the book on the witness first. As you prepare for a deposition, obtain everything that you can on or about that particular witness before the deposition takes place. If the witness is an eyewitness to an intersection collision, obtain statements that the witness may have given to investigators or others. If the witness is an expert, obtain transcripts of testimony from other depositions or trial transcripts. Obtain articles or books written by or about the witness. Search for newspaper or magazine clippings and articles that may contain information about the witness or quotes from the witness given to reporters. Simply put: Obtain everything that you can regarding the witness in terms of information.
Step #8 - Never make a deposition a Christmas gift party! Don’t unnecessarily give away “gifts” during a deposition. Do not stipulate to something that you do not have to stipulate to under the circumstances. Do not concede a point, or an issue or a position unless it is strategically good for the case, well thought out and absolutely necessary at the time. Don’t tip off the other side unnecessarily in terms of giving up something prematurely. Often, lawyers have such a difficult time with temptations in a deposition. In other words, the lawyer is so eager to let the other side know about “what a great case I have” that you give away gifts of information when it gives the other side time to fully defend against, or prepare for, the “gift” you have now given them.

Step #9 - Your persona should be that of a prepared, organized, authoritative and well-meaning advocate. It is true that some witnesses (and their attorneys) will arrive at a deposition thinking they can buffalo or outmaneuver the attorney who is taking the deposition either because the “taker” is unprepared, disorganized, lacking in knowledge, etc. And, yes - there are some lawyers who like to come across as “Columbo” and yet we all know the lawyer is really a fox in disguise with extraordinary intelligence. There are various exceptions. It takes all kinds and types. Nonetheless, in virtually all depositions, the lawyer who comes across as well-prepared, well-organized, authoritative and well-meaning has a tremendous advantage tactically in the deposition in terms of how other counsel and how witnesses respond to that lawyer. Here are some things to consider:

a. Arrive early.

b. Dress and talk and act authoritatively. Demonstrate your leadership skills!

c. Appear organized and be organized and well-structured.

d. Be and appear ethical, professional, sincere and well-meaning.

Some lawyers believe that the process of intimidation and yelling (or raising one’s voice a great deal) helps them in their depositions. This is because these lawyers are lacking in leadership ability and they are not articulate enough to control a situation or other personalities without trying to strike fear into the hearts of others. Sometimes the yelling and screaming and intimidation may work, but, more often than not, it backfires, if not during the deposition, then later in the case.

Step #10 - Ask questions knowing in advance what you intend to do with the answers once you get them. Don’t ask a lot of questions merely in a helter-skelter way so as to take up time and space on pages and just “get the darn thing over with.” Have in mind a clear thought as to what you intend to do with the answers once you get them and once the deposition is completed.

Some answers will assist you in gaining a general understanding of the case or as to the background of the witness. Some answers will assist you in defeating motions. Some answers are important in terms of jury persuasion. Keep in mind that judges are looking for questions and answers that are of “legal” significance. Such questions and answers in a deposition may well help you defeat a motion for a summary judgment. On the other hand, some of these questions that have legalize in them are seemingly of little value to a jury as jurors are looking for questions that begin with the words “who,” “what,” “where,” “why,” “when,” and “how.” The important question to the
judge is: “Do you have an opinion based upon a reasonable degree of medical probability as to whether Janice has a permanent injury that was caused by this collision?” Jurors, on the other hand, are better assisted by the following question: “In your opinion, doctor, will Janice ever be able to work a printing press again?” Although all of us, as lawyers, will ask questions in varying ways and by placing adjectives and adverbs and nouns in different order, the point here is that you want to make sure that your questions in the deposition lead you to specific answers where you have an idea of what you intend to do with those answers once you get them.

**Step #11 -** Understand and learn how to effectively question and obtain information in depositions. This is perhaps the single most difficult area when it comes to taking depositions. You want an expert witness to concede a given point, but you simply cannot figure out how to get the concession! You want a particular witness to agree that she has made an inconsistent statement, but you simply can’t figure out how to get it done in the deposition! A witness in a deposition tells a blatant lie and yet somehow the witness is making it sound or seem truthful, and yet you don’t know how to effectively demonstrate that it is a knowingly false statement! The difficulty here is trying to determine how you, as an advocate, can strategically plan for, and then carry out, a deposition so as to effectively be able to ask the questions you want to ask and get the answers you want to get from a witness who should give you those answers. Here are some helpful hints (even though this is only minimally covering how to go about this dilemma):

a. Basic questions should get you basic information without too much difficulty. For example, when you are seeking background information on a person, they should know this information without having to refer to anything. If they don’t know the information, then you need to follow up with a series of questions asking them where the information might be located, and how they could go about getting the information and furnishing it to you.

For example, assume that you are asking a witness who has been in the military about the kind or type of discharge he had when he left active duty. You might be thinking it was under less than honorable conditions. You ask the witness where and when he was discharged, and he fudges. You ask the witness if he received an honorable discharge and he fudges. At that point, you know something is up! You therefore need to delve into this information and then ask questions to dig into the background of his military history; find out where he was residing when he was discharged; find out where he was stationed at the time of his discharge; find out what branch of the service he was in; etc., etc. You will learn enough information about this so that you can follow up after the deposition and get the information through the U.S. Government.

However, for purposes of the deposition itself, you want to continue with questions along the following lines: Do you have any information whatsoever that would lead you to conclude that you might have received a discharge under less than honorable conditions? Were you ever court-martialed while in the military? Did you receive any type of an administrative discharge? Did you ever get in trouble while you were in the military? Have you ever been turned down from a job because of the type of
discharge you got when you left the military? The questions may go on for several minutes, but you want to delve into the subject in depth.

b. Be ever so patient as you question a witness, attempting to set the stage for a later opinion or impeachment or something else. Don’t jump at the ultimate question too fast. Here is what I mean. Assume that you are deposing an opposition expert and you want to prove the “authoritativeness” of a textbook that you will later use to impeach the witness. Some lawyers just jump right in and say, “Would you agree that Smith’s textbook on ‘ABC’ is authoritative?” The witness responds by simply saying, “No, I would not agree that it is authoritative.” Keep in mind that this expert has probably been to expert witness school and has learned that the word “authoritative” is a buzz word, and that he or she should simply say “no” to any question where the authoritativeness of a textbook comes up in a deposition (or at trial). The better approach is to use a series of many questions to demonstrate that this particular witness may well believe the author, a noted physician, to be a competent and reliable teacher or professor. The better approach is to get the witness to agree that he or she has even used the author’s textbook in his or her office practice, or in his or her teachings (at the medical school). Ultimately, you should reach a point where the witness has all but canonized the author and then the witness is in a position where it would be very difficult to now say that the work is not reliable and competent. Laying the foundation for impeachment with an authoritative work does not necessarily mean that the author has to agree that the work is, per se, “authoritative.” Other words tending to demonstrate authoritativeness can be used and those “other words” will be much more helpful to you as you effectively examine the witness in the deposition.

c. Additional examples will be discussed in depth at time of lecture.

Step #12 - The rule of never asking a question unless you know the answer is generally not applicable in a deposition (as a deposition is exactly where you want to find out about the unknown and the bad stuff). Don’t be afraid to go into uncharted territory in a deposition. Although it depends on the witness and the strategy with a particular witness, you want to find out as much information as you can in the deposition. You also want to know about the negatives of the case and any negative that the witness might have or possess, or be likely to discuss at the time of trial. [An exception to this might be an out-of-state deposition of an eyewitness or an expert.]

X. DIRECTIONS TO COURT REPORTER AT CONCLUSION OF DEPOSITION

Prior to going off the record in a deposition and at the conclusion of a deposition, it is best to give your directions to the court reporter regarding the following:

(1) Timing as to when the transcript will be ready;

(2) Whether original goes to a particular lawyer, or party, or court or other;

(3) Directions as to obtaining signature of deponent, where necessary;
(4) Directions as to what you want in the way of specifics:

(a) Copy of transcript?
(b) Copy of condensed/travel transcript?
(c) Computer disk/ASCII disk, e-mail or e-tran copy?
(d) Copies of exhibits attached to your copy?
(e) Word index?
(f) Other.

XI. SOURCES OF INFORMATION RE DEPOSITION QUESTION LISTS AND STRATEGY

It is recommended that you consider purchasing for your firm or office the following publications:


b. Various sets of publications by Clark/Boardman/Callaghan Publishing Company entitled "Pattern Discovery Checklists." These are published in areas including product liability, medical malpractice, automobile litigation, premises liability and others;


XII. THE THREE MAJOR ERRORS MADE BY LAWYERS THAT CAN HURT YOUR CASE, YOUR CLIENT AND YOUR REPUTATION AS A LAWYER IN HANDLING AND TAKING DEPOSITIONS

Error #1: Taking a deposition that you don’t need to take.

Error #2: Minimal or nonexistent preparation for the taking of the deposition.

Error #3: Allowing opposing counsel in the deposition to distract you, bother you, and get you off track with his or her comments or objections so that you lose focus and begin to play by your opponent’s rules in accordance with his or her game plan for the deposition.
XIII. CONCLUSION

A deposition is to a given case what part of the script is to a play. A deposition is “the essence” of a part of your case and the depositions all together in a given case make up what will most likely be the trial transcript. Prepare well! Brainstorm! Strategize! Organize! Do all of those things necessary to win for your client, and do them in an ethical and a professional manner.