THE DEPOSITION GIFT[1]

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A gift is usually wrapped in gift paper when you receive it. You do not necessarily know what is inside. This was the case with the new client, who came from Paris for our first meeting. She brought to me a wrapped package, her gift. Perhaps a European custom for a first meeting with a lawyer, I wondered. We talked (with the help of a translator) about the facts of the case, her background, her injuries, and her work. In many ways it was like deposing an occurrence witness. The wrapped gift she handed to me when we first met stood unopened off to the side of the spread of papers on my conference room table. What was inside? Was it appropriate for me to open it in the midst of our meeting? Did it appear to her that I was ungrateful for the gesture? Or, would it have been ill mannered if I had just stopped during our meeting to open it? I let it sit. I did not have a gift for her.

The deposition, like the first interview with a new client is that unwrapped gift. It is a great opportunity to open the present, shredding the paper, cutting the tape off of the top to find out what is inside. Then we take out the contents, spread it on the table, put it together, and then take it apart. We might hold it up to the light, feeling its shape and texture, measuring it with a ruler, and at last understanding what it means to us.

Too often, the "discovery" deposition of the opposition's expert eyewitness or the defendant doctor is taken without a plan and with too little preparation. The deposition, like trial testimony, allows the inquiring lawyer to test the credibility of the witness. How does this witness present himself or herself? How much information does he or she have? How does he or she respond to questions? What does the body language express?

In the case of an expert, an engineer, a technical witness, or a doctor in a medical negligence case, these core questions are critical. Many of these witnesses answer questions succinctly, and tightly hold the important facts under wraps. To get to those facts, the lawyer must persist. Do not just take the unwrapped gift and go on your way. Slowly, patiently, and deliberately question the witness. The jury must understand that this brilliant deponent has conveniently forgotten the technique he or she invented and refined only five years ago, which defines the product's defect.

Notice in the following line of questioning how easily the electrical engineer avoids answering the questions.

Plaintiff's Attorney:

> Q. Okay. The next sentence, "While the operator was in the location, the dancer roll apparently moved from the run position toward the thread-up position." Any idea why the dancer roll would have moved from the run to the thread-up while the person was standing on the roll stand?
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> A. Only if—if someone else activated the—moved the dancer roll to the thread-up position which there is no indication that they did, but that is a possibility or if in attempting to thread the machine and the individual did get the paper around the dancer roll and then got back to try to pull it, if he pulled it, the dancer roll would go forward and then there would be pressure on it and could be trapped *and that's what we feel happened in this case.* (Emphasis added.)
>
> Q. And that is something that you agree with, that statement?

[1] This paper was first presented at *ATLA's* 2000 Annual Convention, Chicago, IL.

A. I ---

Defendant's Attorney: Object to the question.

Plaintiff's Attorney:

Q. Well, you said, "We feel that's what happened in this case." Is that how you feel about this case?

Defendant's Attorney: Again, I'll object to the question. Instruct the witness not to answer to the extent that it goes beyond anything that you did in your employment at— that didn't involve investigation at the direction of an attorney.

Plaintiff's Attorney:

Q. Well, I guess I need to know when you answered, "That is how we feel," I can't remember the rest of it, we can have it read back, but you said, "That is how we feel it happened," something like that, are you talking about—?

Defendant's Attorney: Again, I'll object to the question.

Plaintiffs Attorney: Why don't we read the question and answer back.

(Whereupon, the requested portion of the record was read by the reporter.)

Plaintiff"s Attorney:

Q. I believe that the—let's keep going through this Bulletin 199. Do you see the paragraph entitled, "Safe thread-up procedures"?

A. Yes, Ido.

Q. "Threading up the splicer requires the operator to activate the thread-up control." Can you tell me what that means?

A. Thread up the control may be a keyswitch, it may be the pneumatic switch, but that's—it has got to take some action to activate that.

In this sample, the questioning lawyer has recognized that the witness has valuable information that he will not disclose. The witness opened up a new area of information by saying, "That's what we feel happened in this case." The witness had an opinion that he was about to state fully when he was stopped. The opposition lawyer and witness set up their blocks, so that the truth is circumvented. The deposing lawyer has been distracted and misses the truth. Listen carefully to the answers you get from the deponent. Try to set out fact-gathering goals before the deposition. The opponent will try to keep the vital information from you. If this witness has the information, you need to unwrap it by pressing for true expository responses to your questions, rather than perfunctory answers.

Prepare for the difficult deposition by making an outline of the information you want from the deponent. Try to know in advance how the deponent fits into the frame of the case. If you have material that may contradict the witness's expected testimony, such as a published paper or presentation, a deposition or trial transcript, consider saving it for trial. Credibility is the telling factor for each witness. Discredit at trial, rather than at deposition, although the groundwork may originate at the deposition. Sometimes use of impeaching information, in vague terms, may be helpful in negotiating settlement.

The deposition allows you to estimate the deponent's credibility. You will also learn his or her role in your opponent's case. Challenge, but do not humiliate the expert. The jury should understand that he or she is wrong, not feel sympathy for him or her.

Suppose that the deposition of the key opposition witness is set. You are secure that you are prepared, but as the deposition gets under way, you are surprised that the witness is difficult, tight-lipped and an uncooperative curmudgeon. Plan just a little more for this difficult deponent. Set up goals just like other depositions. Examples follow.

1. What does this witness do to build the opposition's case?

2. What evidence or facts does this witness rely on?

3. Does this witness tend to be credible?

4. Will this witness concede or admit theories, opinions or facts at deposition or at trial?

5. Does this witness have new evidence to disclose, refer to, and rely on?

6. How well coached is this witness?

7. Will he or she be better prepared at trial?

8. If the witness is not well prepared, can that be used to show lack of credibility at trial?

In the deposition of an expert witness, control of the questioning should remain with the questioning attorney. He or she should be respectful, but should not defer to the witness. Contradictions and uncertainties should be emphasized. Most witnesses will concede points. Thow who do not can ultimately look simplistic and foolish. Preparation means becoming a expert yourself.

Receive your deposition gift passionately and then use it to the best to advance your case at trial.