9

Strategy and Tactics

9.01
Contrasts between Personal Injury and Commercial Litigation

Strategy and tactics may depend on the type of litigation involved. Two broad categories are personal injury litigation and commercial litigation. In general, there are three principal differences between these categories that affect the techniques lawyers use in taking depositions. These are differences of degree, but, broadly speaking, the three distinctions described here are valid.

A. The First Difference: Duration of Events

In a personal injury case, the key events (a collision at a corner, a slip on a sidewalk, the amputation of a finger by a saw) may have happened in the blink of an eye. By contrast, in a commercial case, the key events may have unfolded over a protracted period of time, perhaps months or even years.

B. The Second Difference: Plaintiff's Knowledge

In a personal injury case, plaintiff's technical knowledge may be limited. She may be able to testify knowledgeably about how the accident happened, but may not know much about the basis of the liability contentions her lawyer is advancing and, in any event, her lawyer may well instruct her not to answer deposition questions directed to such contentions. For example, plaintiff may testify at the deposition that there was no guard on the saw that cut off her finger and she may describe how the accident happened. But at some point her lawyer will probably instruct her not to answer questions probing the contention that the saw should have been equipped with a guard, claiming that such questions call for opinion testimony and should be directed to plaintiff's expert. That is, counsel for the defendant is surely entitled to obtain plaintiff's testimony as to whether such a guard would have prevented her accident and the extent to which the presence of the guard would have interfered with her normal use of the saw, but counsel for plaintiff may draw the line at (that is, instruct plaintiff not to answer)

questions as to how the guard should have been attached, of what material it should have been made, how the advantages and disadvantages of such a guard balance out, and so on. While such an instruction not to answer is technically improper, it is unlikely that counsel for the defendant will raise the matter with the court; and, even if she does, the judge may take the same view, that is, that questioning on those subjects should be directed to plaintiff's expert. See **Chapter 13** on giving and testing an instruction not to answer.

In commercial litigation, by contrast, plaintiff's employees will often be knowledgeable about how the defendant corporation operates and about the industry in general. Thus, they may be able to give detailed testimony to support plaintiff's legal contentions. For example, if plaintiff alleges that the defendant has attempted to monopolize a certain market, plaintiff's employees may know a great deal about what actions the defendant has taken to achieve that objective, how those actions have made it difficult or impossible for plaintiff to compete, and how those actions differ from those that would evince vigorous yet fair competition. The interrogator may subject such witnesses to very probing examination on those issues, usually without objection from counsel for plaintiff.

C. The Third Difference: Documents

Even in a very serious personal injury case, there may be few documents of importance—perhaps none except medical records; the entire liability case may turn on eyewitness testimony. In contrast, it is very unusual to encounter a commercial case of any substantial size without a large volume of documents generated by both sides. Of course, certain types of personal injury cases tend to involve large volumes of documents as well—that is, aviation accidents, mass tort cases, and the like—but these are the exception, not the rule.

9.02
Approaches

When preparing for the deposition, you should give careful thought to the order in which you will cover various subjects. Make an advertent decision whether to begin with the important issues or to postpone them until the deponent starts to tire and is further away, temporally and psychologically, from the cautions her lawyer gave her in their preparation session. The choice is often difficult and there is no single right answer.

A. Getting the Deponent's Background First (and Alternatives)

The majority of depositions begin with questions about the deponent's personal background (age, residence, and, if relevant, marital status, number of children, and the like), followed by questions about education and employment history, including current duties and responsibilities. The interrogator then asks a question to determine the deponent's first involvement in the subject matter of the dispute ("When and how did you first become involved in the Hotel California construction project?"), and proceeds to trace her activities chronologically to the end. It is tempting to say that there is nothing wrong with such an approach, that it is an orderly and sensible way to elicit facts, and that is why it is so often used.

But the truth is that there is a lot wrong with that approach. It can take fifteen minutes to an hour or more to learn the deponent's personal background, education, and employment history. The witness will usually feel relatively comfortable in answering such questions and will become more so as she establishes eye contact with the interrogator and grows accustomed to the cadence of his voice and his mannerisms. The same witness, even if an experienced deponent, may be surprised and flustered if defense counsel asks in rapid succession whether she attended the key meeting at which the defendant's representatives allegedly made certain false statements, what was said at the meeting, what statements she claims were false, and in what way they were false. The deponent

may be somewhat unnerved by the simple fact that the examiner is not "playing by the rules" as the deponent knows them from experience or has learned them from her lawyer. The witness's personal background, education, and employment pedigree can be explored toward the end of the deposition or any other time that suits the interrogator.

A recent example of a witness being thrown off stride by an unexpected beginning was Rupert Murdoch in his testimony before a committee of Parliament concerning telephone-hacking practices of his News Corporation. The episode may be apt here since the parliamentary interrogators were described this way: "They mostly looked like lawyers taking a deposition from a tricky defendant, trying to pin down the mogul and his top executives on facts and apparent contradictions."[1] What threw Murdoch off was the refusal of the committee chair to allow Murdoch to begin his testimony by reading a prepared statement.[2] And yet, as the "deposition" proceeded, Murdoch regained his stride: "After his apparent frailty early in the session, Rupert Murdoch seemed to gain a certain feistiness and combativeness as the hearing went on."[3]

Give thought to whether a chronological approach is the best one *in this particular case*. To take an example, when deposing a defendant-driver in a motor vehicle accident case, counsel for plaintiff will normally question the defendant about her background, then set the scene (how wide were the streets, which vehicle was in which lane, did anything obstruct the defendant-driver's view as she approached the intersection, and so on), and finally reach the details of the accident. The defendant will tend to gain comfort because her own lawyer probably told her that the questioning would unfold this way. Occasionally, plaintiff's counsel may want to take a different approach. He may start by asking, for instance, the defendant's name, then whether she was involved in

[1] Alessandra Stanley, *At Fox News, a Scandal Hits Home*, N.Y. Times, July 20, 2011, at A10.

[2] *Id.*

[3] Sarah Lyall, *Murdochs Deny That They Knew of Illegal Acts,* N.Y. Times, July 20, 2011, at A1.

an accident on December 14, 2010, and then, without further preamble, how the accident happened. This approach may differ from what the defendant's lawyer told her to expect. The result may be an answer harmful to the defendant's case, particularly if she tries to include all the detailed information that she recently reviewed with her lawyer about speeds, distances, and times.

One danger in asking the key question early is that the deponent may respond with a long, detailed answer that assumes a comprehensive knowledge of the facts that would have been elicited by a chronological approach, leaving the interrogator with the feeling five minutes into the deposition that he has just placed himself into the middle of a dense thicket from which there is no escape.

For example, counsel for plaintiff in a medical malpractice case deposing the treating obstetrician might confirm that plaintiff was the obstetrician's patient, and the obstetrician was in charge of the delivery; and then, without further preliminaries, ask, "Why did you choose to perform a midforceps delivery rather than a Caesarean section?" Consider the danger of a lengthy answer phrased in highly technical medical terminology that leaves the interrogator more bewildered than informed. (Gerald McHugh, a highly skilled plaintiffs' medical malpractice lawyer, advises that such overwhelming answers often begin with, "Well, counselor . . . ").[4]

It may be advantageous for the interrogator to postpone the significant questions for as long as possible. For example, assume in a personal injury suit that the liability issue is close but the damages are clear and serious. Understandably, plaintiff may be more interested in her injuries than in the precise dynamics of the accident. Therefore, counsel for the defendant may decide to question first about those injuries and then, hours later, move to liability. By that time, plaintiff may have only a dim recollection of her own lawyer's warnings about the liability pitfalls.

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[4] One commentator also points out that the "rapid-attack mode" may fail because most litigators "lack the skills, preparation, and personal gravitas required to pull it off," and will simply "fail spectacularly" and find themselves dealing with an uncommunicative witness. Laurin H. Mills, *Taking Chances at Depositions*, 28 Litigation 30, 31 (Fall 2001).

There are no hard-and-fast rules. To be sure, at some point in the deposition, the interrogator should elicit certain background information. The deponent's education and employment experience may be highly relevant both to the claims asserted and to the weight to be given to her testimony. It is also wise to ask a nonparty deponent to give her home and business addresses and telephone numbers and to inquire whether she has plans to move. As the case approaches trial, this information can be very valuable in locating this witness to serve her with a subpoena. Sometimes a witness will refuse to give an unlisted telephone number on the record. A simple solution is to go off the record and explain to the witness that if the judge is called, she may very likely be required to provide the number; then ask her to give the number, while assuring that it will be kept confidential—that is, used only to contact her to arrange for her to testify at trial.

As to the deponent's employment history, sometimes the interrogator will be content to obtain a chronology of employers, dates of employment, and job titles, and leave it at that. But if you wish to look further into the deponent's employment history after the deposition, ask more probing questions, such as these:

Q: Who was your next employer?

Q: When did your employment there start?

Q: When did it end?

Q: What was the address of the facility where you worked? Is the facility still there?

Q: What was your job title?

Q: What were your duties and responsibilities? [Or, if you want to sound more like a human being and less like a lawyer: What was your job? Or: What did you do there?]

Q: Who was your immediate supervisor? Does she still work there? If not, where does she work? If you wanted to find her, how would you go about doing so?

Q: Did your employment there end voluntarily? If so, why did you end your employment there? If not, why did your employer

terminate your employment? Or: What were you told as to why your employment was being terminated? Who at the employer would be knowledgeable about the circumstances of the termination of your employment?

Q: By whom were you next employed?

Often an individual's supervisors from her former employment will have useful facts and insights about her. And asking these questions preliminarily, from which the deponent will infer that the interrogator plans to check her out in some detail, may cause the deponent to be more truthful as the questioning proceeds into more substantive areas.

One highly skilled plaintiffs' antitrust lawyer sometimes covers the educational and employment history of high-level corporate executives, which is easily accessible through public means, through a series of leading questions:

Q: You received your B.S. from Bucknell University in 1982 where your major was economics?

Q: You then worked for three years, until 1985, as a market analyst for GE?

Q: In 1987, you received your M.B.A. from the Wharton School?

Q: You then took a position with IBM . . .

And so on.

From the perspective of the defending lawyer, what is disturbing about this approach is that the deponent gets no opportunity, before the tough substantive questioning begins, to get his sea legs by giving narrative answers about his background. That is, the deponent need not, and probably will not, say anything more than a simple yes in response to each of these questions. Moreover, the deponent may begin to develop the sense that it is the interrogator who is in charge, which is not the mindset that the defending lawyer wants the witness to have.

You might also ask the deponent if she is on Facebook or other social networking sites. Of course, if you have already found useful

information through a social networking site, you may elect not to get into this subject.

In tort litigation, sometimes the interrogator will ask whether the adverse party has ever been convicted of a crime. (The question can, of course, be asked in complex commercial litigation but rarely is.) If the answer is yes, the interrogator will then ask follow-up questions to dig out the details. So the defending lawyer should cover this subject in the deposition preparation session.

If such a question is asked at the deposition and there is no such criminal history, the deponent can answer no and that will be that. If there is such a history, the lawyer representing the deponent might object and say that he will allow her to answer in terms of the applicable rules of evidence. Thus, in federal court the defending lawyer might instruct the deponent not to answer except as to any conviction for a crime that was "punishable by . . . imprisonment in excess of one year under the law under which the witness was convicted" or if "the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness,"[5] and if such conviction occurred within the applicable ten-year period.[6] Since the court has discretion under Fed. R. Evid. 609(b) to allow evidence of a conviction beyond the ten-year period, it may be wise for the defending lawyer to allow the deponent to say that there was no conviction before that time for a crime involving an act of dishonesty or false statement by the deponent. In truth, there is no reason why the witness should be obliged to testify about a decades-old conviction for possession of a small amount of marijuana.

If the defender is not prepared to draw the line, then the deponent may find himself slipping quickly into an untenable position on a matter of no relevance to the dispute at issue. One commentator, after remarking that "[i]t is easier to get into this subject [of drug use] than one might suspect," proved the point with this suggested colloquy:

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[5] Fed. R. Evid. 609(a).

[6] Fed. R. Evid. 609(b).

Q: When you witnessed the events in question, were you under the influence of alcohol?

A: No.

Q: Prescription drugs?

A: No.

Q: Illegal drugs?

A: No.

Q: Have you ever taken illegal drugs?

A: Well, er, uh, yes.

Q: What kind of drugs have you taken?

A: I experimented with marijuana and cocaine when I was younger.

Q: Crack or regular cocaine?

A: Both.

Q: When was the last time you used crack cocaine?

A: May I talk with my attorney? (pause) I refuse to answer on the ground that the answer may tend to incriminate me.

Q: Have you ever sold anyone illegal drugs?

A: I refuse to answer.

Q: Did you snort the crack cocaine?

A: I refuse to answer.

Q: Did you smoke it?

A: I refuse to answer.

Q: Did you inject it?

A: I refuse to answer.[7]

[7] Mills, *Taking Chances at Depositions, supra* note 4, at 32–33.

If the defending lawyer were on his toes, he would have objected to the fourth question and, if necessary, instructed the witness not to answer except to the extent that the information sought could be used at trial under the applicable evidentiary guidelines.

Refusing to let the witness answer as to any convictions not within these guidelines is, of course, an instruction not to answer. While giving such an instruction on this kind of question is technically improper—the defending lawyer should recess the deposition and seek a judicial ruling—in many jurisdictions the defending lawyer would give the instruction and figure that it is unlikely that the interrogator would raise it with the court. See **Chapter 13** on giving and testing an instruction not to answer.

B. Clearing the Decks

Another approach for starting the deposition is to "clear the decks"—that is, to ascertain the subjects on which the deponent is knowledgeable, before getting into detailed questioning. Suppose that the interrogator's review of the documents suggests that the deponent participated in negotiations leading to the contract at issue, but that her involvement ended when the contract was executed. The interrogator might decide to gain an overview of what the witness knows, and what she does not, by questioning this way:

Q: From my review of the documents, it appears that you were involved in the negotiations leading to the contract of September 18, 2010. Is that right?

A: Yes.

Q: Did you have anything to do with the dealings between the parties after the contract was signed?

A: No.

Q: Let me be more specific to be sure that we are not overlooking anything. Did you become involved in responding to the complaints by the plaintiff, which I represent, about your company's performance of its obligations under the contract?

A: No.

Q: Did anyone tell you about those complaints around the time they were made or at any time up until today?

A: Yes, Mr. Murphy talked to me on a couple of occasions.

Q: We'll come back to those conversations with Mr. Murphy. Did you have any conversations with anyone else about the plaintiff's complaints around the time that they were made or at any time up until today?

A: No.

Q: Do you know why your company decided to use an alloy T-nut on the lift mechanism, rather than a steel T-nut as specified?

A: No.

Q: Has anyone at your company told you anything about that?

A: No.

And so on. If the right general questions are asked preliminarily, you should be able to eliminate entire subjects from your outline and quickly narrow your focus to matters about which the deponent is knowledgeable. You will have the comfort that comes from a sense of knowing where you are going. Administratively, you will know very early on how long the deposition is likely to take.

C. Developing the Facts

If the case involves a sharp factual dispute about who said what to whom over an extended course of dealing, the easiest approach is to develop the facts by inquiring about them in chronological order. However, consider using something other than a straight chronological approach. The chronological method may be easiest for you, but it is also easiest for the deponent.

Consequently, even if your approach is generally chronological, hopscotching around from time to time may help to develop inconsistencies in the testimony of an untruthful deponent. Consider a topical approach. Henry Hecht, one of the true masters of deposition practice, describes the topical approach this way:

> With a topical approach, you move from one topic or event to another without regard to time sequence. Its value to the taker is unpredictability. Even a well-prepared witness will not know what you will ask next. Such uncertainty increases the likelihood of catching the witness off guard and obtaining damaging testimony that the witness might not have given if a chronological approach had been used.[8]

Or in a commercial case, after questioning the witness about the first four meetings between the parties, you may want to return to the second meeting to ask whether a particular subject was discussed there. Of course, opposing counsel may object that the question is repetitious, but it is highly unlikely that counsel will instruct the witness not to answer, which would be improper.

Some kinds of cases virtually demand a chronological development of facts. For example, in construction litigation, it can be extremely important to establish and maintain a precise chronology of when bars were set, concrete was poured, and so forth. Taking things out of order may produce a useless mishmash.

Once you have given thought to how you will develop the facts, you should not become so mesmerized by your own outline of questions that intriguing answers fail to register. Having settled on the best order in which to cover subjects, you must repeatedly decide during the deposition whether to stick to your script or to set it aside and immediately follow up on an interesting answer that may, for example, pertain to the final subject on your agenda. You must quickly and intuitively decide whether the benefit of pursuing such an answer outweighs the advantages of adhering to your original organization of topics. If you hesitate too long before asking the follow-up questions, the deponent may interpret the pause as a signal that her answer in some way injured her case, and modify or withdraw her statement. At the very least, she will be very much on guard for the next several questions.

Suppose plaintiff purchased component parts, which she now claims are defective, from the defendant supplier. A quality

[8] Henry L. Hecht, *Effective Depositions* 79 (2d ed. 2010).

control manager employed by the supplier is knowledgeable about inspections made of those parts at the supplier's plant and is being deposed by counsel for plaintiff. The interrogation goes like this:

Q: When did the first inspection take place?

A: Well, I remember that the first one took place on my birthday, June 3, because the plant superintendent offered me $500 and suggested that I take the day off. He said he could sign the inspection forms with my initials and no one would be the wiser.

Surely the next question should not be "And when did the next inspection take place?" Of course, usually you will not have such an easy call.

If you will be deposing several similarly situated witnesses, vary your approach. Otherwise the deponent (who may have attended the other depositions, read the transcripts, or viewed the videos) will anticipate the approach and feel comfortable from the outset. At the least, the first substantive question to a later witness should differ from your lead questions to previous witnesses—unless, of course, you think there is some advantage to following the same format each time.

After determining the order in which to address the various subjects, you must decide on the order in which to pose specific questions and how to word them. It makes a difference. The following discussion of approaches, though not exhaustive, illustrates the point.

9.03 Committing the Deponent to Noncontroversial Propositions

You may want the deponent to commit herself to certain propositions on seemingly noncontroversial matters of policy and practice at the earliest appropriate time in the deposition. If the deponent perceives such questions as unimportant, she may readily make significant concessions.

Two areas in which it may be particularly helpful to establish the deponent's policies and practices—correspondence and note taking—are treated separately in the following subsections. Other important areas include the deponent's policies and practices with respect to reviewing certain types of documents routinely sent to her (for example, sales reports, personnel evaluations, customer complaints), consulting with or reporting to others about significant events and decisions, retaining documents, and monitoring activities in particular areas. Obtaining admissions as to policy and practice may be especially helpful when you are seeking to prove a negative by inference from what actions the deponent took in the underlying events.

A. Correspondence

Suppose that these are the underlying facts: There was correspondence between the parties. At some point the defendant sent a letter to plaintiff, stating that certain items (which, it now turns out, are favorable to the defendant's case) were true, and plaintiff made no written response to that letter. How does counsel for the defendant obtain the maximum benefit from these helpful facts in deposing plaintiff's representatives?

If the interrogator studies the correspondence, he may find that his client sent eleven letters before the crucial letter and that plaintiff's president responded only to the fifth and the eighth to correct some inaccuracy. In deposing plaintiff's president, the interrogator may take the letters in turn and ask the president to confirm that she received each letter, that she read it, that the letter contained an accurate statement of the facts, that she did not respond to it, and that she did not respond because the letter was accurate. The interrogator will further ask the deponent to confirm that she responded to the fifth and eighth letters and that she did so to correct inaccuracies. After discussing perhaps the eighth or ninth letter, the interrogator may ask the deponent to confirm that her general policy or practice was to respond in writing only if a letter was inaccurate in some way.

The deposing attorney should not wait too long to pose this question because the closer he comes to the date of the key

document, the greater the risk that the deponent will have her guard up. As one superb trial lawyer put it,

> Most witnesses are like the comic-book hero Spider-Man, with an innate spider sense that begins to tingle and warn of danger when the questioner is approaching a significant area in a case. As a general rule, the reluctant witness will become less forthcoming as the questions increase in importance.[9]

The interrogator has a better chance of obtaining the admission on policy or practice if he proceeds in this painstaking way than if he asks without preamble whether the deponent's policy or practice was to respond in writing only to inaccurate letters.

The described scenario raises again the problem of the conflicting objectives of discovery and admissions. Suppose the deponent concedes that her policy or practice was as the interrogator suggested. The interrogator must decide whether to stop that line of questioning, because he has secured a favorable admission, or to continue and ask the deponent to confirm that, consistent with her policy or practice, she did not respond in writing to the key letter because it was fully accurate. If the interrogator halts the questioning, he will have no inkling how the deponent will answer the critical question if posed at trial.

If the interrogator continues and poses the key question, the deponent may feel compelled to make the desired admission by force of the series of answers she has just given, thus aiding the interrogator. But, much more likely, the deponent may refuse to make the desired admission, and instead give a self-serving but potentially credible explanation of her failure to respond to the key letter. If that happens, the interrogator will learn what he must face at trial, but the witness's explanation at trial may take on an enhanced patina of credibility simply because it was also given earlier, at the deposition. Moreover, the usefulness of the admission for a summary judgment motion will be reduced, if not destroyed.

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[9] Gerald A. McHugh, *Techniques in Taking Depositions,* 55 Phila. Law. 29 (Winter 1997).

As an alternative, the interrogator could follow a middle course and ask the deponent only whether she received the key letter and whether she responded to it—and nothing more. Even with this approach, however, the interrogator risks losing the admission because the deponent may not give only one-word answers without adding any explanatory gloss.

As suggested in **7.01**, the safer, and thus preferred, course is to resolve doubts in favor of asking the questions:

Q: Did you receive the letter of June 18, 2009, which has been marked Exhibit 15?

Q: Did you read it?

Q: Did you reply to it?

Q: Did you decide not to reply because the contents of the letter of June 18, 2009, Ex. 15, appeared to you to be accurate?

But again, a very experienced litigator might take a chance and settle for the deponent saying that she received the letter and did not reply, without the final question.

B. Notes

The technique of obtaining admissions of preliminary propositions may also be used with respect to a deponent's policy and practice for taking notes at meetings. Assume that the defendant claims plaintiff made a statement harmful to plaintiff's case at a meeting between the parties. Assume further that the notes taken by the defendant at the meeting include no mention of the alleged statement. How can counsel for plaintiff best use that helpful fact in deposing the note taker? One approach is to ask first about the notes of other meetings and to confirm that the deponent's general policy or practice at those other meetings was to make notes of what was important and to omit what was unimportant. This proposition is so seemingly obvious and noncontroversial that the deponent may readily agree that she took notes on that basis. Contrast what would happen if counsel for plaintiff were to begin his questioning by asking the deponent whether her approach in

taking notes during the key meeting between the parties was to transcribe important statements and to exclude those that were unimportant. The deponent might quickly perceive the implications of an affirmative answer and hedge. She might claim, for example, that she made notes randomly without regard to the significance of a particular statement. Although this explanation may be somewhat implausible, the interrogator will have gained nothing from the deposition. In fact, the interrogator will have lost ground by permitting the deponent to give a pretrial explanation of her conduct, which, should it surface at trial, may lend credibility to the deponent's trial testimony.

9.04 Establishing a Premise to Shape the Next Answer

Deponents are generally aware of what they have already said in their depositions and want their testimony to be consistent and believable. Consequently, there may be some advantage to asking one question before another. For example, in a personal injury case in which plaintiff last saw a doctor six months before the deposition, does it make any difference in which order counsel for the defendant asks plaintiff the following questions?

Q: Do you still have pain from the injuries you claim to have sustained in this accident?

Q: When were you last treated by a doctor for the injuries you claim to have sustained in this accident?

Some accident defense lawyers argue that the second question should be asked first. If plaintiff first answers that she was last treated by a doctor six months ago, she may think that it will sound odd to say that she still suffers intense pain, and so may tend to give a more temperate account of her current condition. In contrast, if plaintiff is first asked to describe her pain and characterizes it as intense and unremitting, she may then rationalize her failure to seek further treatment by saying that the doctor advised her (or she

concluded herself) that medical treatment would be of no further help and that she would have to live with the pain.

Obviously, asking the questions in one order rather than the other does not assure that the answers will be more favorable to the interrogator. But it should enhance the odds somewhat, and a successful litigator will constantly watch for small advantages.

9.05 Wording the Question Aggressively

Although opposing counsel may object that the interrogator may not ask leading questions to or "cross-examine" the deponent, in fact, you may lead the witness at the deposition if you could properly do so at trial.[10] By wording the questions aggressively, you may improve the chances of obtaining favorable testimony.

For example, suppose that plaintiff distributor alleges that she was wrongfully terminated by the defendant manufacturer without adequate notice. The interrogator could pose his question in either of the following ways:

Q: As of May 2010, did you expect to be terminated by the defendant?

Q: In light of the history of your dealings with the defendant in 2009 and 2010, including the unpleasant meetings in October 2009 and February 2010, which you have told us about, did it come as a [big] surprise to you when you received the letter of termination in May 2010?

In a case involving a very serious personal injury that occurred during a hazing incident at a college fraternity, the objective of plaintiff's counsel, Gerald McHugh (now Judge McHugh), in deposing

[10] Rule 30(c) permits examination of a deponent to "proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615 [rulings on evidence and exclusion of witnesses]." Fed. R. Civ. P. 30(c)(1). The Federal Rules of Evidence permit examination by leading questions of "a hostile witness, an adverse party, or a witness identified with an adverse party." Fed. R. Evid. 611(c).

a representative of the defendant national organization was to show that the national organization had constructive knowledge of the likelihood of this kind of thing occurring at that chapter. After painstakingly interrogating the deponent about every complaint and incident involving the chapter over a period of several years, McHugh asked the deponent,

Q: In light of all of that, did it come as a big surprise to you when you heard about this incident?

Perhaps not wishing to look foolish (in light of his prior testimony), the deponent replied,

A: Of all the chapters nationwide, I was least surprised to hear that something like that had happened here.

If you use this aggressive approach, you should attempt to phrase the question so that it tends to persuade the deponent to assent to the proposition at issue. Sometimes you can coax the witness to accept a proposition by starting the question with, "Would it be fair to say that . . . ?" or "Would you agree that . . . ?" Because most people instinctively want to be fair and agreeable and avoid unnecessary conflict, it may be difficult for the deponent to say no in response to such a question. Another variation is, "Would I be wrong if I said . . . ?" The witness may hesitate to give the rather abrupt answer, "Yes, you would be wrong, " even if that is so. From the witness's point of view, it may feel like bad manners to contradict the proposition submitted by the interrogator.

9.06 Stating the Deponent's Position Baldly

Sometimes the witness will recoil from and reject one of her own contentions if it is put to her starkly, particularly if an allegation of intentional wrongdoing is at issue. For example, if plaintiff alleges fraud and breach of contract because of the defendant's alleged misrepresentations, the defendant's attorney may directly confront plaintiff by asking,

Q: Do you claim that Mr. Suplee lied to you when he described the qualifications of the project manager?

Some lawyers will object to use of the word "lied" on the technically improper ground that it calls for a conclusion.[11] If they do, the interrogator may often eliminate the objection by rewording the question as follows:

Q: Do you claim that Mr. Suplee lied to you when he described the project manager's qualifications, in that he knew that such statement was false when he made it?

Plaintiff may hesitate to say that the defendant lied to her, even though she is willing to make the substantially identical, though semantically more euphemistic, charge that the defendant misrepresented the situation. And if plaintiff insists that the defendant lied to her, the interrogator has not lost ground, because plaintiff already had charged such deception before the questioning began.

Similarly, if the complaint alleges that the defendant acted for the purpose of inflicting harm upon plaintiff, defense counsel may ask directly whether she contends that the defendant deliberately sought to harm her. Plaintiff may be reluctant to answer such a question affirmatively, even though such an allegation appears in her own complaint.

In a case involving allegations of civil conspiracy, counsel for the defendant may find deponents aligned with plaintiff to be hesitant to confirm explicitly that they believe there was a "conspiracy." The word has acquired a sufficiently negative connotation in recent years (with the term "conspiracy theory" invariably used in contemporary parlance to suggest paranoia) that a witness may often shrink from adopting the term.

Sometimes, even in a straightforward automobile accident case, counsel for plaintiff will create an awkward situation for her own client by going too far in the allegations of the complaint. If she alleges that the defendant "negligently, recklessly, and intentionally drove his vehicle into plaintiff," counsel for the defendant

[11] Most such objections lack merit. *See* Fed. R. Evid. 701, 704 and Fed. R. Civ. P. 30(c)(2).

may begin the deposition by asking plaintiff to state all facts upon which she bases the claim that the defendant intentionally drove his vehicle into her. The result may be a flustered and embarrassed plaintiff (who did not realize she had made such an allegation) even before counsel for the defendant has inquired about anything of substance.

This technique may also be employed by a plaintiff's attorney confronting a defendant with a stark statement of a position taken in the defendant's answer or affirmative defenses. In a *Pennzoil v. Texaco* type of case, in which the parties had entered into a letter of intent but the buyer ultimately refused to go forward with the acquisition, the seller brought suit contending that the buyer had breached the duty of good faith and fair dealing inherent in the letter of intent.[12] Although the defendant buyer's position, as set forth in its answer to the complaint, was that the letter of intent was nonbinding and imposed no obligations upon either party, its president balked at that proposition when it was put to him at his deposition, and in fact gave testimony supporting plaintiff's theory. The colloquy went this way:

Q: Was it your view that the letter of intent of April 18, 2009, which has been marked Exhibit 2, created no obligations upon your company?

A: No, it wasn't. I believe we had the obligation to proceed in good faith.

Why did a bright, very successful man give an answer so harmful to his own position? Any witness can make a mistake in the deposition pressure cooker, and perhaps it was nothing more than that. But might it not have been that he felt compelled to soften—that is, retreat from—his own official litigation position when it was stated so starkly?

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[12] *See Channel Home Ctrs. v. Grossman*, 795 F.2d 291 (3d Cir. 1986); *see also Huber & Sons v. Serv. Corp. Int'l*, 2003 U.S. Dist. LEXIS 4094 (D. Minn. Mar. 13, 2003) (the seller brought suit for breach of duty of good faith in the letter of intent where the buyer did not close on the sale of a funeral home).

In a product liability case in which the defendant's engineer seeks to discount numerous complaints about the product, plaintiff's counsel might ask something like this:

Q: So there was no reason at all to believe that using undersized bolts on this huge piece of equipment could cause problems?

Can the witness say, "Yes. There was no reason," and retain her credibility?

9.07
Jumping from the Specific to the General

Sometimes moving abruptly from the specific to the general in the questioning can produce a revealing reaction from the deponent, particularly when he has been charged with conscious wrongdoing. Take a case in which plaintiff alleges that the defendant intentionally made false and misleading statements about the financial viability of an energy company, of which he was CEO, not only to potential investors, but also to regulatory authorities, including the Securities and Exchange Commission. Suppose the defendant had, say, six meetings with representatives of the SEC over eighteen months, during which he made certain statements about his company's financial health; one month after the last such meeting, the company failed. In his answer to the complaint, the defendant denies making any false or misleading statements, intentionally or otherwise, about his company's financial position, to plaintiff or anybody else.

At some point in the deposition, counsel for plaintiff-investors will want to question the defendant-deponent closely as to who said what at each of these meetings with the SEC.

In the midst of detailed questioning about, perhaps, the second of these meetings, counsel for plaintiffs might want to spring a very general question, such as, "At any time in your dealings with representatives of the SEC, did you make a statement that you knew to be false when you made it?" If the defendant-deponent

is in fact a scoundrel (but not a very skilled one), his reaction to such a question might be a prolonged silence (with a "deer in headlights" look) followed by a weak "No." And if asked why it took him so long to answer, he may say something like, "I was reviewing in my mind all of the statements that I made during the half-dozen meetings over eighteen months." Is that how an honest man would react? Counsel for plaintiffs could argue, with considerable persuasiveness, that a man of integrity would answer the question with a prompt and certain "No," and would not need to scroll through each such conversation in his mind before replying.

This example helps to make the case for taking a video deposition. See **Chapter 16**. That is, the long pause between the initial question and the defendant-deponent's answer of no will not be captured on the stenographic transcript. At most, the reporter may add "PAUSE" after the question, but such a notation on a cold transcript carries little narrative force, plus the defendant-deponent and his lawyer might well deny that a longer-than-usual delay between question and answer in fact occurred. Increasingly, court reporters can provide you not only with the disc of the written transcript, but also with an audio disc at the end of a deposition. To be sure that you can use the audio at trial, add the words "and audio" to the deposition notice.[13] The audio will show how the words were really spoken; video will show the demeanor and facial expressions of the deponent. Both may be more telling than the dry transcript.

Perhaps along the same lines, one veteran of hundreds of personal injury trials suggests that if you believe a child witness is lying, ask him out of nowhere, "When is your birthday?" If the child is telling a tall tale, he will pause before answering, says this student of human nature.

[13] Fed. R. Civ. P. 30(b)(3).

9.08
Posing the Either-Answer Question

Some questions afford you a line of attack regardless of the witness's answer. Such questions often begin with the phrase, "Did it occur to you at that point that . . . ?" This approach can be used effectively in many types of cases, including those arising from complex fraud, automobile collisions, product liability, and medical malpractice.

Suppose plaintiff in a complex fraud case alleges that the defendant took nine separate steps, the last of which sprung the trap and caused plaintiff to lose money. After ascertaining the facts of each of the nine steps, counsel for the defendant might ask plaintiff:

Q: Did it occur to you at that point that Ms. Woodruff might be attempting to defraud you?

If plaintiff answers no, the interrogator may ask her to confirm that the defendant's actions up to that point fell within the range of normal business conduct. If plaintiff concedes this, the facts allegedly constituting the fraud are narrowed. On the other hand, if plaintiff responds that it did occur to her that the defendant might be perpetrating a fraud, she will have a more difficult time demonstrating that thereafter she acted reasonably in continuing to rely upon the defendant's representations despite her suspicions.

The same approach may be used in connection with a right-angle collision. Either driver may be asked this question:

Q: Did it occur to you at that point that an accident was about to happen?

If the driver replies no, the answer may hurt her case because the fact finder may conclude that, in view of the circumstances at that moment, the driver should have recognized the risk of an accident and acted accordingly. On the other hand, if the driver answers yes, the fact finder will judge her subsequent actions in light of the concededly recognized risk of an accident. Either way, the opponent has an answer that can be exploited.

The same technique may also be used in a product liability case. In questioning the defendant's safety engineer, plaintiff's attorney may ask the following:

Q: In light of the information available to you at that point, did you give consideration to a modification in the design of the punch press?

If the deponent answers no, she will risk being attacked at trial with "That thought never even crossed your mind, did it?" If the engineer says yes, then she will be forced to explain why, after specific consideration, she made no design change.

This approach can be used effectively in medical malpractice litigation as well. For example, counsel for plaintiff might ask this question of the defendant-treating physician:

Q: When you saw the patient on September 4, 2010, and she had a fever and blood work results that could not be explained by any known condition that you were aware of, did it occur to you at that point that the patient had more than the flu?

Repetition can make such questioning even more effective. Thus, counsel for plaintiff in the same case might follow up this way:

Q: Ten days later, when the same symptoms persisted and the patient made a new complaint about blurred vision, did it then occur to you . . . ?

And so on.

9.09 Establishing the Obvious

There is a tendency to take the obvious for granted and, instead, to focus on the matters that are in dispute. But the obvious can be a powerful force. You should not overlook the opportunity to obtain admissions as to obvious things that tend to support your case. Moreover, at minimum, asking such questions may help to chip away at the resolve of a deponent who has been drilled by her attorney to fight on each and every question you ask. And, if the

answers to a series of questions are so obvious that the deponent feels concerned that resisting them might make her look foolish, the deponent may become less inclined to resist other such questions later in the deposition.

You may ask some questions about the obvious to obtain a good, crisp colloquy with which to cross-examine the witness at trial or to read to the jury. By doing so, you will gain greater control of the witness both at the deposition and at trial. For example, counsel for plaintiff in a product liability case might ask the defendant's engineer:

Q: In designing the universal joint of the steering wheel, did you take safety considerations into account?

Q: Is that because you recognized that a defectively designed universal joint might cause serious personal injuries or death?

Q: Did you take into consideration that a pedestrian such as the plaintiff might be seriously injured or killed if this universal joint were defectively designed and malfunctioned?

In one case, a boiler worker was badly injured when the seam of a cylindrical bin split, spraying his face with ash heated to 500 degrees Fahrenheit. The previously cited Gerald McHugh, who represented plaintiff, used the following litany of propositions (all of which were undeniable because they were set forth in the operator's manual) to obtain control of the defendant design engineer:

Q: This bin holds 95,000 pounds of ash, right?

Q: And it is heated to 450–600 degrees Fahrenheit?

Q: And at that temperature the ash, if set loose, flows like a liquid?

Q: In fact, your operator's manual specifically warns that at this temperature the ash will flow like hot water if it should become loose?

Q: And at another point the manual describes the ash as like molten lava, correct?

Though none of these points was in dispute, McHugh had the sense that, by forcing the deponent to acknowledge the truth of

each one out loud, he had gained a certain control of the deponent. In framing all of his succeeding answers, the deponent would feel obliged to take into account the conceded danger that would be unleashed if a seam were to split. Here, the effective advocate gained an advantage by impressing certain of his strong points upon the witness, just as he would later seek to impress them upon the fact finder.

To state the obvious about the obvious here: particularly if the case is to be tried before a jury, counsel will want to spend time on those obvious points that support her case.

9.10 Inviting the Deponent to Speak

Often in deposing a party-opponent, the interrogator will seek to keep reasonably close control of the deponent to foreclose opportunities for self-serving speeches. But if the questioning is carefully crafted, the interrogator might obtain even more useful testimony by letting the deponent talk.

Take a case in which a female employee alleges that she was the victim of sexual harassment by a co-employee and that she reported the incidents to the employer, who made only halfhearted efforts to correct the situation, with the result that the co-employee's harassment continued. Suppose plaintiff alleges that the first such incident occurred when plaintiff and her co-employee were traveling together on a business trip, that at the end of the first day they went to dinner in the hotel, and that, as they were taking the elevator to their rooms at the end of the evening, the co-employee groped plaintiff.

To put aside any defense that this "after hours" conduct was irrelevant, counsel for plaintiff might ask the following questions of a management-level witness for the employer:

Q: If two of your employees are on a business trip, they are subject to your company's antiharassment policy even after the business day has ended, right?

Q: And if one employee harassed another on the elevator after dinner, that would be a violation of your company's policy, right?

Q: If two employees are on a business trip, your company's policy applies from the time they leave until the time they return, right?

The best the interrogator can hope for is a simple yes answer to each of these questions. While that would be fine, compare the value to plaintiff of the testimony likely to be elicited by open-ended questions, such as the following, that invite the witness to talk:

Q: If two of your employees are on a business trip, does your company's antiharassment policy cease to apply after the end of the business day?

Q: Why does your antiharassment policy apply after the end of the normal business day?

Q: Why does it matter to your company how one of your employees behaves toward another after the end of the normal business day?

Q: Why does your company's antiharassment policy apply from the time your employees leave on a business trip until they return?

Often the deponent in such a situation will give an articulate rationale for his company's policy that counsel for plaintiff can use much more effectively with the jury than a series of self-serving leading questions, each followed by a simple yes.

Another way to prompt the deponent to give a narrative answer that may be useful to you is to phrase the question in a manner that is just the opposite of the way he expected to hear it. An example makes the point. Counsel for plaintiff in an attempted monopolization case might ask the defendant's key witness this question:

Q: When you changed your pricing policy, did you believe that would make it easier for the plaintiff to compete with your company?

If there is no plausible basis for an affirmative answer, the question may come as something of a surprise and elicit a good crisp answer of "no." Then try another question:

Q: Did you believe your pricing policy change would make it harder for the plaintiff to compete with your company?

If that is a more or less an undeniable fact (especially after the "no" answer to the first question), you may well get a good crisp "yes" answer. If you do, then follow up with, "Explain why." In the best of circumstances, the response to that type of question will be a narrative answer that tracks your theory of the case in a detailed and informative way. Indeed, the witness may identify and describe potentially harmful aspects of the new pricing policy that your own client had missed.

Of course, you could skip the prefatory "easier to compete" question and without preamble ask the key "harder to compete" question. But since that's the question the deponent expected to hear the way he expected to hear it, the answer is more likely to be something like, "When we adopted that new pricing policy, we were not focused on plaintiff. Rather, we were thinking about what we had been hearing from our customers and learning from the market as a whole," and so on. Asking the "easier to compete" question first may knock the deponent off script. Just as a slow changeup may throw the batter expecting a fastball off his stride, varying your "pitch" to the deponent can do the same.

9.11
Stepping into the Deponent's Shoes

In preparing for the deposition of an adverse party, you should assume the role of the deponent and think through the deponent's position in the case. Then consider two questions.

First, *what possible actions by the deponent would be consistent or inconsistent with her present claim?* Think about what steps the opposing party would have taken if events occurred as she now says they did. For example, if plaintiff claims that she entered into an oral contract with the defendant—which the defendant denies—counsel for the defendant should ask whether plaintiff arranged to obtain the raw materials needed for performance. Failure to initiate such arrangements would be inconsistent with plaintiff's claim that a contract existed, as would laying off employees who, before the alleged breach occurred, were going to assemble the raw materials.

Similarly, the interrogator should explore what the deponent might have done if the facts were *not* as claimed. To revert to the example used in **7.01 A**, take a dispute between a landlord and tenant as to whether the tenant gave timely notice of his intention not to renew the lease;[14] suppose the tenant contends that he gave timely oral notice and that the landlord assured him that written notice was unnecessary. In preparing to take the landlord's deposition, counsel for the tenant should think through what steps the landlord might have taken if, in fact, the tenant's version of the facts were correct (and, thus, the landlord's version, were not true). Possible actions by the landlord that would be inconsistent with his claim that he never agreed to accept oral notice would include listing the premises with a real estate broker, printing brochures to describe the premises, or showing the premises to a prospective tenant, all soon after oral notice was given. The interrogator should investigate such possibilities at the deposition.

Second, *in what circumstances would it have been in the deponent's interest to take a position inconsistent with her litigation position?* For example, if plaintiff avers that the defendant sold defective goods to her, counsel for the defendant should inquire whether plaintiff attempted to resell the goods. If so, did she describe them as defective? Counsel for the defendant should determine the identities of all prospective buyers with whom plaintiff dealt. Counsel may further inquire about the details of plaintiff's conversations with these buyers. Alternatively, counsel may decide to avoid highlighting the point and instead interview the prospective buyers privately later on.

Or suppose that plaintiff in a product liability suit alleges that a certain component part was defectively designed, causing the machine to malfunction and injure plaintiff. The defendant, the manufacturer of the machine, denies that allegation. Where might the defendant have taken a contrary position? In correspondence and

[14] *See, e.g., Kachigian v. Minnesota*, 320 N.E.2d 173 (Ill. App. Ct. 1974); *Greenwood Land Co. v. Omnicare, Inc.*, 2009 U.S. Dist. LEXIS 74374 (W.D. Pa. Aug. 20, 2009).

conversations with the component manufacturer, of course. Such inconsistency can be the source of devastating cross-examination. Things will only get worse for the defendant if its witnesses seek to rationalize away the inconsistency by saying that the denial of defectiveness in the answer to the complaint and the assertion of defectiveness in correspondence to the component part manufacturer are reconcilable because made in different contexts. The skilled plaintiff's counsel will relentlessly pursue this supposed distinction until the deponent regrets ever having suggested it.

9.12
Exhausting the Deponent's Knowledge

If you seek full discovery of the facts, be careful to exhaust the knowledge of the deponent. In business litigation, for example, if asked who attended a meeting, the deponent may say that she, Mr. Karam, and Mr. Leddy did. The interrogator should persist in asking whether anyone else attended the meeting until the witness says no.

This is harder than it sounds, particularly if the deponent is undisciplined in her thinking and speech. Consider this colloquy:

Q: Who attended the meeting of March 31, 2010?

A: Mr. Karam and Mr. Leddy.

Q: Anyone else?

A: Well, Mr. Hazlett was there for a few minutes.

Q: Anyone else?

A: I don't think so. Do you have a document there that shows somebody else present?

Q: Stick with your recollection. Did anyone else attend?

A: Well, I've told you about Karam, Leddy, and Hazlett. I don't understand what you're getting at.

And so on. Such a deponent can wear down even the most dedicated and meticulous interrogator. It is difficult, but important, not to yield to the temptation to cut corners. Remember that although the deponent may appear to be something of an innocent, she may be holding onto some crucial information that she will not relinquish unless you persist.

In dealing with broader subjects in business litigation, you must be careful to avoid becoming lost in the details of the deponent's answers. For example, the interrogator may begin by asking the witness which meetings she attended on a particular topic. After the deponent gives the approximate date of one such meeting, the interrogator may question her at length about what was said on that occasion. However, when the interrogator completes such particularized questioning, he should return to the general subject and ask whether other meetings on that topic were held. This pattern should be repeated until the deponent confirms that no other meetings were held. The interrogator must concentrate to be sure that he has exhausted all knowledge of the witness about each meeting: who attended, what was discussed, what options were considered, what actions were decided upon, whether there are any documents reflecting the discussions at the meeting, and so on. The interrogator must be sure that he has exhausted the knowledge of the witness, not only about meetings but also about telephone calls and other communications.

The same doggedness is required in personal injury litigation. Suppose the defendant's design engineer in a product liability suit knows that model 4058A (the model of the product that injured plaintiff) has a perfect safety record, but that model 4058B has been involved in four fatal accidents, and that the only difference between the two models is the immaterial fact that 4058B has a vinyl sheeting cover while 4058A does not. The engineer may well strive to limit his answers to 4058A. In that event, counsel for plaintiff is not going to find out about the 4058B fatalities unless she is thorough and careful (or just lucky).

One case involved a collision in the middle of the night between a tractor-trailer, which was making a left turn to its terminal a block away, and a motorcycle. Plaintiff's motorcycle collided

with the very front of the tractor, right between the headlights. Plaintiff was left a quadriplegic and had no memory of the accident. The only witness was the driver of the tractor-trailer. Counsel for plaintiff took the driver's deposition, but his testimony was in all respects exculpatory. Thus, counsel for plaintiff had a case involving an extremely serious injury but no liability. As the deposition of the driver was about to conclude, counsel for plaintiff thought of one more question. The testimony went this way:

Q: Did you have your headlights on?

A: No.

It turned out that, as an accommodation to the homeowner on the far left side of the intersection (whose house would be illuminated as the tractor's headlights swept by), the driver would extinguish his lights before making his left turn toward the terminal. The driver was not going to lie about that, but he was not going to volunteer it, either. Hence, a no-liability case became an extremely strong liability case. But the question should not have been an afterthought. Thoroughly prepared counsel should have had the question on the outline going into the deposition.

9.13 Getting the Most Out of a Good Answer

If you get an answer from an adverse deponent that is helpful to your side of the case, think whether there's a way to break the answer down to maximize its impact. For example, take a case in which, as a precondition to closing on a contract between A and B, B agrees to use its best efforts to obtain a judicial ruling on a certain issue within nine months. If such a ruling is not obtained within nine months, then by its terms, the contract between A and B terminates. Although B files the necessary declaratory judgment action, and soon thereafter moves for summary judgment in its favor, B then permits the motion to languish and, as a result, the nine-month period expires and the contract terminates. A then

sues B for breach of the duty of good faith and fair dealing, alleging that B deliberately allowed its motion to slip into limbo because, for reasons unknown to A, B had secretly decided not to go forward with the business deal with A.

At her deposition, B's key witness denies that B either allowed the declaratory judgment action to languish or decided not to go forward with the A/B deal. Instead, B's witness asserts that B took no action to remind the court to order the briefing schedule only because of B's alleged concern that doing so might well be seen by the judge as hectoring, which might cause the judge to deny B's motion for summary judgment out of pique. Just those basic facts are very helpful to A's case because the idea that the court would see a single, respectful reminder in a matter of considerable urgency as inappropriate nagging (enough so that the court would deny the motion without regard to its merits) seems quite implausible. The interrogator might be content, perhaps very content, with that testimony and move on. But, instead, in the actual case on which this example is based, he followed up this way:

Q: So while you were waiting for the judge to issue a scheduling order and it got to be *a month later* in October, did you give any thought to the possibility that the court had simply lost track of the motion so someone should write a letter?

A: Again as I explained earlier, we believed that the court would pick up the matter in due course and enter the scheduling order.

Q: How about November, that's *sixty days later*. Are you still waiting for the court to pick it up in due course?

A: Yes.

Q: And in December, that's now *ninety days later*, still waiting for the court to pick it up in due course?

A: Yes.

Q: In January, that's now *one hundred twenty days later*, still waiting for the court to pick it up in due course?

A: Yes.

Q: And February, *one hundred fifty days later*, still waiting for the court to pick it up in due course?

A: Yes.

Of course, there is always the risk that the result of such detailed questioning will be that the witness will start to rationalize and give some stronger explanation for the course chosen and that you will lose the admission you had in hand. As in so many instances in questioning a witness, you have to trust your instincts.

Or take a case in which plaintiff alleges that while working from 1978 to 2008 in the defendant's chemical research facility as an independent contractor (not as an employee, thus explaining why he is not subject to workers' compensation limits on recovery), he was exposed to fumes from certain chemicals, particularly A, B, and C, as a result of which he developed esophageal cancer. Assume that plaintiff's expert toxicologist is asked at his deposition whether he has any information as to plaintiff's level of exposure to each of those chemicals at any time during that thirty-year period (1978 to 2008), to which he answers no. The interrogator might well decide to leave it at that. But consider how much more effective the following series of questions is:

Q: Take chemical A. For the period from 1978 to 2008, do you have any information tending to show the level of the plaintiff's exposure to such chemical at any time during that time?

Q: More specifically, do you have any information to show how many parts per million of chemical A were in the plaintiff's breathing zone at any time during the period from 1978 to 2008?

Q: If the plaintiff was in fact exposed to fumes of chemical A at some time during the period from 1978 to 2008, do you have any information tending to show whether it was ever above Threshold Limit Value (TLV)?[15]

Q: Now, take chemical B. For the period from 1978 to 2008 . . .

[15] TLV is set so that a worker can work with exposure to a chemical at that level for eight hours a day, five days a week, for a lifetime without encountering a health risk.

And so on. Assuming that the deponent answers no to all of these questions, the resulting transcript will not only make the defendant's point better, but it will also be far more difficult for the deponent to wriggle out of at trial.

Again, there is the risk that, instead of making things better, you will make them worse—that is, such detailed follow-up questioning may prompt the witness to recall something he read or heard about chemical A and to begin to speculate that he has seen such evidence even though he cannot recall it very well. And so, again, you risk losing the admission you had. And, again, you must trust your instincts.

9.14 Delving into the Deponent's Preparation

In addition to questioning the deponent on substantive topics, you will usually inquire how the deponent prepared for the deposition. Of course, the attorney–client privilege will protect the substance of communications between the deponent and her lawyer, and the work product doctrine, in certain circumstances, will protect the lawyer's selection of documents for the witness's review.[16] Without trespassing into privileged areas, however, you may ask questions such as the following:

Q: How many preparation sessions did you have with your counsel? How long did each last? Who else attended the sessions or any part of them?

Q: Did you review documents? That you selected? That your lawyer selected? How many? Where did they come from?

[Confirm with the deponent's lawyer that they have been produced.]

Q: What documents did you review?[17]

[16] See discussion of *Sporck v. Peil* and related cases in **18.02** and **18.08**.

[17] See discussion of Fed. R. Evid. 612 in **18.08.**

Q: Did you talk to anyone other than your lawyer to prepare for the deposition? With whom? What was said?

Q: Did you review transcripts of other depositions in the case? Or watch any videos? Which ones?

Q: Did you see any testimony with which you disagree or that you think is inaccurate?

[This question may raise an objection that the witness cannot possibly respond with respect to hundreds of pages of transcript, but it sometimes elicits a useful response.]

Interrogation about preparation for the deposition may uncover information about documents and witnesses that have not previously been identified. The extent of preparation may also affect the credibility of the deponent when she testifies at trial.