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Depositions for Safety Professionals

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Introduction

As a society we generally do not condone or accept vigilantes. The emphasis in modern society is that people will instead resort to the law. On the criminal side there are the police and other law enforcement agencies with a duty to address the criminal wrongs perpetrated against a person, group, company, etc. On the civil side persons must enforce for themselves by way of civil actions.[3] These civil lawsuits can be in regards to almost anything.[4] Examples include such things as odors emanating from the neighboring facility, dissatisfaction with an equipment purchase you made or with the services provided by a safety consultant you retained, or a workplace injury.

The litigation process is filled with rules and processes. A mistake in some of these rules/processes can result in the loss of a case. One of the most basic (and longest) processes of civil litigation, and also perhaps the most important, is that of discovery. One of the methods of discovery is that of an oral deposition.[5]

This paper provides a brief summary of discovery and then discusses oral depositions in detail. For the vast majority of people, oral depositions are extremely stressful, unnatural, and disconcerting. Due to the very nature of our profession, safety professionals should not be surprised to be subpoenaed for a deposition at one or more points in their career. Regardless of the unnatural nature of depositions, they can be managed and persons can even excel at performance in depositions. Using attorney goals for depositions as a backdrop, this paper will

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[1] Nothing herein is intended to be nor should it be construed as presenting legal advice. Legal advice can only be provided by counsel admitted in the jurisdiction and with a specific understanding of the facts being considered. Legal advice cannot be provided as a generality and nothing herein should be considered to establish an attorney client relationship.

[2] All information and opinions expressed herein are the sole work of the author and do not represent New York City, the New York City Department of Environmental Protection, or any official, agency, or any other New York City employee or official.

[3] Civil Action: Action brought to enforce, redress, or protect private rights. (Black 245)

[4] And many would argue that these civil suits are brought far too often which has led to numerous calls over the last decade for various forms of reform.

[5] Criminal prosecutions utilize a different process but the overall goal of sharing all "discoverable" material remains. Depositions, while unusual in criminal proceedings, are still used to preserve testimony.

provide an understanding of what comprises a successful deposition and provides means and methods to achieve that success.

Discovery[6]

Despite the general appearance on television shows, the United States legal system does not like trial surprises. Two of the primary purposes of discovery are to eliminate surprise and to encourage settlement. Winning at litigation is not supposed to be about who can hide information/facts/witnesses/etc. better. Discovery is fashioned around the belief that if the parties have the same information, they are more likely to reasonably value their case and are therefore more likely to be rationale in reaching a settlement. To ensure this happens, the Federal Rules of Civil Procedure[7] provide for a very broad discovery, stating that a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense".[8] The common forms of discovery include interrogatories;[9] physical and mental examinations; admissions; inspecting land, real property, stored information and documents; and depositions by either oral or written examination. For the person or persons subject to discovery, the oral deposition is the discovery method considered most difficult, as it is conducted "live" and has the appearance of an interrogation where your thoughts, beliefs, and prior actions are questioned. The remainder of this paper focuses solely on oral depositions.

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[6] Discovery: In a general sense, the ascertainment of that which was previously unknown; the disclosure or coming to light of what was previously hidden; the acquisition of notice or knowledge of given acts or facts; as, in regard to the "discovery" of fraud affecting the running of the statute of limitations, or the granting of a new trial for newly "discovered" evidence.
Trial Practice. The pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial. Under Federal Rules of Civil Procedure (and in states which have adopted rules patterned on such), tools of discovery include: depositions upon oral and written questions, written interrogatories, production of documents or things, permission to enter upon land or other property, physical and mental examinations and requests for admission. (Black 466)

[7] Individual jurisdictions each have their own set of rules for civil procedure. The Federal Rules are often used as the basis the state rules and are therefore used herein to present an example. Any questions about the rules in a jurisdiction in which you are subpoenaed should be addressed with local counsel.

[8] Federal Rules of Civil Procedure (FRCP). 2010. FRCP 26 (b)(1), Duty to Disclose; General Provisions Governing Discovery (retrieved March 3, 2011) (http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf)

[9] A set or series of written questions drawn up for the purpose of being propounded to a party, witness, or other person having information of interest in the case. (Black 819)

Depositions[10]

Depositions can be conducted by either oral or written examination, although deposition by oral examination is more common. Since it is estimated that less than 10% of all cases go to trial, for the vast majority of witnesses the deposition will be the only time they are in the "hot seat" and questioned by an attorney (or attorneys[11]). Additionally, when compared to trial testimony (as a witness on the stand), depositions last longer, have fewer rules, can be more confrontational and argumentative, and can cover a much wider range of information and knowledge. Each of these elements contributes to making oral depositions extremely difficult and stressful for the vast majority of deponents[12].

The general perception is that witnesses that are not a party to the suit do not have an interest or "side" in the suit. While there is a level of truth to that perception, the usual truth is that every safety professional being called as a witness has at least a personal interest in appearing professional and knowledgeable and does not desire to be perceived as a potential cause.

Despite the difficulties of depositions and stress suffered by most people (perhaps professional witnesses being one of the few exceptions) it is possible for the average safety professional to perform acceptably and even to excel. To achieve these goals it is useful to first understand the purposes for which attorneys utilize depositions.

Use of Depositions

When deposing witnesses attorneys are usually looking to achieve one or more of ten major goals.[13] Understanding these goals provides both guidance and insight into being a good deponent.

Goal #1: The attorney wants to gather information. This is the overall goal of discovery. The attorney wants/needs to learn everything that you know that may be relevant to this case. This may be information direct to the issues of the case or may just lead to other sources of information. You should expect that the attorney will make notes of every new fact you say or every new issue you might mention (or imply) and they will then ask an entire avenue of questions to follow that new item/issue until the attorney is satisfied they have exhausted your knowledge (or that it is not an issue). It may surprise many deponents to know that attorneys often walk in to a deposition with only a few questions written down or just a few general areas to be questioned, and they expect that the answers to those few items will create the avenues for further questioning.

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[10] The testimony of a witness taken upon oral question or written interrogatories, not in open court, but in pursuance of a commission to take testimony issued by a court, or under a general law or court rule on the subject, and reduced to writing and duly authenticated, and intended to be used in preparation and upon the trial of a civil action or criminal prosecution. A pretrial discovery device by which one party (through his or her attorney) asks oral questions of the other party or of a witness for the other party. (Black 440)

[11] Safety professionals that serve on the plaintiff's side in large lawsuits, such as the asbestos cases, can often find 100 or more attorneys waiting to ask questions at a deposition.

[12] Deponent: [o]ne who gives under oath testimony which is reduced to writing. . . . (Black 438)

[13] (Babitsky 18-33) While these are only general rules of thumb they do embody the primary purposes for which most attorneys utilize depositions.

Goal #2: Lock in the testimony. Whether an expert or a factual witness, attorneys do not want to be surprised at trial. The attorney wants to know what you are going to testify to, or in the alternative they want to be able to impeach your testimony at trial if you do you change your story. Changing testimony later, when done poorly, can very quickly destroy a witness' credibility (see goal #5 below). The attorney may also be looking to secure and lock-in testimony which may not be available later.

Goal #3: For expert witnesses (or any other witness that may be allowed to express an opinion) attorneys want to learn those opinions. This includes the basis of opinions, methodologies, testing, evaluations, whether you'll change (or have changed) your opinion(s), etc.

Goal #4: For expert witnesses and where otherwise appropriate, the attorney wants to determine your qualifications, training, experience and expertise.

Goal #5: The attorney wants to evaluate the witness' probable credibility. At trial, how witnesses are perceived can be more important than what a witness says. One of the largest elements of perception is credibility, so it is important for an attorney to determine how opposing witnesses will be perceived.

Goal #6: The attorney wants to probe for a real or perceived bias on behalf of the witness. (Example: the "professional" witness that has testified 100+ times and has never testified that a safety professional made a mistake.)

Goal #7: The attorney wants to determine what, if any, factual assumptions your testimony is based upon. This is most important where the two opposing parties disagree on the facts, especially if the facts disagreed upon are the basis of your testimony and your testimony would change to more closely match the attorney's case if the facts are as the attorney alleges. It is of immeasurable value for purposes of settlement or in front of a jury when there is the perception the expert is agreeing with opposing counsel's conclusions.

Goal #8: An attorney wants to probe if your opinions are able to help his case. Often, witnesses agree on numerous facts, so having an opposing witness agree to your facts is particularly significant in front of a jury. Also, you may have information or opinions of which the attorney is unaware and can be used to bolster or establish his case.

Goal #9: The attorney may seek to intimidate and/or disorient the witness. This is both a goal and a tactic. Intimidating or scaring the witness may make them vulnerable at trial. But as a tactic, having a witness disoriented, scared, stressed, angered, etc. is of immeasurable value. When a witness is in that condition, the witness is unlikely to think before answering a question; they essentially blurt out "stuff," some of which the attorney may not have thought to ask, may not have known to ask, didn't even know about, etc. Some novice witnesses think that simply saying everything they think they know as quickly as possible will get them out of the deposition quickly; the opposite is usually the result as the attorney will now need to probe every element, fact, issue, etc. that you raised, many of which the attorney was unlikely to have asked about if you had not raised.

Goal #10: Where possible, the attorney wants to learn as much as possible about the opponent's case. This will especially true of expert witnesses who are being called to substantiate

the opposing attorney's case. It is a natural response for a person to explain and educate those who may not know your subject matter. Open-ended questions or feigning ignorance play both to a witness' vanity and for their willingness to teach and are both common attorney tools.

An attorney may have one or more goals in any given deposition. The fact of the matter is that an attorney is out to win their client's case, and a win is a win, no matter what technique achieved that victory. The attorney is likely to attempt the goals that are most in-line with the strengths/weaknesses of their case and their overall strategy. Trial attorneys may not understand the technical aspects of health and safety that you discuss, but they are very good at having witnesses disqualified (or at least discrediting witnesses). For example, a Certified Industrial Hygienist was amused to tell me about a two-day, 14-hour deposition which consisted of more than 12 hours of the attorney probing every line of the CIH's CV, and the very small remainder of time was spent on questions in regards to his opinions in the case. The case was settled quickly thereafter in favor of the CIH's client; this attorney was clearly going after goals 4 and 5, which when combined with the quick settlement indicates he did not have a strong case but still had a strategy of attempting to undermine the opposing expert witness. When this fails, the overall goal of discovery is achieved because it allows the attorney to truthfully and rationally settle the case for an amount, that while likely below or on the low side of the initial valuation, is likely a reasonable settlement to the impartial observer.

Trial strategy is about winning, and winning by disqualifying the opposing expert counts the same as winning the same case by convincing the jury that your side is correct. Understanding these goals, no type of "odd" deposition should surprise an informed witness and allows deponents to set a path for success.

Achieving Success

For many witnesses, simply being done with the deposition is success. However, there is much more to consider than merely finishing the questioning. Being personally accused of perjury, violation of a non-disclosure agreement, improper release of trade secrets, etc. or having complaints and charges brought to your professional licensing board are all possibilities by simply getting to the end of a deposition as fast as possible and without thought.

Simply because you are not a party to the litigation does not mean that the deposition can have no impact upon you personally. (Example: An injured worker of a subcontractor is suing the prime contractor for negligence in failing to properly oversee the activities of its subcontractor in regards to fall protection. You are the regional CSP for the prime contractor and at deposition you state that during your bi-weekly site visit you always inspect the fall protection equipment and program implementation. You further admit that when you observe deficiencies during your site walk you do not include them in your written report to the General Supervisor when the deficiencies are identified as belonging to another contractor or a subcontractor. You generally mention these where there could be the perception that you have an involvement can cause a feeling of impending concern with the upcoming deposition. (Example: You are the Corporate Safety Officer for the prime contractor in the prior example and you developed the overall Fall Protection program. You may never have been on site nor observed the conditions but may be subpoenaed to be deposed in regards to the fall protection program and the training and requirements provided to your regional CSPs.) There is also the very normal concern that poor

performance at the deposition could affect your employer and hence your employment status and the overall desire to perform well should be self-evident.

Success in a deposition is not some lofty goal. Rather, it is merely measured as your ability to minimize your stress and anxiety while also ensuring that you perform in accordance with the legal requirements.[14] The next two sections will provide methods of achieving this level of success, specifically, preparation and how to answer questions.

Preparation

Preparation is immeasurable in providing a deponent a comfort level, yet it is surprising how often attorneys neglect to take advantage of this opportunity. Attorneys experience depositions as a normal course of their work, so they know the type of questions to expect and find very little anxiety or stress and often have difficulty in relation to deponents that may not feel the same way. Expert witnesses can often choose the attorneys they work for and many factor how an attorney prepares their witnesses into whether to accept work. Most witnesses don't have that option though. Preparation for the deposition serves two main purposes: preparing the witness for the types of questions to be asked or the specific issues for which they have been sent to address, and providing a level of comfort to the witness to allow them to focus on simply answering the questioning.

Preparation includes what, if any, documents or subjects you need to review for your deposition (or if you need to provide documents at your deposition). In many instances, an attorney may request the name of a person that has knowledge of and can address specific issue(s) in regards to the case. (Example: The attorney in the fall protection example above may request a person that can speak to the corporate fall protection program, training of the regional CSPs, and corporate requirements for biweekly site inspections.) If you have been identified, then you need to be prepared and have reviewed any necessary documents to discuss the issue(s) for which you have been identified.[15] (NOTE: Document review prior to deposition can be a tricky subject and should be discussed with counsel as they may have specific documents for you to review and specific documents for you not to review.) If you have a deposition upcoming and the attorney is not contacting you to prepare then you need to take the initiative. Explain your concerns; at a minimum your attorney can explain the questions that are likely to be posed which by itself can provide a level of comfort. A good attorney will spend the time necessary to not only prepare the witness for the types of questions but will provide the witness with a comfort level that the witness only needs to truthfully answer the questions (as discussed below) and the attorney will take care of everything else.

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[14] Note that for expert witnesses and even for some factual witnesses attorneys (and perhaps employers) will expect you to perform beyond the "minimum". In other words, they will expect you to answer questions well and not just "in compliance". While expert witnesses clearly have a side in the case, even the normal safety professional has a side, their own (which often matches their employer). No safety professional wants to sail in their job or their safety responsibilities nor do they want to feel that their abilities or performance is being questioned.

[15] Showing up unprepared when you have been identified as the person to speak to one or more issues is a good way to turn a deposition into a confrontation which could lead to sanctions and/or a return trip for a second deposition.

Answering Questions

The simplest (and shortest) advice in regards to answering questions at a deposition is to "tell the truth, briefly".[16] While that very brief statement sounds simple, it does not provide a roadmap on how to achieve. Truthfully answering the question asked and answering briefly is not a skill most people ever practice or perform. There are three basic elements to answering a deposition question: listening, understanding, and answering the question in the context of a legal proceeding. While these steps sound very simple, they are not how most people have discussions in their normal life, which creates the difficulty in achieving these steps for the few depositions you may ever experience. But even more basic than how to answer deposition questions is how to reach a level of comfort and ease by establishing the pace of the deposition.

Controlling the Deposition

Depositions are controlled by the attorney calling for the deposition. Regardless of this fact though, deponents can exert a significant (and reassuring) measure of control. This measure is necessary to allow a deponent to remain calm in the face of what appears to be endless questioning. The most important way of exerting control is through the pace of the questioning. Attorneys can blurt out questions as fast as they want (which can achieve goal #9 above), but a thoughtful and careful deponent will allow for a pause between question and answer (a second reason for this will be discussed below[17]) and will then answer in their own calm pace. Responding to an attorney's quickened questioning by increasing the pace of your answers can only favor the attorney by raising stress levels and reducing the amount of time you have to think and process the questions being asked.

Listen

Think back to the last question and answer type conversation you had. Did you really listen to *every* word of the question or did you already start formulating the response (or perhaps even start your response) as soon as you thought you knew what the person was asking? For most people, common conversations are more like *Jeopardy*, where giving the response quickly is more important than understanding every element of the question. We expect that the person questioning will simply ask a follow-up question if we don't respond to all the elements of their question. This is exactly the approach that a deponent should not take.

Some attorneys call it active listening, but essentially a deponent must listen to every word of a question. For most people that must mean that they are alert and not tired, do not have personal issues on their mind, and are truly focused on the question and only the question. (TIP: At deposition you can request breaks as needed. Many people find an hourly five-minute break to get up and walk around effective at keeping them alert. Also, be careful of the post-lunch and late afternoon doldrums.) You need to embody the anti-*Jeopardy* approach to listening. There is no effort to do *anything* but listen at this point in the questioning; ignore any attempts by your mind to begin dissecting what is being asked, to think why it is being asked, or what might be your response. Listening and hearing every word of the question is your only goal when the attorney is asking a question.

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[16] (Schwab 54)

[17] A third reason which is outside the scope of this paper is to allow your attorney a chance to object. As a procedural matter, objections are very limited at depositions (remember the "broad" nature of discovery) but listening to an objection may point out "issues" with the question that you did not detect.

Understand

Once you have listened to every word of the question, you are prepared to decide whether you truly understand what is being asked. You must have heard *every* word of the question in order to understand that question. The words also need to be understandable; so you need to identify "buzz" words that may not have an exact meaning. (Example: "Was that condition safe?" Answering that question indicates that you agree with the attorney's definition of "safe," which you likely don't know.) You need to understand the question actually asked, not what the attorney might have meant. (Example: "Do you know the time the accident occurred?" is asking if you know the time, not what time it occurred.) This is very dissimilar to answering questions in your normal day-to-day life. The vast majority of people when asked by someone "Do you know the time?" will respond with the correct time, not "yes" or "no" (though the "yes" or "no" is the correct answer to this question).

Attorneys are usually not just reading questions off of a sheet of paper so often don't know the exact nature of their question until after they have already started asking the question. It is not surprising that attorney's questions at deposition are often rambling, restart, or have multiple negatives. While it is difficult for most people, unless you have a 100%, complete understanding of the question, you should not answer the question. If you don't understand the question the correct answer is to say "I don't understand" or "could you ask that again". The incorrect way to answer the question is to respond "did you mean xxxxxx or did you mean yyyyyyy" or to just start responding to what you think the attorney might want to hear. If the attorney is using buzz words, a correct answer would be "what is your definition of safe" or "safe means different things to different people, can you tell me what you mean by safe so that I can answer that question".

The attorney's job is to ask a clear and understandable question. The deponent's job is not to lead the attorney or provide them possible options about what they might want to ask. A good deponent does not provide extraneous information in response to a question. Remember, "Tell the truth, *briefly*".

Answer in the Context of a Legal Proceeding

Once you have listened and understood the question, the final step is to answer the question. The first element of answering the question is determining whether you know the answer. If the question is asking "do you know," they are asking if you have firsthand knowledge. If you have personally experienced, then you have firsthand knowledge. But if the only knowledge you have is secondhand (Example: someone told you that there was a report that the scaffolding was unsafe) then you do not *know* that the scaffolding was unsafe. But if the question is asking "have you heard" or "are you aware" then it is asking for secondhand knowledge.

Because this is a deposition, that answer must be *in the context of a legal proceeding*. This means actually answering the question asked (since you understood it) without humor, sarcasm, commentary, etc. This also means that you will not guess, estimate, speculate, recall "as best as you can," use superlatives, etc. unless you are specifically asked to do so. If you do not know the answer then the response is "I don't know". If you think you knew the answer at sometime in the past but you aren't sure now then the response is "I don't recall" or "I don't remember". You should also avoid the use of absolutes unless you *know* there are no instances in which case that absolute may not be true. (Example: If asked "Did you check the scaffolding before it was used on the day of the accident" do not respond "Yes, I must have, because I always check the

scaffolding before allowing anyone on it" unless you know that there has never been a case where this is not true.)

When you respond to a question that you do not recall or do not remember, an attorney may attempt to refresh your recollection by providing you one or more documents. In those cases, completely review the document(s) and then return or turn over the documents. If the document refreshed your recollection, then you can now answer the question. Do not assume that you recognize the document and know what it says without completely reviewing the document.

The final element of answering in the context of a legal proceeding is to be careful of how you respond to questions that might be understandable but where there may be "problems" with the question. Compound questions (more than one question), questions that have an inherent assumption (Example: When did you stop beating your spouse?), questions with improper predicates (Example: "The workers were using the unsafe scaffold starting on March 4; what steps did you take to stop the use?"), questions with alternative answers (Example: "Was the loading on the scaffold member heavy or light?"), leading questions, and attorney paraphrasing are all problem questions. Be as accurate as you can in your response. If you can't answer the question the way it was asked then that is your response. Qualify your response as necessary. (Example: "I would not say it that way" in response to an attorney paraphrasing.)

The embodiment of the above steps in answering in the context of a legal proceeding can be observed in the seven most common answers to deposition questions:[18]

1 & 2: Yes and No. (If the question is a yes or no question, then the correct response is yes or no, unless you have to respond that you don't know or can't recall.)

3: Green (This answer is not actually green but is a reminder to keep answers short. When asked the color of something the correct response is "green" or "greenish" not "a shade of green but with a little bit of grey sort of like that car that Chevrolet advertised during the Super Bowl; you saw that ad right?")

4: I don't know.

5: I don't remember.

6: I don't understand the question.

7: I need a break.

The above steps seem overly simple, but due to the differences from how people typically act in their normal lives they require preparation in order to succeed. Preparation is required not only for the deposition but in each of the steps of answering questions. A good attorney should provide both the preparation and practice necessary to achieve success, and expert or frequent witnesses should seek out opportunities to practice these skills.

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[18] (Schwab 58)

Conclusion

Today's litigious society along with the nature of the safety profession result in the fact that many safety professionals will, at some point in their career, be subpoenaed to be deposed. Lawyers have many goals in deposing witnesses; some are intended to gather information and others are intended to determine whether witnesses are credible and qualified or whether the witness (and subsequently the witness' testimony) can be undermined. Answering questions in depositions is unlike typical conversation and can be stressful and complicated, which is a barrier to safety professionals performing well. However, utilizing simple rules of preparation and answering of questions can allow a safety professional to achieve success in even the most difficult of depositions.

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