Depositions: An Overview

1. Preliminaries

Purpose of the Deposition

By the time you begin to prepare for a deposition, you should have completed a significant amount of preliminary work. During overall discovery planning you should have decided about the general purposes of all the depositions in your case. When preparing for each deposition, this process should be refined until you have defined the deposition's purposes and goals.

Generally, depositions are useful for two related reasons. They permit the discovery of information directly from witnesses, unfiltered by lawyers, and they create a record of people's recollections that can be used as evidence in motions and at trial. Seldom will a deposition be used just to discover information. Frequently, the deposition will be used to support a motion, to provide a foundation for an expert's opinion, or to cross-examine a witness.

For discovery purposes, are you seeking names, dates, places? Are you seeking to have documents produced and/or explained? Are you looking for an agency to explain its policy? If so, are you thoroughly familiar with the applicable statues or regulations? Is a primary goal to observe the deponent and/or the opposing counsel? If so, what specific information do you hope to gather about their style or reactions? Do you think the adverse party may be intimidated by court proceedings and thus be forced to settlement?

If you are seeking to preserve specific testimony, is it because a witness may not be available at trial? Are you seeking to fix the deponent's story to narrow the adverse party's arguments? Are you looking for impeachment nuggets? Are you hoping to get conflicting testimony? If so, what will such a conflict mean in your case? Do you need specific testimony from the deponent in order to eliminate the need to marshal complicated evidence elsewhere such as multiple-custodian business records to prove some element of your case?

You must be able to answer questions such as these to be able to plan intelligently for the deposition. All other decisions hinge on these answers.

Who Will Be Present

Another important phase of preliminary work is in preparing those who will accompany you to the deposition. Someone should always accompany you. Your job is to concentrate on the interaction between you and the deponent, remaining alert to subtle factors such as momentum and evasiveness, etc. You will be listening to the answers for the implications they have for your continued line of questioning. Someone must be listening to you, objectively noting whether your questions are clearly stated and keeping track of the case so as to alert you to areas you have failed to cover sufficiently. Your partner should also remind you to identify documents for the record. A partner is

imperative if your deposition strategy is to move from one subject to another to head off the effects of your opposition's preparation. Your assistant should be someone who understands the case and understands your deposition goals. It may be co-counsel, another attorney or a legal worker who is familiar with the case. You also may want your client to be present, which may make the other side slightly uptight. Be sure to prepare your client extensively so that they understand the deposition's purpose and procedures.

Practice Rule: Check applicable Rules of Civil Procedure or Court Rules to determine who can attend depositions other than the parties. In California courts, all witnesses but parties may be excluded. Code of Civil Procedure § 2025.330(d) (depositions proceed as permitted at trial); Evidence Code § 777 (at trial, court may exclude all witnesses except parties)

When to Depose

If fixing testimony is your goal, consider deposing as early in the suit as possible. The longer you wait, the more time opposing counsel has to study your case and advise the deponent. An early deposition may catch the opposition off-guard and produce more candid responses. For example, multiple depositions conducted to obtain conflicts in testimony should be conducted close together, if possible on the same day.

On the other hand, depositions may be ineffective ways to learn about your case. If your goal is to obtain information, you will be in a much better position to ask appropriate questions and recognize incomplete answers if you have investigated the case. Similarly, when the crux of a case is a policy or action for which only the deponent is responsible, thorough investigation should build to that person's deposition.

When dealing with ongoing policy and its effects, the advocate must also consider the effects of the deposition's age at the time of trial. Consider:

- An early deposition records an immediate intent to change the challenged policy. At trial no change has taken place;

- An early deposition records a policy explanation that is damaging to your clients. At trial some policy has changed.

In the first instance, the deposition is strong evidence that no change is imminent and court action is appropriate. In the second instance, the court might well adopt a "wait and see" posture, forcing you to abandon your deposition and document the effects of the "new" policy.

Where to Depose

The party noticing the deposition may choose the deposition site within mile limitations in the civil procedure rules. Strategically, site selection depends largely on the deposition's purpose. If the information you seek requires a relaxed deponent who is willing to ramble on, the setting should be one in which deponents are comfortable — maybe their home ground. Depositions of agency officials are typically conducted at their offices, where they have access to relevant records.

If the deposition's purpose is best served by catching the deponent off-balance, then forcing a visit to a neighborhood legal services office may be ideal for accomplishing this goal.

Practice Rule: In California**,** Code of Civil Procedure § § 2025.250; 2025.260 govern location and distance.

2. Going on the Record

Preliminary Matters

Before going on the record, make sure the court reporter is settled and comfortable – offer coffee, tea or water, give the reporter a pleading or motion that contains the case caption, your name and contact information and a glossary of any acronyms, abbreviations and technical terms you may use. Indicate where opposing counsel and the deponent should sit. If you've asked the

other side to produce documents, copy them before the deposition gets started.

Then signal the recorder to begin. Identify yourself, the purpose of being present (taking the deposition of Ms. X), and the time and place of beginning the deposition. Have the reporter swear the witness. Identify everyone else present.

Stipulations

The California Civil Discovery Act allows parties to modify discovery procedures by written stipulation. Code of Civil Procedure §2016.030. It recognizes that just because the code sets forth a particular procedure does not mean that it is the most practical or convenient in a given situation. For example, you may need to expedite a transcript (one or two days) to use in support of a motion. A practical solution is to agree to allow the deponent to promptly review, correct, and sign the transcript within 1 or 2 days rather than the 30 days directed by § 2025.520. Usually at a deposition's beginning or end, attorneys may ask for the "usual stipulations", which may include these agreements:

1. Waiving objections to the reporter's qualifications
2. Waiving objections to defects in the deposition notice
3. Preserving until trial all objections except as to form
4. Waiving the deponent's reading and signing the deposition.
5. Relieving reporters of their statutory duties under the code

Practice Rule: Never stipulate to anything unless you understand what you are agreeing to and have spelled it out on the record. As part of your preparation, write out any stipulations that you need and anticipate any stipulations that the other side might ask for.

Stipulations #1-2

California rules cover the substance of these stipulations as follows:

Code of Civil Procedure § 2025.320(e) provides that objection to deposition officer qualifications is waived unless made before the deposition begins or as soon as the grounds become known or could be discovered by reasonable diligence.

Code of Civil Procedure § 2025.410(a) provides that any errors or irregularities in the deposition notice are waived unless a party objects in writing *at least three days* before the deposition.

Stipulation #3

Code of Civil Procedure § 2025.460(b) waives errors and irregularities of any kind that might be cured if promptly presented unless a specific objection is timely made during the deposition. These errors and irregularities include, but are not limited to, those relating to the

• manner of taking the deposition,

• oath or affirmation administered,

• conduct of a party, attorney, deponent, or deposition officer,

• the form of any question or answer.

Note that § 2025.460(b) reserves all evidence objections except those that can be "cured" if made at the time. In other words, if the problem is fixable at the deposition, the objection is waived if it's not made then.

Why shouldn't you stipulate to preserve all objections except as to form? Look at the list again: more things can be fixed at the time than just the form of a question. And this list is illustrative only – § 2025.460 says "These errors and irregularities include, but are not limited to".

Agreeing to this usual stipulation preserves more of your opponent's objections than is question form. Are you sure you want to do this?

Stipulations #4-5

Don't waive the requirement that deponents read and sign the deposition. It makes it a lot easier

for deponents to deny their statements when you try to impeach them at trial.

Waiving the reporter's statutory duties also is not a good idea. This stipulation waives the reporter's statutory duty to accurately transcribe testimony, certify that the deponent is duly sworn and that the transcript is a true record of the deponent's testimony. § 2025.540(a). Court reporters also must keep transcript notes for 8 years for untranscribed depositions; 1 year for transcribed. § 2025.510(e).

In *The Dangers of the "Usual Stipulation" in Deposition Practice*[1], author Stephen D. Archer dissects the usual stipulation on waiving a court reporter's duties and a deponent's obligation to review and sign the deposition within a certain time limit. He argues that this common stipulation may leave to chance (and your opponent's good faith) whether the deposition can be used at trial. He offers a thoughtful and more effective alternative.

Introduction

The introduction's purpose is to record that the deposition procedure was explained completely to the deponent and ample opportunity was given for the deponent to fully explain. An effective introduction diminishes the any attempt to explain away answers at a later date.

Practice Rule: Use a series of short, crisply worded questions rather than getting assent to paragraphs of text. Get an audible response from the witness to each question. For example, "I am going to ask you some questions about the subject of this lawsuit. Do you understand that?" "You have taken an oath to tell the truth. Do you understand that?" And "If you don't understand a question, will you tell me?"

Preliminary questions like these help set the tone for the entire deposition, making it clear who's in charge.

This kind of introduction allows you to effectively impeach witnesses when they testify inconsistently with their deposition testimony. Conclude with "Do you understand the procedure? Is there anything I said that you don't understand? Do you have any questions?"

It bears repeating that head shakes are seldom audible on the written record.

3. Style of Questioning

Some lawyers write out their deposition questions ahead of time because it lessens the chance of failing to cover all important areas. Others suggest preparing an outline of important areas, but insist that the specific questions should be formulated in response to the deponent's answer patterns. This latter technique may help you listen more attentively to the witness.

Using an Assistant

You can combine the best of both worlds by using an assistant. You can examine the witness from an outline, and not lose eye-contact or be distracted from the deponent's answers. At the same time your assistant can keep track with the more detailed list of questions and alert you to any particularly significant questions that you may have missed or failed to phrase precisely.

> *Psychological factors are extremely important in most depositions; the first ten minutes are critical.*

Whatever your questioning style, you should know what you want to do in the deposition's first few minutes. Psychological factors are extremely important in most depositions; the first ten minutes are critical. What you are attempting to do is establish firm control and counteract the deponent's preparation.

[1]Los Angles Bar Association: Survival Guide for New Attorneys http://www.lacba.org/Files/LAL/Vol28No7/SGNA21.pdf.

For example, most witnesses have been instructed to pause before answering (to give their attorney an opportunity to object) and to answer the questions as briefly as possible without explanation. One way of overcoming this instruction is to begin the deposition in a substantive area in which you are expert. If deponents evade or answer your questions incompletely, you can follow up with a series of questions demonstrating specific knowledge of the area.

This strategy can result in the deponent beginning to explain without waiting for the inevitable follow-up questions. At this point you may move to substantive areas that will continue without your ignorance being revealed. If the pattern breaks at any point during the deposition, you can return to this strategy to re-establish the pattern.

For the most part, keep the deposition as low-key and uneventful as possible. Don't clarify the deponent's misperception of legal theories or contradictions unless it suits your purpose. Ask for details about answers which you feel are exaggerations or lies, but do so without challenging or warning the witness or counsel that some answers are particularly important.

Resist the tendency to repeat questions that you consider important. If you are moving from one subject to another, you can repeat a question at another deposition point without arousing suspicion. On the other hand, coming back with an immediate, "So you don't know whether the intake workers are aware of this policy?" may force the deponent to back out of a former answer.

As a legal services lawyer keep in mind that we always are building a knowledge fund, particularly with the usual suspects, such as the Department of Social Services, housing authorities and big landlords. For this reason you should get into the habit of always asking who, where and how questions that your deponent's answers suggest, even if the information will not be useful in the instant case.

Documents

Even if you have not formally requested or subpoenaed documents you can use the deposition as an opportunity to get documents. For example, if deponents mention a certain document, you can ask counsel, on the record, to produce it. Although not legally binding, a promise to deliver certain documents is likely to be kept when it appears on the record. Furthermore, if you are deposing agency officials in their office, you might get the document on the spot.

Get into the habit of asking "Isn't there a record on this? Who keeps that record? Will you send a copy of that record?" Even if the informal pressure doesn't produce the record, you have the information as to what, where and who which you will need for a Request for Production. You should also ask to see copies of standard forms used for record keeping so that you know what specific pieces of information might be sought in a Request for Production.

When you are confronted with documents in a deposition, you must decide whether to identify them as exhibits that will be attached to the deposition transcript. One rule – if you question from a document, make it an exhibit. Otherwise, be careful not to clutter up the record.

The transcript should clearly identify the document you are discussing ("You are referring now to Exhibit C, the List of Participants?"). Court rules may direct how documents should be numbered. Belabor document identification for the record; it will be more confusing if you don't.

Cross-examination

Conducting a deposition in the style of cross-examination can be useful when you want to pressure the opponent into settling. You may also use this style with witnesses when you must use a deposition in lieu of testimony.

Many attorneys use their cross-examination style toward the end of the deposition, sometimes in a subject area which is extraneous to their case.

This strategy enables them to observe demeanor of the witness and opposing counsel without affecting the deposition's overall tone and until after the substantive information gathering stage is complete.

4. Coping with Objections and Other Problems

Your assistant should be listening to *you* with the critical adversary's ear and should alert you to objectionable questions.

Form of the Question

When the appropriate objection is to form, most questions can be rephrased to get the same information in non-objectionable form. Even though question form is improper and the other side objects, the deponent must answer the question. If the other side does not object, the objection is waived.
Code of Civil Procedure § 2025.460(b)

You will be confronted with invalid objections. Sometimes objections are strategic; at other times opposing counsel confuses deposition practice with trial practice. For example, a frequent objection is that you are asking for inadmissible opinion. You have the right to ask such questions in a deposition, even though the answers are inadmissible at trial. And this objection is automatically preserved until trial; the other side need not object.
Code of Civil Procedure § 2025.460(c)

Privilege/Protected Work Product

Defending attorneys must object to information that is privileged or work product or it is waived. Code of Civil Procedure § 2025.460(a) To make it clear, the attorney should instruct the deponent not to answer. In both state and federal courts, the record must reflect efforts to work out any disputes. If counsel still instructs the witness not to answer, restate your question, making certain that the deponent's response is a clear refusal to answer. If the objection appears to be to only a part of your question, separate out the acceptable portion from the unacceptable portion and get a response from the deponent on both questions.

Motion to Compel

The information you are seeking may be important enough to seek a court order compelling the answer. You may want the deponent and opposing counsel to believe that you are willing to go to court. Whatever your strategy, restate the question in a different form later in the deposition; you may get a response.

Weigh the practicalities before taking the issue to court. Some judges and magistrates may be reticent to order something than not to, pressuring the parties to work out problem independent of judicial intervention. As in all aspects of discovery practice, the actual burden may be on parties seeking orders to compel. Even if you succeed in obtaining an order, it may not be as specific as you would like, and you may find yourself with the same stalemate when you go back into the deposition situation. Consider discussing the situation with someone who has had discovery experience with the judge.

If you do choose to move to compel the answers, you should be certain that the:

- Question is clearly stated
- Refusal is clear
- Attempts to resolve the dispute are on the record

Practice Rule: Practice going through this procedure beforehand so that you will have a set ritual for establishing these things. *The more it appears that you are reasonable and flexible and the opposition is unreasonable and foolishly obstructionist, the better chance you will have in court.*

According to discovery expert, Katherine Gallo,[2] the leading case on "meet and confer"

[2] Save Time, Money and Angst -- MEET AND CONFER (2012) http://www.resolvingdiscoverydisputes.com/meet-and-confer/how-to-save-time-money-and-angst-in-litigation-meet-and-confer/

requirements is *Obregon v. Superior Court* (1998) 67 CA4th 424 (pdf). The Second Appellate District stated that in determining whether a party has met and conferred in good faith the court should consider the following relevant factors:

1. the history of the case and the past conduct of counsel as it reflects upon the bona fides of their efforts;

2. the nature and extent of the actual efforts expended;

3. the nature of the discovery requested and its importance to the case;

4. the size and complexity of the case;

5. the effect of expense upon litigation of the case; and

6. whether or not the discovery propounded would be so expensive for the other side that its intent was to force settlement other than to reach the merits of the case. *Obregon* at 431.

Townsend v. Superior Court (1998) 61 CA 4th 1431 at 1439 (pdf) states

"a reasonable and good faith attempt at informal resolution entails something more than bickering with [opposing] counsel . . . Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate." [Emphasis added]

5. When Your Side Is Deposed Defending Attorney Role

Plaintiff's attorney Max Kennerly[3] asserts that to comply with deposition rules and ethical obligations, the defending attorney should assume the role of a potted plant. Two exceptions to this status:

1. raise objections in a concise, nonargumentative and nonsuggestive manner, and

2. instruct deponents not to answer a question when necessary to preserve a privilege or enforce a court order.

As for the propriety of deposition conduct such as coaching, speaking objections and conferencing, Kennerly says:

> No attorney would, in the middle of their client's cross-examination at trial, loudly clear their throat and say "if you know" or "don't speculate" before the client answers. You don't have to be a lawyer to see that as little more than an attempt to coach the witness into claiming they don't know something that they actually do know.
>
> Similarly, no attorney would ask to stop their client's cross-examination at trial right before the client says something important then take the client out in the hall and instruct the client to claim they forgot.

Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993),[4] the most important case on deposition abuses, prohibits coaching, speaking objections and all conferencing during a deposition except for discussion on asserting privilege.[5]

Federal and state courts use *Hall's Rules* as guides to regulate deposition conduct, but not to the strict degree advocated in *Hall*. Most allow attorneys to direct witnesses not to answer questions unrelated to privilege when the

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[3] *Be A Potted Plant: Sanctions For Deposition Coaching and Witness Conferences* by (2011) http://www.litigationandtrial.com/2011/08/articles/litigation/potted-plant-deposition-sanctions-witness-coaching/

[4] http://www.scribd.com/doc/49170587/Hall-v-Clifton-Precision

[5] Hall Guidelines are discussed in detail in *Dealing with the Rambo Culture in Depositions*, below.

question is intended to demean the witness and has no other valid evidentiary purpose. And attorneys may make speaking objections when the interrogator is attempting to misuse the answers to create a misleading record.

Courts also have recognized legitimate reasons for attorneys to confer with witnesses during depositions, recognizing that conferencing exists on a continuum: conferring with the deponent when a question is pending is asking for trouble, while conferring over lunch or breaks taken for unrelated reasons is more likely to be viewed as acceptable.

Finally, courts hold that an attorney may instruct a witness before the deposition concerning conduct of the deposition and the witness cannot be ordered to disclose those instructions.

California

California Supreme Court has not spoken directly on coaching, speaking objections and conferencing. The Second District Court of Appeals, Division 4 in *Stewart v. Colonial Western Agency* (2001), 87 Cal.App.4th 1006 held that privilege is the only basis for instructing not to answer. In *Stewart* the court sanctioned an attorney $2400 for instructing a deponent not to answer on relevancy grounds. For a critique of *Stewart*, see "A New Theory of Relativity: The Triumph of the Irrelevant at Depositions." [6]

California allows defending attorneys to protect their witnesses. § 2025.470 authorizes a party to suspend a deposition to move for a protective order under § 2025.420 on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party.

State Bar of California and many local bar associations have enacted Attorney Guidelines of Civility and Professionalism. While they do not have the force of law, they offer useful standards of conduct. California Attorney Guidelines of Civility and Professionalism[7] on Depositions include these provisions on defending attorney behavior:

> 6. Once a question is asked, an attorney should not interrupt a deposition or make an objection for the purpose of coaching a deponent or suggesting answers.
>
> 7. An attorney should not direct a deponent to refuse to answer a question or end the deposition without a legal basis for doing so.
>
> 8. An attorney should refrain from self-serving speeches and speaking objections.

Los Angeles Superior Court Guidelines For Civility In Litigation,[8] Deposition Guidelines (9) and (11) state:

> (9) Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass.
>
> (11) Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

Only Los Angeles Bar Association Ethics Opinion[9] even mentions the consulting with

[6] For a critique of *Stewart*, see "A New Theory of Relativity: The Triumph of the Irrelevant at Depositions." http://www.metnews.com/legcom/civproc.htm

[7] http://www.saccourt.ca.gov/local-rules/docs/guidelines-civility-professionalism.pdf

[8] Appendix 3.A, Guidelines For Civility In Litigation (e) DEPOSITIONS. http://www.lasuperiorcourt.org/courtrules/CurrentCourtRulesPDF/ChapAppdx.pdf#page=49

[9] Consulting With A Client During A Deposition,

clients during depositions issue. Refusing to ban conferencing with clients, the Ethics Committee found that ethical duties do not depend on when the consultation occurs (before or during a deposition); but on whether the consultation's purpose or content crosses the line between proper advocacy and suborning perjury or obstructing justice. The Committee noted that ample authority prohibits attorneys from telling a client to lie or withholding information that should properly be disclosed.

Preparing the Deponent

The deposition setting can be very unsettling for a deponent. Deponents see an event dominated by an adversary, in which their attorney is relatively silent, where they are not able to tell their story with no authoritative, neutral decisionmaker present.

At the same time, the examining attorney may play on the deponent's feelings of fear and abandonment, either by attempting to psychologically seduce the witness by being friendly and understanding, giving opportunities to explain, or by driving the witness to anger and resentment. Either way, the opposing attorney has control of the deposition. Just as one of the most important success factors in taking a deposition is asserting control, one of the most important factors in defending is to prevent that from taking place as much as possible. The first step is to prepare the witness carefully.

The idea of a deposition may be explained your witness in these ways: (1) it is your responsibility to tell the truth, but give them minimal information about your case; or (2) we have the opportunity to see the opposing party's case.

The first approach puts the burden on the witness and may raise the level of apprehension substantially. Many legal services clients are intimidated by legal proceedings, want the attorney to handle things, and are afraid of messing things up. For this client, the second approach may be preferable, stressing team effort (we instead of you) and indicating that the experience will be useful for our case.

The witness must understand what will happen and why, what the other attorney will be trying to do, and what your role will be. Setting out the deposition goals in a positive way ("we want to force them to reveal as much as possible about their information and their style") rather than in a defensive way ("we have to hide the ball") makes it easier to explain to the witness why it is necessary to avoid detailed explanations. For example, because we want to hear the types of questions the other side asks, we want to make it necessary for them to ask as many questions as possible.

Putting the emphasis on having the opportunity to watch the other side operate rather than telling the whole story, also makes it easier to explain why you will probably ask few, if any, questions.

You will know many of the substantive areas into which opposing attorney will inquire. Discuss these areas at length with your witness. Explain that unanticipated areas of questioning may arise for various reasons, for example, the examining attorney wants to demonstrate their knowledge or mislead about a strategy. Tell the witness to answer these questions directly with minimal explanation.

Making Objections

Code of Civil Procedure § 2025.460 governs objections at a deposition.

You must object to questions that go beyond the scope of discovery (privilege or work product) or objections are waived.

You must object to errors and irregularities of any kind that might be cured if promptly presented unless a specific objection is timely made during the deposition. These errors and irregularities include, *but are not limited to*, those relating to the

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Formal Ethics Opinion No. 497 (March 8, 1999) http://www.lacba.org/showpage.cfm?pageid=436

• manner of taking the deposition,

• oath or affirmation administered,

• conduct of a party, attorney, deponent, or deposition officer,

• the form of any question or answer.

Objections to the deponent's competency or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failing to make them before or during the deposition.

In most jurisdictions you still may object on the record to these questions even if they are automatically preserved until trial without objection. In these instances, you may want to object for these strategy reasons:

• to demonstrate defects in the opponent's case,

• to place the objection on the record as a reminder to re-enter it at trial, or

• to induce the examining lawyer to abandon a particular line of questioning.

Maintaining Contact

Maintaining contact with your witness is critical.

• Think about seating. You may want to sit close to your witness for symbolic reasons; if you sit directly beside your witness, eye contact will be almost impossible.

• If a question obviously confuses the witness, be supportive ("That question was not clear, counselor".)

• Notice when your witness needs a glass of water, a break or a tissue, etc.

• Do what you can to break the hypnotic effect of the adversary's questioning and to remind the witness that she or he is not alone.

Asking Questions

Usually no advantage exists by asking questions of your own witness. Do question the witness however if the witness has misunderstood a question, said something you know to be both mistaken and potentially damaging, and you are *certain* the witness will correct the information with a few questions.

Some attorneys ask two or three questions about some insignificant area to maintain client confidence in their lawyering ability. Solid preparation should achieve the same goal.

Don't forget to de-brief your witness after the deposition. Ask whether any questions remind the witness of any information that you should know. Gauging the psychological effect the deposition on the deponent also is helpful.