**DEPOSITION 101: Winning Your Case with Depositions**

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The right to a jury trial—a cornerstone of the criminal and civil proceedings in Kentucky—shall remain “inviolate.” Ky. Const. § 7. Despite this constitutional imperative, the number of jury trials in the Commonwealth have continued to decrease over more than a decade.[[1]](#footnote-1) From 2005 to 2015, the number of civil jury trials in Kentucky decreased by 60 percent, from 292 in 2005 to 118 in 2015.[[2]](#footnote-2) According to data produced by the Administrative Office of the Courts, excepting family and domestic matters, including proceedings concerning parental rights, only 66 civil jury trials occurred in Kentucky circuit courts in 2017,[[3]](#footnote-3) which is less than three-tenths of a percent of the 25,179 civil cases closed by Kentucky circuit courts in 2017.[[4]](#footnote-4)

This trend tracks the rise of alternative dispute resolution, such as mediation and arbitration. Often, the most important testimony in a civil matter is no longer trial testimony but, instead, deposition testimony. Eliciting favorable deposition testimony of opposing parties, witnesses, or medical providers may provide support for a successful dispositive motion or the basis for contesting liability or the plaintiff’s claimed damages at mediation or arbitration, effectively “winning” your case.

As a result, each deposition must be approached intentionally, with an understanding of the facts and legal issues in dispute, as well as the purpose or objective of the deposition. This article hopes to provide a primer to assist young lawyers in preparing for and conducting depositions.

1. **PREPARATION**

Much of the time and effort necessary to conduct a successful deposition occurs before the deposition begins. Without thorough and effective preparation in advance of a deposition, a favorable result is unlikely once the deposition begins. Below are considerations when preparing for a deposition.

**Purpose of the deposition**

Prior to noticing a deposition, it is important to consider your purpose for taking the witness’s deposition. Some depositions are taken purely to obtain previously unknown facts or to determine who may be knowledgeable regarding the subject matter of the litigation. The purpose of other depositions may be to bolster, impeach, or clarify testimony or facts already of record. In addition to seeking facts, many depositions serve to pin a witness down regarding their version of events and the testimony they may provide should the matter proceed to trial.

In addition to considering the purpose of deposing a particular witness, you must also consider the testimony you expect to obtain from a witness. In many cases, you may have an idea of the areas of knowledge a particular witness may have, and that is likely to guide your preparation. For example, if a witness is likely to only have knowledge regarding matters concerning liability, but no knowledge regarding damages, your preparation will be limited accordingly. Alternatively, a witness may have knowledge relating only to an affirmative defense. If possible, it is advisable to conduct an in-person or telephone interview of a witness before noticing their deposition to gauge their expected testimony. If their testimony is likely to be adverse to your position or strategy, it may be best to inform your client of their harmful testimony and reevaluate whether you wish to take a deposition that is likely to support the opposing party.

**Understanding the claims and defenses**

The first step in preparing for a deposition is often to understand the elements of the causes of action asserted by the plaintiff. While the elements of a negligence claim arising out of a common motor vehicle accident are straightforward, it can be helpful to review pattern jury instructions for more complex or uncommon causes of action asserted in the complaint. Likewise, if the complaint asserts negligence *per se* premised upon the violation of a statute or regulation, or a statutory cause of action, you must review and consider the statutes or regulations at issue in their entirety, including potential statutory or regulatory defenses therein.

Much like considering the elements of the causes of action contained in the complaint, you must also understand your defense strategy, including any applicable affirmative defenses or grounds for dispositive motions. For example, if a case involves a claim asserted by one co-worker against another, but there is a dispute as to whether the employees were serving their employer at the time of the alleged incident, it would be advisable to review Kentucky case law regarding the factors to be considered in assessing whether a party is acting within the course and scope of their employment and Kentucky’s fellow servant rule prior to deposing the plaintiff. This consideration is of particular importance when your affirmative or legal defense relies upon a doctrine that includes a multi-factor test.

**Preparing an outline**

It is important to prepare an outline of some sort in advance of a deposition. It is far easier to organize your thoughts and topics in a manner consistent with your strategy or the theme of your case in advance of the deposition as opposed to relying solely on your memory. However, the form your outline takes is subject to personal preference. Some attorneys swear by creation of a detailed and thorough outline that deftly navigates the intricacies of each factual and legal issue to be addressed. Others choose to rely on streamlined outlines comprised of little more than headings and bullet points to ensure they do not overlook important areas of examination.

While neither strategy is incorrect, I gravitate towards the former and often prepare detailed outlines in advance of depositions. Yet, when the deposition begins it is not uncommon to disregard the outline for long periods. An outline will keep you on track and serves as an important reminder of the topics and issues you intend to address during a deposition, but much of the benefit of an outline comes from its preparation. Much like outlining a class in advance of a law school exam, you gain as much benefit from synthesizing and organizing the relevant facts and issues into an outline as you do from using the outline itself.

Despite the importance of an outline, it is important not to get bogged down in, or become wholly reliant upon, your outline during the deposition. It is imperative you listen to and consider each response provided by the witness, including body language and demeanor. Strict reliance on your outline, or considering your next questions during the witness’s answer, will prevent you from asking prudent follow-up questions or exploring relevant tangents. Preparing word-for-word questions for use during the deposition can be similarly counterproductive, as it tends to restrict flexibility and precludes a conversational, free dialogue that creates a favorable rapport with the witness. But this rule is not without its exceptions. There may be limited circumstances where the exact phrasing of a question, or brief line of questioning, may be of such importance that it is worth composing specific questions for use during the deposition. This is not often the case, but will typically relate to technical legal or contractual phrases or doctrines upon which you intend to base a dispositive or similar motion.

To simplify preparation and outline creation, it is helpful to create a boilerplate outline covering many common deposition topics in personal injury cases, including the witness’s background, their contact with parties or witnesses, injuries claimed, and treating providers. This boilerplate outline can then serve as a starting point to be modified and revised during the preparation process to fit the factual and legal issues relevant to the deposition.

1. **CONDUCTING THE DEPOSTION**

No two depositions are identical as not only are the facts and claims distinct, but each witness is different and will respond to questioning and the stressors of a deposition in a different manner. Most deponents are not what you would classify as “difficult” witnesses. Many adverse parties in personal injury cases are, generally, average people who will answer questions to the best of their ability. The below provides an overview of considerations to keep in mind when taking a deposition.

**Ground rules**

It is common for attorneys to begin each deposition by reminding the witness of the “ground rules.” Starting with an explanation of these rules at the outset of the deposition provide an opportunity to inure yourself to the witness and begin establishing a rapport which will serve you well throughout the deposition. These ground rules also serve as reminders to yourself to help ensure a clear transcript upon conclusion of the deposition. These ground rules generally include the following:

* Remind the witness to respond with audible “Yes” or “No” answers, as it is difficult for a court reporter to transcribe accurately head nods or “Uh-huh” or “Uh-Uh” responses. I often ensure a witness that if I ask them during the deposition “Was that a ‘yes’?” That I am not intending to be rude, but to ensure the court reporter’s transcription is accurate.
* To ensure a clean record, only one person should talk at a time. Ask the witness to wait until you complete your question before beginning their answer. In kind, assure the witness you will wait until they complete their answer before asking your next question.
* Perhaps the most important of the “ground rules” is to instruct the witness to ask you to rephrase any question they find confusing or that they do not understand. I often lighten the mood by advising the witness I will inevitably ask a bad question. Once this rule has been discussed, be sure to obtain an affirmation from the witness confirming they have understood a question if they do not ask you to rephrase or restate the question.
* A deposition is not an endurance contest. Inform the witness you are willing to take a break at any time if needed—whether they need to use the restroom, stretch, or get a drink—so long as there is not a current question pending. In my experience, witnesses do not abuse this instruction, and it is attorneys that often suggest breaks. This also prevents the, albeit rare, circumstance where a witness requests a break while a question is pending to engage in a conference with their attorney before providing a substantive answer.
* Lastly, I find it worthwhile as part of the discussion of “ground rules” to enquire as to whether there are any circumstances that may impact the witness’s memory during the deposition. This is followed with a brief line of questioning regarding whether the witness has taken any prescription or illicit drugs or consumed any alcohol or other mind-altering substances prior to the deposition.

**Order of examination**

Once the ground rules have been laid, it is time to begin the substantive portion of the deposition. Depositions typically have three general areas of inquiry: the witness’s background, the subject incident or accident, and damages. While it seems logical to address these areas in chronological order as outlined above, there is a strategic decision to be made in your order of examination. In most depositions, beginning with standard background questions, such as the witness’s residence, family members and other ties to the venue in which the matter may be tried, and employment history, will allow the witness to settle into a conversation with the examiner as opposed to feeling as though they are being interrogated. Establishing this conversational tone should allow a witness to feel more at ease in the deposition and, therefore, more forthcoming with their knowledge or information.

However, in some circumstances, a more effective approach may be to skip these formalities and jump directly to the substantive questions at the heart of the litigation. This tactic may throw the witness off and prevent them from providing more guarded answers to questions of great importance to the litigation. This tactic may by successful with more sophisticated witnesses, such as experts or corporate representatives, that are seasoned in providing deposition testimony. More experienced witnesses are likely to expect the deposition to begin with a discussion of their background or qualifications as an expert which will have been contemplated in their preparation. Going for the “jugular” by beginning with rapid-fire questions pertaining to critical issues may catch even the most seasoned witness off guard. Of course, there is always the opportunity to return to the witness’s background and qualifications at the end of the deposition.

When deposing the plaintiff, all three primary areas—background, the subject incident, and damages—will be discussed in detail. Yet, most other witnesses will have knowledge regarding the subject incident (such as an eyewitness) or damages (such as a medical provider), but not both. You should understand the areas where your witness will be knowledgeable, but be sure to confirm with each witness that they have no knowledge regarding other areas, such as how the accident occurred, or the injuries claimed. Many times, witnesses will indicate they believe an accident occurred in a certain manner. It is worth briefly exploring whether the plaintiff described the incident to them. Otherwise, confirm they have no first-hand knowledge regarding the incident and move on.

**Question format**

Generally, it is advisable to ask witnesses open-ended questions that provide the witness the opportunity to give an expansive answer touching on many topics. Remember, one of the purposes of taking a deposition is to obtain knowledge possessed by the witness. Asking open-ended questions permits the witness to discuss any topics that they believe relevant to the matter and may open doors to lines of questioning you may not have considered or known to be relevant. You must listen carefully to the entirety of each answer so you can ask directed follow-up questions and track down all relevant tangents.

An example of a common open-ended question is simple: “How did the accident happen?” Once a question on this nature is asked, you may use strategic periods of silence to urge the witness to continue speaking. Many people abhor an awkward silence and will reflexively continue speaking to fill the silence. Alternatively, you may encourage a witness to continue speaking with simple follow up questions such as “What happened next?” or “Then what happened?” Ask similar questions until the witness has provided their entire recollection of the subject incident. Once the witness has provided their full recollection, there will be areas of testimony that you will want to revisit to seek clarification. It is important to listen to every word of the witness’s testimony as it occurs, so you can return to areas requiring additional clarification or information.

However, there will be some situations where you do not want to provide the witness an opportunity to give an expansive answer or the opportunity to explain or justify past conduct or statements. This is likely to occur when you already know the witness’s answer before asking the question. In this instance, it is appropriate to ask a pointed leading question. Kentucky Rules of Evidence 611(b) permit leading questions on cross-examination or when calling a hostile witness or an adverse party. As such, when noticing the deposition of an adverse party, the notice should specifically state the deposition is being taken as if on cross-examination.

The answer to a leading question should always be “yes” or “no.” I often find myself concluding a leading question with “correct?” encouraging the witness to agree with me. An example of such a leading question would be: “You told the investigating officer that you ran the stop sign, correct?” This sort of leading questions are best used when plaintiff has given a pre-litigation recorded statement, has made statements to police officers or medical providers (pre-incident Social Security Disability applications can be gold mines), or when seeking confirmation of information contained in bank, employment, or similar records.

This tactic can also be used to pose questions a witness or medical provider cannot disagree with without undermining their credibility (even if you do not know the answer). One scenario where such a question may be useful is where a treating medical provider is unaware of the plaintiff’s preexisting complaints of injury. One example: “Doctor, you would want to know plaintiff complained of low back pain two weeks before the car accident before relating her current back pain to the car accident, correct?” If the treating provider agrees with your statement, they have undermined their opinion that the plaintiff’s pain is related to the subject accident. If they do not agree with your assertion, they undermine their credibility which, in turn, undermines their opinion that relates the plaintiff’s pain to the subject accident.

**Exhibits**

Not all depositions require the introduction of exhibits. It is important during the preparation process to consider whether an exhibit should be introduced and what purpose introducing an exhibit will serve. If your case involves a business matter with multiple contracts, it is advisable to make the contracts exhibits to prevent later confusion. However, if the case involves a car accident and a single police report was prepared as a result, it may not be necessary to attach the police report as an exhibit. If you believe a deposition transcript may form the basis of a future dispositive motion, strongly consider attaching all documents that may support your future motion as exhibits. While there is no rule against attaching unnecessary exhibits (so long as they are relevant), doing so does not provide any value.

I typically do not attach medical records as exhibits to a party’s deposition unless there is some unusual reason to do so. In that case, I would limit the records to be used as exhibits to the bare minimum necessary to make my point. On the other hand, when deposing a treating medical provider, I will typically attach as a composite exhibit the provider’s entire file regarding the plaintiff, and confirm the same on the record. This way, the provider is locked into the documents of record and cannot later “discover” additional documents or records to support their testimony.

Once you have determined what exhibits you may use during a deposition, bring enough copies of each potential exhibit to provide a copy for yourself, a copy for the witness (that the court reporter will keep and attach to the transcript), and a copy for each attorney you expect to be present. When I prepare documents to be used as exhibits, I find it helpful to paperclip all copies of each exhibit together with the top copy bearing my initials at the top, indicating it is my copy. I then highlight relevant portions of the exhibit and jot notes directly on my copy for use during the deposition. These notes largely replace my outline during portions of the deposition focusing on the exhibits.

**Addressing inconsistencies**

During a deposition, it is likely the witness’s testimony will reveal some inconsistencies with records produced in written discovery or with their medical records. This frequently occurs when questioning a plaintiff about their prior medical history that is relevant to the injuries they claim. While a plaintiff may not recall specific dates of treatment or minor injuries that occurred years prior to the incident at issue, it is surprising when plaintiffs testify they do not recall surgical procedures, diagnostic imaging or testing, or extended complaints of pain. When confronted with such a circumstance, you can either confront the witness directly with the inconsistency and put them on the spot in the deposition, or you can lock them in to their testimony and reveal the inconsistency at trial.

Particularly as it relates to prior medical treatment, I typically do not confront the witness about their inconsistencies to prevent the witness from reconsidering their testimony in advance of trial. To lay a “trap” to be sprung at trial, at the outset of the portion of the testimony relating to the plaintiff’s medical condition, I ask the witness to confirm their records constitute a more accurate reflection of their medical history and treatment than their memory. Plaintiffs rarely disagree. I then question the witnesses regarding their relevant pre-incident conditions and treatment. If they deny a relevant complaint or treatment, I ask them multiple times to confirm they are sure no such complaints or treatment occurred. This provides a nice opportunity at trial to undermine the plaintiff’s damages claim and credibility, whereas if you were to confront them during the deposition it is likely they will agree the treatment occurred but simply needed their memory refreshed. This portion of the transcript will not be effective during trial.

1. **ADDITIONAL CONSIDERATIONS**

In addition to the preparation and strategy techniques outlined above, below are a few additional factors to consider in with regard to depositions:

* **Deposition uses—**Kentucky civil procedure and evidentiary rules permit deposition testimony to be used in a number of circumstances. It is important to keep these uses in mind during the course of a deposition and strive to create as “clean” of a record as possible during your questioning. The permissible uses of deposition transcripts include the following:
  + Deposition transcripts may be used to refresh a witness’s recollection. KRE 612.
  + If a previously deposed witness later testifies to diminished in insufficient recollection, the deposition transcript may arguably be introduced as a past recollection recorded. KRE 803(5).
  + Deposition testimony may be used to contradict or impeach the deponent during later testimony or as a party admission. CR 32(a), KRE 801A(a); (b). Be to lay a proper foundation for the impeachment or party admissions.
  + If the witness is a bank president, physician, dentist, or lawyer, dead, or otherwise meets the qualifications of CR 32(c), deposition testimony may be introduced as substantive evidence.
* **Video recording—**Civil Rule 30.02(4) permits video recording of depositions and outlines the requirements for such recordings. While retaining a videographer as a matter of course may not be feasible, consider video recording a deposition of an opposing party if you anticipate they will not present well or may be prone to outbursts or personal attacks. Preserving on video an opposing party’s angry outburst in the midst of questioning regarding the ultimate fact at issue may be enough to sway a jury in your favor. You may also consider setting up your own video camera and recording the deposition yourself to save costs, assuming opposing counsel agrees.
* **Court reporter—**Court reporters may provide useful insight both during and after the deposition. While the court reporter is unlikely to have any knowledge regarding the circumstances of the case at issue at the outset of the deposition, they are not unlike a juror in that respect. By listening to the testimony, the court reporter may think of a question you have not previously considered. Similarly, as they are impartial and unaffiliated with any party to the litigation, they are good judges of character, veracity, and overall likability of the witness. Of course, no court reporter will foist their unprompted thoughts upon you at the deposition. I have found, however, that court reporters are generally willing to provide their thoughts regarding their impression of the witness if asked politely during breaks or upon conclusion of the deposition. This may provide valuable insight to help evaluate your case.

1. *See Concerns grow as jury trials disappear in Kentucky*, Jason Riley, WDRB.com (Oct. 14, 2016), available at [https://www.wdrb.com/news/sunday-edition-concerns-grow-as-jury-trials-disappear-in-kentucky/article\_9cae1ce 3-3078-54d4-9888-6c65009bd746.html](https://www.wdrb.com/news/sunday-edition-concerns-grow-as-jury-trials-disappear-in-kentucky/article_9cae1ce%203-3078-54d4-9888-6c65009bd746.html%20) (last visited September 15, 2021). [↑](#footnote-ref-1)
2. *Id.*  [↑](#footnote-ref-2)
3. For more information regarding the reduction of civil jury trials in Kentucky, and for the Administrative Office of the Courts report referenced herein, see *The Civil Jury Trial is on Death’s Doorstep: Should We Resuscitate, and if so, How?*, John A. Day, 2018 Kentucky Bar Association Annual Convention, available at [www.kybar.org/resource/](http://www.kybar.org/resource/resmgr/2018_convention/materials/death_of_trial.pdf)

   [resmgr/2018\_convention/materials/death\_of\_trial.pdf](http://www.kybar.org/resource/resmgr/2018_convention/materials/death_of_trial.pdf) (last visited September 15, 2021). [↑](#footnote-ref-3)
4. *See Circuit Civil Cases Closed CY 2011-2021* included with materials. [↑](#footnote-ref-4)