Develop Nuggets, Unpack Weasel Words & 8 More Deposition Suggestions to Minimize Frustration

By Adam Babich

Depositions are a useful, exciting, but frustrating part of a litigation practice. They are frustrating because when you read a deposition transcript you almost always find that the deposition could have been better — if only! There are no panaceas. Below, here are 10 suggestions intended to minimize deposition frustration.

1. Develop Nuggets.

By "nugget," I mean a short Q&A that you can use to impeach a witness at trial or to drop into a summary judgment motion. A nugget does not need context. An example:

> Q: You were not present when Jane Smith took the groundwater sample from well number 14 at the South Scavenger Landfill on June 13, 2016, were you?
>
> A: No.

You cannot build a solid nugget from a question like, "Were you present when she took those samples?" Who is she? What are "those samples?" During impeachment, you will need to leaf up through the deposition to find out and provide context. That is a painful thing to do when you impeach a witness; instead, you want to slap the witness hard and fast with a self-contained nugget that needs no further explanation.[1] Similarly, when you quote from a deposition in your summary judgment brief, you would rather not quote passages to catch the judge up on the context. You want a sharp question and answer that adds forward momentum to a hard-hitting, efficient brief.

Learning to ask questions that elicit nuggets is a habit. It involves questioning like a lawyer, not like a conversationalist. This means you must disengage from behavior you have engaged in for your whole life, which is a challenge. In addition, you want to keep the deposition feeling like a conversation from the witness's perspective.

Although everyone at the deposition table already knows the context, the lawyer needs the discipline to put enough context *in the question* to create a nugget. When gathering nuggets, it sometimes helps to write down in your notes a description of context that you can drop into every pertinent question, *e.g.*, "the June 13, 2016, sampling of groundwater at well number 14 on the South Scavenger Landfill." That makes it easy to ask, as many times as it takes, "You've told me about cleaning the sample bottles, preparing the chain of custody documents, and drawing a sample, did you do anything else as part of the June 13, 2016, sampling of groundwater at well number 14 on the South Scavenger Landfill?" When you finally get the "no," that Q&A will be a nugget. If the witness tries to add something else at trial, you can slap him or her with a nice, sharp impeachment.

When crossing an expert witness, it is nice to have a series of nuggets (for impeachment) about the limits of the experts' expertise. For example:

> You do not have a PhD, do you?
>
> You are not a medical doctor, are you?
>
> You are not an expert in toxicology, are you?
>
> You are not an expert in chemistry, are you?

Tactically, you may not always try to develop nuggets. During one part of a deposition, you might focus on just getting the witness to talk freely and on learning as much as possible. But then go back to your notes and turn all the good things you have learned into nuggets.

2. Close the Door with Definitive Lists.

You "close the door" by drawing boundaries around what the witness knows. You draw these boundaries by asking the witness to agree to definitive lists of relevant information. For example:

> Q: What kinds of things might cause inaccurate results of laboratory analyses of groundwater samples?
>
> A: Cross-contamination, contaminated laboratory chemicals, an open window at the lab.
>
> Q: You've told me that inaccurate results of laboratory analyses of groundwater samples can result from cross-contamination, contaminated laboratory chemicals, and open windows at the lab. Is that everything that might cause inaccurate results of laboratory analyses of groundwater samples?
>
> A: Human error.
>
> Q: OK, you've told me that inaccurate results of laboratory analyses of groundwater samples can result from cross-contamination, contaminated laboratory chemicals, open windows at the lab, or human error. Is there anything else that might cause inaccurate results of laboratory analyses of groundwater samples?
>
> A: Excessive hold times.
>
> Q: Ah. You've told me that inaccurate results of laboratory analyses of groundwater samples can result from cross-contamination, contaminated laboratory chemicals, open windows at the lab, human error, or excessive hold times. Is there anything else that might cause inaccurate results of laboratory analyses of groundwater samples?
>
> A: Well everything else on that list was really a type of human error.
>
> Q: Got it. You've told me that inaccurate results of laboratory analyses of groundwater samples can result from the following types of human error: cross-contamination, contaminated laboratory chemicals, open windows at the lab, and excessive hold times. Is there anything else that might cause inaccurate results of laboratory analyses of groundwater samples?
>
> A: No. (Or, "Nothing else comes to mind at the moment" — from a well-prepared witness who has been instructed to keep as many doors open as possible).

That door is now closed, or at least as closed as it gets. If the witness comes up with new sources of laboratory error at trial, you are in good shape to impeach. For impeachment purposes, you should generally craft your door-closing questions to elicit nuggets.

3. Close the Door by Unpacking Weasel Words.

Closing the door also involves spotting and unpacking the witness's weasel words. There are a limited number of these words or phrases in common use (*e.g.*, probably, not specifically), so they are not hard to spot once you get in the habit of listening for them. For example:

Q**:** Was it raining when Jane Smith took the groundwater sample from well number 14 at the South Scavenger Landfill on June 13, 2016?
A: Probably. (The door is not closed.)
Q: You said "probably." Where would you look to determine whether it was raining when Jane Smith took the groundwater sample from well number 14 at the South Scavenger Landfill on June 13, 2016?
A: My report.
Q: Please look at it now and let me know when you're ready to tell me whether it was raining?
A: It was raining. (We have an answer, but no nugget.)
Q: So it was raining when Jane Smith took the groundwater sample from well number 14 at the South Scavenger Landfill on June 13, 2016?
A: Correct.

Another typical type of exchange:

Q**:** What did Jane Smith tell you about the conditions under which she took the groundwater sample from well number 14 at the South Scavenger Landfill on June 13, 2016?
A: I don't remember specifically. (The door is not closed.)
Q: You said you don't remember specifically, what do you remember generally about what Jane Smith told you about the conditions under which she took the groundwater sample from well number 14 at the South Scavenger Landfill on June 13, 2016?
A: I don't remember generally either. (Now the door is closed).

4. Learn What the Witness Knows.

Go back to suggestion 2 (close the door with definitive lists). When you keep lists and confirm with the witness that those lists are complete, the next step is to explore each item on the lists. For example, "Please tell me what an excessive hold time is?" "Could an excessive hold time have affected the groundwater sample from well number 14 at the South Scavenger Landfill taken on June 13, 2016?" "What things do you do to avoid excessive hold times?" (This will be another list).

Often you will be working through several lists, and creating more lists as you go. Keep track. Before closing the deposition, go through your notes and make sure you have made a conscious decision about whether to exhaust the witness's knowledge behind each item on each list.

In general, people (including witnesses) love to talk about themselves and what they do, and they love to explain things. Defending lawyers want their witnesses to fight this tendency and to calmly dictate short, responsive and carefully thought-out statements to the court reporter. In contrast, deposing lawyers want the witness to live in the moment and to speak freely, without deliberation, as if the witness were having a simple conversation or argument.

Usually, being a "nice guy" who is genuinely interested in what the witness has to say is the most effective way to reinforce a witness's natural tendency to talk. There are other tactics, however. Sometimes, once the "nice guy" side of a lawyer's personality has gotten everything it can, it is time for a more aggressive approach, to make the witness feel uncomfortable or defensive. You might try to rattle a witness by harping on an inconsistency or mistake, by jumping around among topics, or by leaning forward and picking up the pace. If the lawyer succeeds in rattling the witness, then that can be a great time to jump to a key topic. Another great time for discussing key topics is after a witness has become tired. Rattled or tired witnesses make mistakes.

Remember the five "W"s — who, what, when, where and why. "Why" is especially useful with experts. Most witnesses love to explain why, and the explanation can open fruitful areas for further inquiry. When preparing questions and taking notes, it is often helpful to think chronologically — to construct a timeline and fill in the gaps.

I recommend against prefacing questions with topic sentences, such as "now let's talk about background" or "I want to ask about your report." Many lawyers do this, but it seems more of a nervous habit than a tactical choice. Because you build nuggets to stand on their own, you should not need topic sentences for the transcript to make sense. There is a downside to letting the witness know where you are going with your next series of questions, and thus allowing the witness to prepare mentally. Topic sentences may also allow the lawyer on the other side to provide specific preparation for the witness during a break. Perhaps some lawyers think these topic statements are useful in getting the witness talking, but I have my doubts. How often in a conversation do you preface questions with a topic sentence, such as "now let's talk about where you went last night?" Go straight to your questions.

5. Take Notes.

I suggest working on paper. You will need to leaf through your notes while putting questions together and building nuggets, which is difficult on a computer. Also, you want the witness to feel as if he or she is having a conversation with you, which is difficult while typing or scrolling on a computer. When acting as second chair at a deposition, or when defending a deposition, computers are fine for note-taking.

6. Object When Appropriate.

When defending depositions, lawyers rarely say much. Not every technically improper question is worth an objection. But you should always be making a conscious decision about whether to speak. You must stay in the moment to make sure that you are paying attention during the one-in-20 (or one-in-200) question when an objection is needed to protect your client.

7. Handle Objections Efficiently.

The usual response to an objection is "noted" or, to the witness, "You can answer." Do not let objections slow you down (unless you agree that the objection is well-taken, in which case you might want to re-phrase). Circumstances are few (*e.g.*, privilege) under which the defending lawyer may instruct his or her client not to answer without risk of sanction. Arguing with opposing counsel on the deposition record is often a waste of time.

8. Make (and Protect) the Record.

Often a witness will answer a question before you have finished asking it, so two people are talking at once. It may sound perfectly natural and understandable in the deposition room, but who knows what the transcript will look like? An important habit is for lawyers to listen for problems in the transcript and provide friendly reminders like, "Mr. Witness, the court reporter may not be able to take down everything if we both talk at the same time. Please allow me to finish my question before you answer." Next, repeat your question and get a good answer on the record. This same habit of listening for how the record is going to read also helps in developing nuggets. In general, careful listening (to both the witness's words and your own) is a crucial deposition skill.

9. Be Tactical.

Especially with federal time limits on depositions, lawyers must be tactical in deciding what to explore. You should know why you are asking questions. In addition, you generally would rather not do your opponents' work for them. It can be a mistake to explore (and thus develop) a bad fact that the other side might have missed. This is a judgment call, however. The other side of the balance is your desire to know what the witness may say at trial.

10. Develop Good Habits.

Good deposition skills become good habits. Develop good habits by noticing your own mistakes and those of your colleagues and opponents — both during the depositions and on the transcripts. In other words, do not relax just because someone else is taking the deposition; use the opportunity. The more depositions you observe, while being alert to mistakes, the better prepared you will be to avoid mistakes. You make some anyway. Depositions can be long and stressful (albeit fun for the deposing lawyer). It is easy to become tired and somewhat sloppy (this happens to witnesses and defending lawyers, too, which works in your favor as the deposing lawyer). Remember to live in the moment, listening carefully to the witness and to yourself, and focusing on the task before you. If you make a mistake, fix it and/or move on. There will be time to beat yourself up about it after the deposition.

FOOTNOTE

1. I like to keep things simple during trial. It is hard enough to do an effective cross-examination without leafing through a lot of paper during impeachment.

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LSBA Rules of Professional Conduct Committee Sets 60-Day Public Comment Period on ABA Model Rule 8.4(g)

On Aug. 8, 2016, the American Bar Association's (ABA) House of Delegates adopted a new ABA Model Rule 8.4(g), making it ". . . *professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law . . . .*"

Since then, a subcommittee of the Louisiana State Bar Association's (LSBA) Rules of Professional Conduct Committee (the Rule 8.4(g) Subcommittee) has been charged with studying current ABA Model Rule 8.4(g), along with the current rules and relevant case law of all other U.S. jurisdictions. The Subcommittee has recently made a report and recommendation to the LSBA Rules of Professional Conduct Committee, summarized in an "executive summary."

The LSBA Rules of Professional Conduct Committee has not yet taken any position on the Subcommittee's recommendation but has chosen to seek written comments from the public and LSBA membership at-large for a period of 60 days. The comment period began on July 19 and will be open through Sept. 16, 2017.

Anyone wishing to comment on the Rule 8.4(g) Subcommittee's recommendation should email written comments to: "SUBJECT: Rule 8.4(g) Subcommittee Recommendation" c/o RLemmler@lsba.org. (Comments also may be mailed to: "Attn: Rule 8.4(g) Subcommittee Recommendation," c/o Richard P. Lemmler, Jr., Ethics Counsel, Louisiana State Bar Association, 601 St. Charles Ave., New Orleans, LA 70130.)

Be advised that any comments submitted will be considered public and, as such, may be published on the LSBA's website and/or may become a matter of public record.

To review the Subcommittee's Final Report, the Subcommittee's Executive Summary and the ABA Model Rule 8.4, go online to: *www.lsba.org*, then follow the links.