

## TRUST, TRUTH AND DEPOSITION TESTIMONY

Trial lawyers know that juries often decide cases based on which parties and witnesses they trust to be telling the truth. Witnesses who tell the truth, and who are perceived to be telling the truth, will win a jury over and liars and exaggerators will often lose. Therefore, predicting the outcome of a jury trial often come down to evaluating the credibility and reliability of the parties and witnesses and the best way to do that is to question the witness under oath in a deposition.

Over the past 30 years, I have taken and defended over 1,000 depositions in the state and federal courts. Before a deposition begins, the court reporter will swear in a witness using the same oath that the witness will take if they were in a courtroom in front of a judge and a jury. The witness, therefore, has a legal obligation to tell the truth and can be prosecuted for criminal perjury if they tell a willful lie. The possibility of a perjury charge is always a danger to the witness who testifies untruthfully or who contradicts himself under oath in another proceeding. However, an equally important reason for telling the truth in a deposition is that liars are actors and actors are liars and unless a witness has some theatrical training it is going to be difficult to lie without being detected.

Trial lawyers, police detectives and arson investigators know how the truth should sound. Truthful witnesses convey information, liars try to convince you that they are telling the truth. Truthful witnesses answer questions directly and spontaneously without qualification in most instances. Lying witnesses possess some type of guilty knowledge that they do not want to reveal so they have to process your question and edit their answer which takes time and effort and is anything but spontaneous.

When I take the deposition of a party or witness, I structure my examination in a way that will allow the untruthful witness to reveal his or her lack of candor. In general, I follow a five-step outline. First, I ask background questions. Second, I'll ask the witness open-ended questions to let the witness talk. Third, I will follow-up with specific clarification questions tied to the witness's open-ended response. Fourth, I may ask bait questions designed to elicit a specific response. Finally, I will ask summary questions to make sure that I have all the information that the witness has to offer. I will review each of these steps to explain what I mean:

I always open my deposition with a series of background questions about the witness's personal history. People like to talk about themselves and this gives me the opportunity to establish a rapport with the witness. I look for common denominators that I may have with the witness such as owning a dog, having children or hobbies or activities. I do this because people tend to confide more in friends than adversaries and it is always helpful to begin a deposition by selling yourself to the witness as someone he or she can trust.

Background questions are also likely to elicit truthful responses from the witness. There is usually no reason for a witness to lie about his or her personal background and watching the witness tell the truth provides many verbal and non-verbal cues which will

help me detect what the witness is likely to look like and sound like when he is fudging or exaggerating in response to my specific follow-up questions. One of the most important ques is the witness's facial expressions and the look in his eyes. Later in the deposition, when I ask specific questions, I expect to see the same look and the same expression on the witness's face if he is telling the truth.

After the background questions, I asked a series of open-ended questions that will allow the witness to use his own words to explain the event. Typically, I ask the witness to explain everything that he did, saw and observed from the time that he got up in the morning until the time he went to sleep at night. Usually, witnesses will divide the day into thirds describing events before the accident occurred, the accident itself and the follow-up care. I listen closely to the witness's description of the day of the accident. First, I want to hear how the witness expresses himself, his vocabulary, syntax and common phrases that he relies on. Next, I want to determine the extent of his memory and his power of recall. I also want to hear what he has to say because I want to look for signs that his version may be rehearsed or memorized by rote. I want to see if his version differs from the written version of the event set forth in his answers to interrogatories. Finally, I want to hear what the witness leaves out and what the witness thinks is important. The areas that he leaves out are critically important because if he fails to discuss the event in detail, he may be deliberately glossing over details of the event in order to conceal knowledge that he does not want to reveal. If that is the case, I want to follow up with specific questions that will force the witness out of his passive role of concealer to make him into an active liar by forcing him to reveal the details that he wanted to hide.

After listening to the witness testifying in an open-ended manner, I begin asking clarification questions. During the clarification section of the deposition, it is important to listen carefully to how the witness testifies. Inexperienced lawyers overemphasize the information gathering role of depositions and fail to actually listen to the answers that the witness is giving. That may be a mistake because listening to the witness's answers can often lead to the most valuable testimony you will get in a deposition. During the clarification questions I want to follow up with specific questions that came to mind during the witness's open-ended description of the event. I do not want to limit myself to asking questions that the witness expected to be asked and was prepared to answer by his or her attorney. Instead, I want to try to get the witness out of his or her comfort zone and look for unusual details that the witness hadn't thought of before. Deceptive people don't give unusual details and the more details that a witness is willing to share, the more likely it is that he or she is telling the truth.

When I ask a specific question during the clarification section of the deposition, I look for the verbal and non-verbal ques that the witness seemed to give me when he was answering the background questions. When I ask a pointed question that the witness may find uncomfortable to answer, I look for specific ques such as posture change, mood swings, hesitation or defensiveness when the witness answers a question. When the witness answers a pointed question, does he lock himself into the chair by grabbing onto the chair rails, does he cross his arms, does he suddenly develop any tics or quirks that I

did not see before during the background questioning. All of these will be noted and kept in my notes when I prepare to cross-examine the witness at trial.

At the beginning of a deposition I always instruct the witness that he is required to testify factually and not to answer questions where he doesn't remember the answer. Most witnesses will, on occasion, not remember an answer. Witnesses that want to deliberately repress the truth rely on that response more often during a deposition. I look for signs of repression which means that the witness is forgetting details that he should recall because he does not want to talk about it. Once again, my goal will be to try to force the witness out of the passive role and into an active role and press for answers.

Witnesses who are repressing the truth are not testifying as to their full knowledge often using language to cover their intentions. These witnesses use a lot of qualifiers, such as I think, if I remember or I believe. This is in contrast to truth-tellers who will tell you an answer to a question without qualification and are willing to commit to a particular version.

I also look for verbal emphasizeers such as greatly, very, really and I always remember that liars will try to convince you that they are telling the truth while truthful witnesses will simply try to convey information.

At the end of every deposition I want to be able to think that I accomplished two goals. First, I want to have a sufficient factual record that will fix the plaintiff's version so that the plaintiff can be impeached on cross-examination if he or she changes his version at trial. Second, I want to have an overall view of the reliability of the witness's testimony. Did the witness tell any apparent lies during the deposition? Is he or she willing to present claims that are unsupported by the record? Are the witness's subjective complaints magnified or out of proportion to the claimed injury? Has the witness changed a time, distance or any other detail of the event or accident to favor a version that he is committed to? How can I use the witness's particular characteristics and exaggerated testimony to show a jury that the witness is not trustworthy and his story should not be believed? \

At the end of every deposition I ask several closing questions that are designed to prevent the witness from freely adding to his story at a later date. I always ask the witness if there are any other facts or details about the accident or event that I did not ask him during today's deposition. This wrap-up question is intended to prevent the witness from adding details to a story at a later date and claiming that those details did not come out before because he wasn't asked about them.

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